




Speech By
Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 22 August 2018

CRIMINAL CODE (NON-CONSENSUAL SHARING OF INTIMATE IMAGES) AMENDMENT BILL

Introduction

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (11.54 am): I present a bill for an act to amend the Criminal Code for particular purposes. I table the bill and the explanatory notes. I nominate the Legal Affairs and Community Safety Committee to consider the bill.

Tabled paper: Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018 [[1162](#)].

Tabled paper: Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018, explanatory notes [[1163](#)].

I am pleased to introduce the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018. The amendments in the bill fulfil the government's election commitment to create a new offence related to the non-consensual sharing of intimate images that would apply to sending, or threatening to send, intimate material without consent. This is about sending a very clear message to those people who think sharing, or threatening to share, an intimate image of another person without their consent is acceptable. This behaviour will now have serious consequences.

Often colloquially referred to as 'revenge porn', the non-consensual sharing of intimate images covers a broad range of horrendous behaviour that causes humiliation and distress to its victims. It is a form of cyberbullying and technology facilitated abuse. In some instances it is domestic violence. It often represents a heartbreaking abuse of trust, as these intimate images are in many instances taken and shared as part of the most intimate of personal relationships. However, the distribution of intimate images without consent as a form of abuse goes beyond the breakdown of relationships. It is a weapon that can be used to hurt, humiliate, coerce and intimidate a victim in countless contexts. Perpetrators of this type of abuse are not always malicious. Intimate images can be shared non-consensually for the amusement and titillation of the distributor and their audience, but this comes with callous disregard for the impact on the person depicted.

Regardless of the intention of the distributor, it is important to remember that the impact of the non-consensual distribution of an intimate image on the victim can be devastating. Some of the most damaging consequences can be caused before an image is even shared. Threats to distribute intimate images without consent can cause untold fear and anxiety. In some of the cruellest instances these threats can be used to control or coerce the threatened person. This type of abuse can affect anyone but, unsurprisingly, it disproportionately affects younger members of the community.

The continuing evolution of modern technology and ease of access to instant and wide-reaching modes of communication makes dealing with this increasingly prevalent conduct an important priority for government. Responding effectively to this issue requires a multifaceted approach including education and awareness-raising schemes and the assistance of the community sector.

The passing of comprehensive criminal laws in this area is an essential component of the response to this issue. These laws will form part of a clear message to the community that this behaviour is abusive and unacceptable and those who are found responsible for it will be held to account. This bill will ensure that this behaviour will no longer simply be regarded as immoral. This behaviour will be illegal and treated accordingly.

I would like to take this opportunity to thank our stakeholders for the time and resources they generously continue to provide during consultation on legislative reforms. The comments I received from our legal, youth and women's advocacy stakeholders during consultation have contributed to the development of the bill.

During this consultation a number of stakeholders commented on the existing child exploitation material offences under the Criminal Code and the way in which they apply to children engaging in consensual sexting behaviour. This feedback noted the importance of the police continuing to prioritise prevention and education when dealing with youth sexting but raised concerns that this may not provide sufficient protection for children engaged in this conduct. While some comments and suggestions dealt with broader issues of child exploitation material and were outside the scope of this bill, they are important concerns and I would like to assure stakeholders that the government will consider those issues during consultation over the coming months.

Let me now briefly outline the bill's significant reforms. The bill creates a new offence that prohibits distribution of an intimate image of another person without that person's consent. This offence will have a maximum penalty of three years imprisonment. Distribution must happen in a way that would cause the person in the image distress reasonably arising in all the circumstances. The term 'distress' is not defined and will take on its everyday meaning.

It is intended that distress will require a lower threshold of harm than that required by the offence of unlawful stalking. It will not be necessary in the prosecution of this offence to prove that the person depicted in the image actually suffered distress. Rather, it will have to be proved beyond reasonable doubt that the distribution objectively would reasonably cause distress in all the circumstances.

In deciding if the distribution would reasonably cause distress, the court may consider any relevant circumstance. The bill includes examples of circumstances that may be relevant in order to assist in interpretation. These non-exhaustive examples make it clear that any relationship between the parties and the extent of any interference with a person's privacy are relevant circumstances when considering if distribution would cause distress.

The bill defines consent for the purpose of the new offence to confirm that consent must be free and voluntary and given by a person with cognitive capacity to consent. In recognition of the greater vulnerability of young children, the bill provides that a child under 16 years of age cannot consent to the distribution of an intimate image.

Defences that allow for the distribution of images for law enforcement purposes or for a genuine artistic, educational, legal, medical, scientific or public benefit purpose which are currently provided for the offences of distributing child exploitation material or distributing prohibited visual recordings are similarly extended to this new offence.

The new offence is centred on a definition of 'intimate image'. This term, used throughout the bill, captures moving or still images of an intimate sexual activity not ordinarily done in public; of a person's genital or anal region when bare or covered only by underwear; and of bare female breasts. We know that existing technology readily allows for images to be created or edited whether by combining innocent images with pornography to create something indecent or intimate or by editing already intimate images.

The bill makes it clear that images that have been altered to appear to show any of the things mentioned in the definition of intimate images, or images of these things that have been digitally obscured but still depict the person in a sexual way, are also included. This means that the definition will capture an image of a person's head superimposed onto an image of another person's naked body or an image of a naked person that is digitally altered, for example, by placing emoji stickers over the person's genitals or bare breasts before distribution when that person is still depicted in a sexual way.

There is no requirement in the definition or elsewhere in the new offences for an intimate image to be made in a private place or in circumstances in which a person had a reasonable expectation of privacy. This is because the culpable behaviour the new offences in this bill seek to address is the non-consensual distribution of the intimate image, not the time, place or manner in which the image was created. Further, to support the inclusive operation of the offence, the definition of intimate images explicitly provides for images depicting the bare breasts of a person who is female or a transgender or an intersex person who identifies as female.

The bill also creates two new offences that prohibit threats to distribute intimate images or prohibited visual recordings without the consent of the person depicted in the image or recording. Prohibited visual recordings of a person cannot be made or distributed without consent under the current offences at sections 227A and 227B of the Criminal Code. Unlike intimate images, prohibited visual recordings are limited to recordings of persons in private places or engaged in private acts where a person would reasonably be expected to be afforded privacy.

Threats to distribute both intimate images and prohibited visual recordings can similarly cause a person depicted distress or fear and can be used to control or coerce. For either of these offences, it is immaterial whether the image that is the subject of the threat actually exists or not. One new threat offence will apply when a threat is made to the person depicted in the intimate image or prohibited visual recording. The other will apply to threats made to distribute an intimate image or prohibited visual recording of another person. For example, this might include an ex-partner threatening a person's new partner or family members to distribute an intimate image of them that they possess.

Each of the new offences will carry a maximum penalty of three years imprisonment. Each offence requires that the threatened distribution be without the consent of the person depicted and done in a way that would cause distress, either to the person depicted or the person who was subject of the threat, reasonably arising in the circumstances. Each offence requires the threat to be made in a way that would cause the person threatened fear, reasonably arising in the circumstances, that the threat would be carried out. Like the new distribution offence, a child under 16 years of age cannot consent to distribution of an intimate image subject of the threat offence.

Amendments in the bill provide new powers to a sentencing court to make a rectification order. Rectification orders will empower sentencing courts to direct a person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording upon conviction for the new offences in the bill or the existing offences under sections 227A 'Observations or recordings in breach of privacy' and 227B 'Distributing prohibited visual recordings' of the Criminal Code. Noncompliance with a rectification order will be an offence punishable by a maximum penalty of two years imprisonment. The availability of these orders will give the court an opportunity to assist victims in regaining control of this material to minimise ongoing distress.

Like the new offences implementing the election commitment, both section 227A, 'Observations or recordings in breach of privacy', and 227B, 'Distributing prohibited visual recordings', of the Criminal Code criminalise interferences with a person's privacy and involve a lack consent. It is appropriate that these offences are able to be punished consistently. The bill will increase the maximum penalty of each offence from two years imprisonment to three years imprisonment. The introduction of the new offences in this bill will ensure that people who engage in this harmful conduct can be held properly accountable and reflects the community's condemnation of such hurtful and blatant interferences with personal privacy. I commend the bill to the House.

First Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (12.06 pm):
I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to Legal Affairs and Community Safety Committee

Mr DEPUTY SPEAKER (Mr Stewart): Order! In accordance with standing order 131, the bill is now referred to the Legal Affairs and Community Safety Committee.