




Speech By  
**David Janetzki**

**MEMBER FOR TOOWOOMBA SOUTH**

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Record of Proceedings, 12 February 2019

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

 **Mr JANETZKI** (Toowoomba South—LNP) (12.32 pm): I rise to address the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill introduced by the Attorney-General on 22 August 2018. The objective of the bill is 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 the person's consent. The bill specifically amends the Criminal Code to introduce new offences and provide new powers to the court targeting the non-consensual distribution of intimate images.

The Legal Affairs and Community Safety Committee tabled its report on 5 October 2018 recommending that the bill be passed. From the outset I confirm that the LNP will not be opposing this bill, although I will raise concerns as I address key elements of the bill highlighted by the evidence given to the committee by stakeholders throughout the process.

The bill seeks to create new offences to protect vulnerable people from the distribution or threats of sharing intimate images or recordings without a person's consent. 'Consent' is defined in the bill to mean consent freely and voluntarily given by a person with the cognitive capacity to give the consent. There was a significant number of stakeholders who raised concerns with the definition of 'consent'. The Women's Legal Service held the view that the proposed definition was inadequate and that the New South Wales definition ought to be adopted together with an additional provision that true consent does not include the circumstances where the defendant is reckless as to whether the person consents or not.

Drs Henry and Flynn submitted that the bill should make it clear that consent given on one occasion does not apply to all other occasions. Rhys LG Michie also recommended that the definition be amended to read 'consent means voluntary and free agreement given by a person with sufficient cognitive capacity'. Lastly, the Gold Coast Centre against Sexual Violence raised concerns about the issue of consent, commenting that—

Within an abusive relationship, where power and control are the cornerstones, the victim will never have the power to freely and willingly give consent to any activity sexual or otherwise.

The bill extends protection to children under the age of 16 by expressly recognising that children under the age of 18 cannot consent. Although implied in the definition of consent, the bill does not expressly provide that persons who lack the capacity to give consent cannot consent. Some stakeholders were concerned about the impact the proposed offences may have on children, with some expressing support for alternatives other than prosecution. Notably, the Queensland Family and Child Commission observed that there is some concern that the bill may criminalise a large cohort of children under 16 who share intimate images in circumstances that should not be treated through a criminal response.

It is true that there is a real risk of children under 16 potentially facing charges for sending sexualised photographs of themselves. Research by the Office of the eSafety Commissioner shows that nearly one in three children between the ages of 14 and 17 had sexting experiences during

2016-17. The Bar Association went further, asking the government to enshrine defences for young people who send or receive intimate photos. There is merit in their claim that it would be an injustice if such children faced the criminal justice system and potentially placement on the child protection register.

The new offence of distributing intimate images will be contained in section 223 of the Criminal Code. It provides that a person who distributes an intimate image of another without that other person's consent and in a way that would cause the other person distress reasonably arising in all the circumstances commits a misdemeanour. It is immaterial that the person did not intend to cause the other person distress. An 'act of distribution' includes distribution in person, online or over the telephone. 'Intimate image' is defined to mean a moving or still image that depicts or is altered in a way to show the person engaged in an intimate sexual activity that is not ordinarily done in public.

While most stakeholders were pleased with the definition of 'intimate image', some stakeholders also expressed their concern. The Women's Legal Service was concerned that the proposed definition creates unnecessary loopholes and may undermine the achievement of the bill's objects. Rhys LG Michie was concerned that the proposed definition is too narrow and constrained by past technologies. He mentioned that audio and 3D printed statues could also document a person's sexual communication, but these would not fall within the definition because they are not a moving or still image. I also note that the Women's Legal Service recommended that the definition of 'intimate image' be extended to reflect the different perspectives of intimacy of some cultures and religions as expressed in the recently passed federal Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018.

A further two offences are created of making threats to distribute intimate images or prohibited visual recordings. This includes making a threat to a person depicted in the image or recording or making a threat to a person to distribute an image of another person. For example, it will include an ex-boyfriend threatening a woman's new partner to distribute the image of the woman.

The bill also includes rectification orders that will empower sentencing courts to direct offenders to remove or delete intimate images or prohibited visual recordings. In the event that the prosecution cannot prove who uploaded the photo, a rectification order cannot be ordered by the court as this order can only be made when someone is convicted of an offence. The issue is whether there will be any restorative action that victims can rely on in circumstances where a person is not convicted of an offence. The Bar Association recommended that there be provisions so that the court must state the particular action the person convicted of the offence is required to take to rectify the offence. The Queensland Law Society recommended that a provision be included to permit a rectification order regardless of whether a prosecution that results in a finding of guilt is achieved. All offences carry a maximum penalty of three years imprisonment.

One of the major issues with the bill relates to the difficulty of prosecuting people who anonymously upload prohibited images or recordings. This may include instances where someone uploads material from a device that has particular anonymising qualities to it, such as a phone with a prepaid SIM card. This circumstance may result in the prosecution being unable to prove who the offender actually is. Similarly, there are concerns about the practicality of the bill and whether it will have application to offenders who live outside Queensland. If an offender lives interstate or overseas, they will be subject to any offences in that jurisdiction. While victims may make a request to the eSafety Commissioner, there are limitations attached to that process.

The bill only has prospective application, and offenders will only face prosecution for conduct that occurs after the bill is passed and becomes legislation; therefore, victims who are currently being threatened or who are trying to have the images or recording removed will have no remedy. The only option that victims have available is to invoke the Commonwealth jurisdiction and submit a request to the eSafety Commissioner to have the image or recording removed.

There was a need for the law to keep pace with rapidly changing technology and how that interfaces with societal behaviours. While there are concerns about unintended consequences as a result of the operation of these new laws, they are necessary. This is despite Queensland currently having offences that would cover some examples of the non-consensual sharing of intimate images. Research released last year revealed that one in five of all Australians have had intimate images or videos taken or shared without their consent. Publicly sharing sexual images of another person can destroy someone's life. It can hinder job prospects and family relationships and can strike at a person's overall health and wellbeing. There continues to be a major role for the Queensland Police Service, and the LNP supports the continued operational practices of the Queensland Police Service to educate our children and young people and increase awareness of the seriousness of the matters contained in this bill.

In closing, I believe that the issues raised by the opposition ought to be addressed by the Attorney-General. I add my support to review the laws in three years time as proposed so as to properly assess its operation and identify anticipated or unanticipated consequences of the bill.