



Speech By
Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 12 February 2019

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

Second Reading

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (12.16 pm): I move—

That the bill be now read a second time.

The Palaszczuk government is committed to the safety of Queenslanders across the state. We have shown that earlier today with the introduction of the Criminal Code and Other Legislation Amendment Bill 2019. Now we will debate the Palaszczuk government's Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018, introduced to parliament in 2018.

Parliament referred the bill to the Legal Affairs and Community Safety Committee for consideration and requested the committee to report on the bill. The committee tabled its report on 5 October 2018 and made just one recommendation—that the Criminal Law (Non-consensual Sharing of Intimate Images) Amendment Bill 2018 be passed.

I thank the Committee for its consideration of the bill and for its careful consideration of the public submissions received. I would also like to thank those who made submissions to the committee, many of whom work tirelessly to support victims who have had their intimate images shared without consent, often within coercive and controlling relationships or as an act of domestic violence.

The bill before the House delivers on an election commitment of this government to create new offences related to the non-consensual sharing of intimate images or threatening to share intimate images without consent. The new offences contained in the bill will send a clear message that sharing or threatening to share an intimate image without consent is unacceptable, illegal and punishable by up to three years in prison.

The colloquial label 'revenge porn' is often attached to this behaviour—a label that brings to mind the non-consensual uploading of nude images to the internet by ex-partners for the purpose of revenge. The term 'revenge porn' is problematic because it labels the images themselves as pornographic, regardless of the nature of the image, which may not be made for the purpose of sexual gratification. Some would also argue that the term 'revenge' implies wrongdoing on behalf of the victim which may reinforce victim-blaming attitudes.

We do not use the term 'revenge porn' in the bill and we know this conduct is so much more. The government recognises that the non-consensual sharing of intimate images covers a broad range of conduct, relationships, motivations and modes of distribution. In some cases it may be a form of sexual abuse, image based abuse or technology facilitated abuse. In some cases it can occur as an act of domestic violence.

The non-consensual distribution of intimate images can amount to a fundamental breach of a victim's autonomy, trust, sexual integrity and privacy. However, perpetrators of this type of abuse are not always malicious. Intimate images can be shared non-consensually for the amusement of both the distributor and their audience, but this comes with callous disregard for the impact on the person depicted. The distribution can be humiliating and distressing for those depicted, regardless of how an image was created or obtained or the motivation for sharing an image.

In developing this bill we have been conscious that threats to distribute intimate images can also cause enormous anxiety and in some instances can be used to control or coerce the threatened person. This government is committed to preventing these types of behaviours, which have continued to increase with the evolution of modern technology and social media. This bill will ensure Queensland has comprehensive criminal laws in this area that are intended to cover the use of new and emerging technology to facilitate abuse.

The bill contains a new offence of distributing intimate images without consent, as well as two new offences of making threats to distribute intimate images or prohibited visual recordings. The offence will extend to threats to distribute intimate images without consent even in circumstances where the material may not exist, recognising the distress that such a threat can cause.

In recognition that the removal of an intimate image from online sources or mobile phones is a significant concern for victims, the bill provides that sentencing courts will be able to direct offenders to take reasonable action to remove or delete intimate images or prohibited visual recordings. What will amount to reasonable action will be a matter for the court to determine in the particular circumstances of each case.

The government is aware that responding to these issues requires a multifaceted approach. In addition to strong criminal laws, we are working across government to deliver education and awareness-raising initiatives directed at the non-consensual sharing of intimate images. We will work together to ensure that training and education materials are updated in order to inform Queenslanders about the new laws and to spread the message that sharing, or threatening to share, intimate images without consent is a crime. I will also be writing to the Commonwealth's eSafety Commissioner to ensure that Queensland's new laws are reflected accurately in their resources.

The Legal Affairs and Community Safety Committee considered that it would be beneficial for the new laws to be reviewed three years after they commence operation to ascertain whether they are operating as intended in light of continuing technological advances. I note this comment and thank the committee for its concern. Changing technology is an issue under ongoing consideration for the operation of criminal laws in Queensland more broadly, not just offences in this bill. Agencies involved in the criminal justice system will monitor the operation of the offences over time and will consider whether new technologies impact on the effectiveness of the bill.

I want to assure members of this House that the bill has been drafted with the future in mind. The broad definition of 'intimate image' is intended to apply to the use of digital technologies to facilitate intimate image abuse including deepfakes or pornography created with artificial intelligence that depicts a person in a sexual way.

The committee expressed some concern that the bill did not apply to the sharing of private contact details for the purposes of fake sex advertisements. I am aware of instances where individuals have advertised an ex-partner's contact details and advertised that they were available for sex without their knowledge or consent. The committee suggested that further consideration should be given to ways to combat this sort of conduct. I am sure all members would agree that this kind of behaviour is abhorrent and not condoned.

I would like to assure parliament that there are a number of existing offences both in the Queensland Criminal Code and the Commonwealth Criminal Code that may apply if a person posts information about another on the internet encouraging sexual contact from others and providing contact information, depending on the specific circumstances of the case. For example, under section 474.17 of the Commonwealth Criminal Code it is an offence to use a carriage service including the internet to menace, harass or cause offence. This offence applies if a person uses a carriage service in a way that reasonable persons would regard as being in all the circumstances menacing, harassing or offensive and carries a maximum penalty of three years imprisonment. In addition, under chapter 33A of the Criminal Code it is an offence to stalk another, punishable by a maximum penalty of five years imprisonment.

The laws contained in this bill are specifically targeted at the recognised prevalence of the non-consensual sharing of intimate images to fill an identified gap in existing criminal offences. *I note the concerns expressed in some submissions to the committee regarding the operation of consent in the bill, particularly in regard to the defence of mistake of fact in section 24 of the Criminal Code.*

Section 24 of the Criminal Code provides that a person is not criminally responsible if they did something based upon an honest and reasonable but mistaken belief in the existence of any state of things. This excuse may be raised in any criminal prosecution except where the operation of this rule is excluded by the express or implied provision of the law.

Broader issues raised by some stakeholders about whether the section 24 excuse of mistaken belief should be available in situations of consent and sexual offending, and sexual violence more broadly, are outside the scope of this bill. However, I note that the New South Wales Law Reform Commission is undertaking a review on consent in relation to sexual assault offences, and the government will of course monitor developments in New South Wales and consider any finding of the New South Wales Law Reform Commission that may have relevance to Queensland.

I will now further 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 with 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. Importantly, 'distribution' can include the redistribution of an image without consent, even if it was originally shared prior to the laws coming into force. It will be necessary neither to prove that an offender intended to cause distress nor 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 would reasonably cause distress in all the circumstances.

This objective test applies to standards of the common person to the consideration of harm in the actual circumstances of each case. The court may consider any relevant circumstance when determining if the distribution of an intimate image would reasonably cause distress. It is intended that distress will require a lower threshold of harm than that required by the offence of unlawful stalking. The distress element limits the scope of the new offences in order to ensure that conduct that should not be criminalised is not unintentionally captured. For example, an image of a streaker would not normally cause that person distress and would therefore not be covered.

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. A child under 16 years of age will not be able to consent to the distribution of an intimate image under the bill. This recognises the greater vulnerability of our children. The bill includes 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.

'Intimate image' is defined and 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. 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. It is important that the provisions are robust in the face of technology, and the definition ensures that images 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. 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.

Threats to distribute intimate images or prohibited visual recordings without the consent of the person depicted in the image or recording are prohibited by two new offences. Each of the new offences will carry a maximum penalty of three years imprisonment. One new threat offence applies to threats directed at the person depicted in the intimate image or prohibited visual recording. The other new offence applies to threats made to distribute an intimate image or prohibited visual recording of another person such as an ex-partner threatening a person's new partner to distribute an intimate image of them. The threatened distribution for either offence must 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. Consistent with the new distribution offence, consent to share an intimate image cannot be given by a child under 16 years of age.

Amendments in the bill provide new powers to a sentencing court to direct a person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording upon conviction of the new offences in the bill or the existing offences under sections 227A, 'Observations or recordings in breach of privacy', and 227B, 'Distributing a prohibited visual recording', of the Criminal Code. The question of what will amount to reasonable action will be a matter for the court to determine in the particular circumstances of each case. This may require consideration of the

nature of the distribution that has occurred in a particular case. Failing to comply with an order to take reasonable action regarding an intimate image will be an offence punishable by a maximum penalty of two years imprisonment.

The bill increases the maximum penalty for the existing offences in section 227A, 'Observations or recordings in breach of privacy', and 227B, 'Distributing a prohibited visual recording', of the Criminal Code from two years to three years imprisonment. This government is not concerned with the sharing of intimate images between consenting adults. What we are concerned with, and will tackle with the aid of this bill, is the devastating invasion of privacy resulting from the non-consensual distribution of intimate images, and this is happening all too often with our young children in our schools. We want offenders to know that this conduct is a crime. We want bystanders to know that what offenders are doing is unacceptable. Finally, we want victims to know that it is safe to come forward, that they will not be blamed or shamed and that they will be supported by the new laws contained in this bill when they do so.

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.