




Speech By
Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 13 February 2019

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

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (2.42 pm), in reply: I would like to begin by thanking all honourable members for their contributions to the debate on the Criminal Law (Non-consensual Sharing of Intimate Images) Amendment Bill 2018. I would like to respond to some of the matters that have been raised by honourable members during the course of this debate.

There was some discussion from members opposite regarding comments during the committee process about the need to avoid the overcriminalisation of children. That is what we do about young people who might be engaging in the sharing of intimate images, and we all have concerns about that. This is not about trying to criminalise, charge and prosecute young children who are engaged in sexting. It is about sending the very clear message that they should not be engaging in this conduct, we do not want them engaging in this conduct, and that there are consequences if they engage in this conduct.

Currently, independent of this bill, children who engage in experimental peer sexting could be captured by the offence under section 228C of the Criminal Code, distributing child exploitation material. This offence carries a maximum penalty of 20 years imprisonment. A conviction for this offence can have implications, including a person becoming an automatic reportable offender subject to the obligations under the Child Protection (Offender Reporting and Offender Prohibition Order Act) 2004.

Following passage of the bill, children who engage in experimental peer sexting may instead be captured by the new distribution offence with its lower maximum penalty, so if we are concerned that suddenly they are all going to be charged under this offence we need to make it clear that there are already very serious consequences. When I go out and talk to high school students, this is the one topic that I make sure I talk about each and every time to make it clear that, irrespective of whether they share the image, if they are under the age of 16 then the moment they take a picture of themselves they are creating child exploitation material. The moment they share it with someone else they are distributing child exploitation material. These are very serious offences. We need to try to get the message through that it is just not worth it and they should not do it.

The existing operational response to youth sexting in Queensland, which prefers prevention and education to criminalisation—and we have heard over and over again about the importance of education—will be adopted to support the appropriate application of the new distribution offence in these circumstances. Specifically, our police and prosecuting agencies will continue, as they do now, to be guided by the provisions of the *Queensland Police Service Operational Procedures Manual*, which notes that police adopt an alternative approach to investigation and prosecution focused on prevention and education in relation to young people of similar age sexting. Further guidance on this issue is provided by the guidelines issued by the Director of Public Prosecutions. Of course, in any case where a young person distributes an intimate image in circumstances that satisfy the elements of the offence, the decision whether to prosecute that matter will be a matter for the police and prosecuting agencies to determine. Sadly, there could well be cases where the deliberate non-consensual sharing of intimate images, which the bill aims to stamp out, are committed by young people.

An important element of this new legislation is the opportunity is to use it to start a dialogue with young people in our community, to educate young people about the potential long-lasting harm caused by this behaviour and to educate them about the criminality of this behaviour. That is absolutely paramount. This bill provides an opportunity to discuss with young people the danger and risks involved in sharing intimate images of themselves. This is in no way to blame victims for non-consensual sharing; rather, it is an opportunity to talk to young people about the risks of the growing trend of sharing intimate images, even with people they may currently trust.

I have 16- and 18-year-old children—a son and a daughter—and it is a conversation that we regularly have. We need to educate not just our daughters about the sharing of images and the risks but also our sons about sharing images of themselves or encouraging or requesting young females to share images with them. It is so important, because the initial sexting is happening two ways. It is not necessarily gender based. We see that the sharing of those images is very much gender based and there is much more harm being done to young females. We hear statistics in relation to teenagers over 16, but I would really like to see the statistics pertaining to under 16s. I think they would horrify all of us, not just in this place but in the community. It is happening out there and we need to be having these conversations not just with our high school students but, very sadly, with our primary school students as well.

In terms of the operation and implementation of this legislation, I have absolute confidence in the policies and procedures of the QPS and the ODPP. We are also committed to the review of this legislation within three years to see how it is working. I will shortly take up the issue raised by the member for Mermaid Beach.

An issue was raised with the committee that the 'intimate image' definition does not include audio. This issue was raised by one submitter to the committee. It is correct that the new offences in the bill will not capture the sharing of audio recordings; however, there are existing avenues with the potential to address this conduct, depending on the circumstances involved, including under the Invasion of Privacy Act 1971 and the Commonwealth Criminal Code. I have to say that the committee process did not seem to show that this type of sharing is occurring and causing harm. The bill is quite rightly focused on intimate images. The definition of 'intimate image' is quite broad and it accords with national guiding principles, agreed to by the ministerial council in 2017, regarding the prevalence of the sharing of images. This is something we have been having a national conversation about and agreeing on what those parameters should be so that we can have as much consistency as possible across the country when we try to tackle these issues.

It is important to remember that images allow the easy identification of a depicted victim. That highlights the significant breach of the victim's right to privacy which the amendments in the bill will remedy. In an audio recording it is far more difficult to identify particular individuals. In an intimate image it is much more likely that a person can be identified, causing them harm or potential harm.

Matters regarding consent and the operation of the excuse of mistake of fact pursuant to section 24 of the Criminal Code were also raised by a number of members and with the committee. As I outlined in my second reading speech, this issue is outside the scope of this bill, but I am currently undertaking a consultation process with relevant stakeholders on the issue of consent and the operation of section 24 in relation to sexual offending more broadly. I will continue with that consultation. I also note, as other members have said, that the New South Wales Law Reform Commission is presently undertaking a review of consent provisions in their interaction with sexual assault offences.

The definition of 'consent' in this bill is 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent'. This definition is consistent with the approach currently taken in the Criminal Code. This consistent definition recognises the vulnerability of persons with reduced capacity and recognises that offending can arise in situations of coercion, power imbalance and duress and in a domestic and family violence context. I will touch on that briefly. A number of members mentioned that this can occur in a domestic and family violence setting. What has not been mentioned is that, when that does occur and it has been identified that the offence has been committed in a domestic and family violence setting, that will be an aggravating factor when the court is considering the sentence that should be applied. It is very important to know that the provisions this House has previously passed around domestic and family violence and aggravating factors are relevant to these offences. We do not have a stand-alone domestic violence offence in the Criminal Code because the aggravating factor applies to all offences. Every time something like this is enacted, if it is done in the context of domestic and family violence, that becomes an aggravating factor. That is the way we want it to work.

Members raised the issue that this bill requires a conviction before a rectification order can be made. It is important to note that the provisions in this bill complement what already exists at the Commonwealth level and the powers of the Office of the eSafety Commissioner. The Enhancing Online

Safety Act 2015 prohibits the posting of or the threat to post an intimate image without consent on a social media service, relevant electronic service or designated internet service; establishes a complaints and objections system; provides the commissioner with powers to issue removal notices or remedial directions; establishes a civil penalty regime to be administered by the commissioner; and enables the commissioner to seek a civil penalty order from a relevant court and issue an infringement notice or obtain an injunction or enforce an undertaking or issue a formal warning for contravention. This is a civil scheme that does not require a conviction, and there are civil penalties and powers of the commissioner through the courts. Importantly, on top of that, we now have a criminal offence such that when there is a conviction there are consequences and rectification orders through the Criminal Code. They really are about complementing each other. I want to reassure members that there is not a gap whereby a victim is not to be able to seek some remedy in relation to those images without a conviction.

In relation to crossing over jurisdictions, as with many other existing criminal offences it is possible that aspects of this new distribution offence may extend into other jurisdictions, including distribution beyond the Queensland border or even Australia, especially when we are talking about electronic distribution. Chapter 3 of the Criminal Code sets out the necessary nexus with Queensland before an offence can be prosecuted under Queensland laws where offending behaviour partially occurs in another jurisdiction. At a practical level, Queensland police are experienced at working cooperatively with their interstate colleagues when investigating offences that cross into other jurisdictions.

I pick up the issue of evolving technology and members being concerned that we will have to come back and fix this up potentially sooner than three years because technology is moving at such a rapid pace and asking whether we can futureproof this legislation. I am confident that we will not have to keep coming back on a regular basis to modify this because the definition that applies in relation to the distribution of the intimate image under our bill is section 207A of the Criminal Code. That is, 'distribute' is defined to include—

- (a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not;
- (b) make available for access by someone, whether by a particular person or not; and
- (c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and
- (d) attempt to distribute.

It actually does not mention technology. It can be distributed in any way. Someone could download a photo and show you. That is sharing an intimate image. It does not matter how it is distributed. It does not matter what change happens in technology. We are not mentioning phones, iPads, computers or anything else. We do not know what the future holds in terms of distributing that image. It does not matter. This is not about the way it is distributed; it is about the fact that it is distributed or threatened to be distributed. We are hopeful that that means it captures any sorts of changes in the future about how that image may be captured and distributed.

I certainly agree with the comments made in this House that ultimately it starts with respect—teaching our kids to respect each other, adults respecting each other, leaders in our community respecting each other. It is about leading by example—every one of us in this House, every member of parliament at all levels, every professional, every teacher and every police officer. It applies to anyone in a position of authority who can be a mentor or influence others. We have a responsibility to lead by example—to show respect and teach respect. We cannot stand here and ask for respect and lecture people about their behaviour if we cannot behave that way ourselves, if we cannot show respect to each other. That includes on social media and what we say behind closed doors. It is so important that we get that message out there.

How can kids be asked to behave a certain way when they watch their parents online making vile, offensive statements about other people, whether they know them or not? What sort of example is that setting? We have to call it out. People in this chamber have heard me say it for all the years I have been here and I will keep saying it. If we do not accept that we need to change our culture and how we interact with each other, especially online, we may as well just shrug our shoulders and say, 'This is the new norm and we just have to accept it.' No-one in this chamber during this debate has said, 'This is just the new norm. Let's just accept it.' We know that this has to stop, but we have to change our behaviour and our culture and how we look at these things, and it is not just about sexual images; it is about how we interact with and treat each other.

In conclusion, I once again thank all honourable members for their contributions to the debate. This is an important step forward for the safety of Queenslanders. I want to thank the Premier for her leadership on this important community issue, including her leadership in establishing the cyber safety task force. I know some members have talked about bullying as well and, again, it is the same thing. We cannot lecture children about bullying and educate them about bullying when they are watching

their parents and they are watching adults and they are watching people in authority bully each other each and every day, and we have to change it. People's lives are being lost and people are taking their lives because of these actions.

This bill is further proof of what can be produced with strong leadership and Labor governments, and I want to very much thank the departmental officers who worked to deliver this reform. I will continue every day to thank the Department of Justice and Attorney-General for the incredible work it does, the support it gives me as its minister and the work it does on behalf of Queenslanders each and every day. I once again thank all of the stakeholders who participated in the committee process and the committee members and the secretariat and the members of the House. I acknowledge and thank all of those organisations and individuals throughout Queensland that work tirelessly each and every day to support victims and seek to educate our communities about the risks and about the need to change our behaviour. It is with pleasure that I commend the bill to the House.