CHILD PORNOGRAPHY AND EXPLOITATION MATERIAL AND CLASSIFICATION LEGISLATION AMENDMENT BILL 2009

Second Reading

Resumed from 21 April.

MR J.R. QUIGLEY (Mindarie) [3.30 pm]: The Opposition congratulates the government on bringing the Child Pornography and Exploitation Material and Classification Legislation Amendment Bill forward. This legislation was first flagged by the previous Labor government in 2005. A committee had investigated the bill prior to the sudden election that was called in 2008 before this legislation had been brought before the Parliament. The incoming Liberal–National government then brought the legislation forward and we support it. The legislation is aimed at criminalising the possession and transmission of not only child pornography, but also material that could be regarded as exploiting children in our community. There are no more vulnerable people in our community than our children. As legislators, parents and teachers, we have a special responsibility to all children in our community. Having said that the legislation aims to criminalise the possession of child pornography and extends it to materials touching on the exploitation of children, I will soon come to what that may encompass.

The first matter of some contention in the community is the age at which a person is deemed to be a child for the purpose of this legislation. The bill proposes to insert in the Criminal Code "Chapter XXIV – Child exploitation material", proposed section 216 of which defines a child as being a person under 16 years of age. That does not include, of course, 16 and 17-year-old children. The Labor opposition supports this approach by the government, even though we realise that there will be some contention in the community about the age of children for the purpose of this legislation being capped at 16 and not 18. Many in the community will say that 16 and 17-year-olds need equal protection from this sort of exploitation because they are children of tender years. I maintain that 16 and 17-year-old children are of relatively tender years. Although there are some very sophisticated children of that age, some 16 and 17-year-old children are very naive and susceptible and some might believe that they need protection from this sort of pornographic material and exploitation. I have strong sympathy with that argument. In my extended family—I want to be careful so that I do not identify the person—a young person of 17 years was subjected to some of this sort of material. I have seen the devastating consequence that has had on that child's life, which has caused me the deepest grief. I identify very, very strongly with the sentiment of needing to protect 16 and 17-year-old children. However, despite my personal bias and my personal sympathies for the child involved and for the argument that some 16 and 17-year-old children need the protection of this legislation, as a legislator, I must approach this objectively and not allow my personal prejudices to get in the way of sensible law making.

The age of consent is 16. I have said in this chamber before—I have never examined my children to see whether they heeded my advice—that the age of 16, although it is the age of legal consent for sexual activity, nonetheless is an age at which children have not developed the emotional maturity to be able to withstand, not the pleasurable activity of sex, but the tide of emotions that intimate relationships unleash, both during the course of the relationship and upon their termination. It is nearly beyond the capacity of some 16 and 17-year-old children to deal with the emotions that an intimate relationship generates, which can lead to devastating consequences in their lives. Similarly, to be exposed to or be the subject of this sort of material could have the same consequences for a 16 or 17-year-old child. Having said that, from almost time immemorial, western countries have accepted that 16 is the age of consent. It is permissible for 16 and 17-year-olds to indulge in intimate behaviour with each other. In the course of those intimate relationships, there will be occasions when some of those couples—if I can call them that—will generate pictures of themselves. We have seen reports in the paper that this happens as a common occurrence.

I have five children, ranging in age from nine months, three, 21, 24 and 26. Having spoken to my children, I am aware that cameras are attached to every electronic device these days, including iPhones or any other type of mobile phone. A mobile phone does not have to be particularly smart to have a camera attached to it. Sometimes videos are made in the course of an intimate relationship. I cannot record videos with my camera. My phone has the capacity to make them but I am a bit of a Luddite in that area. A video or a camera can be switched on easily by people engaging in intimate behaviour, especially by the young. It would have been scandalous when I was 16 if someone had taken a picture of me and my partner in the nude or in a sexual or intimate embrace, whereas today it happens frequently. Some 16 and 17-year-olds who are engaging in an entirely legal intimate relationship can, in the course of that relationship, consensually take pictures of each other in states of undress that could be viewed by others as pornographic, or at least as exploitation. It is quite beyond my range of thinking, but it happens—they start transmitting these pictures to each other by mobile telephone. Often, and this is where it gets insidious, they will transmit them by SMS to another child—a friend. Under this legislation that friend would be duty bound to delete them immediately upon reception. We are dealing with children and a child

can receive these pictures in an unsolicited manner because another child submits them to him. This is where it becomes fairly murky as to where we impose a criminal sanction on these people.

A lot of the cases dealing with child pornography and the exploitation of children by pictures do not involve 50-year-old or 60-year-old men in plastic raincoats, but other children. On balance, despite my strong sympathies with the argument that 16 and 17-year-olds need to be captured by this law and despite my strong family and religious bias to do that, as a legislator I must be disciplined and dispassionate and ask, "Is it right, on the other hand, in this whole balancing act to say that we should be criminalising the behaviour, what seems to be not uncommon behaviour, of 16 and 17-year-olds and rendering them liable to criminal sanction, which could see a 16 or 17-year-old schoolchild placed on the sex offenders register?" It could be devastating for the rest of time for such a child.

I think that the government and the Attorney General are approaching the matter in a responsible way by taking the conservative approach. I know that it sounds as though the conservative approach could be interpreted by some as applying this legislation to everybody, including the 16 and 17-year-olds. However, the opposition is of the opinion that this is the proper and cautious approach. If it becomes evident in the community that there is a further problem that has not been addressed by this legislation, we can always come back to this house. Members of this house who want 16 and 17-year-olds included can always either move an amendment or come back to this house, if they can persuade their party room, and subsequently amend the legislation once this bill goes through. I am confident it will go through in its current form, because it has the support of the opposition and there might be only a few members who, as a matter of conscience, would seek to vote against it.

The opposition praises the government for including the definition of "child exploitation" in the bill. It is something that the Labor Party would have lobbied for anyway, but it acknowledges that the provisions of this legislation are extended beyond child pornography to include the definition of "child exploitation", which is outlined in clause 4, which will be new section 216. The definition in the bill means —

(a) child pornography; or

(b) material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be, a child —

(i) in an offensive or demeaning context; or

(ii) being subjected to abuse, cruelty or torture (whether or not in a sexual context);

This definition is important because the gravamen of the offence should not be limited to sexual activity, but the exploitation of any child in conduct that would be offensive, either in bondage, slave poses or anything else. Once again I think this touches also upon the first definition; that is, that the capture of this legislation is limited to those under the age of 16 years.

I know and I have listened to the community on radio talkback, especially during daytime hours when mothers have rung those programs very concerned about the sexualisation of children, particularly by the advertising industry. The advertising industry can generate ads that take my breath away at times. I do not know the age of these children, because in these advertisements the age of the children are not published. I am going back a few years now to when that famous Australian model, Miranda Kerr, soon to be Mrs Bloom as we read in the newspaper, looked years younger at 20 years of age. She was a thin slip of a lass with an angelic young face. I am uncertain about whether some of the models are 16 or 13. It is legal, although it is not to my taste, that in some of these advertisements for lingerie, bathers and cosmetics these models are asked to pose in what is a very provocative pose and sometimes put photographs of them up on large billboards roadside. If the person is a child, but is 17 years of age—I am not talking about pornography but exploitation that some people say is offensive—I do not think she should be captured. I do not think that the retail or advertising agent and all the billboards people should be criminalised for using a 16 or 17-year-old model, although it is not to my taste. I am not talking about pornography here, but some of the poses in lingerie and bikini ads. They are put out there if not to shock us but to at least in some way attract our attention. It is another reason why it should stay for children under the age of 16. It is very important to have this child exploitation provision in the bill.

It is the last day of this sitting and I notice on the clock that I have 44 minutes of speaking time left. I do not intend to occupy that. This bill has been debated in the Legislative Council and examined twice by separate committees in the Legislative Council and on this last day of the autumn session, I am sure that other members want to make a contribution to this debate.

I have also had an off-air discussion with the Attorney General. It was a very interesting discussion. I would like to highlight parts of that discussion, because it is worthwhile. We will hear from the Attorney in due course. I refer to something I share with him, and I come back to defences contained in the bill. For as long as I have been

a lawyer, and that is since 23 December 1975—that admission date seems like another lifetime—there has always been controversy about defences involving artistic merit or artistic performance. It goes back to the days when the police would enter a live performance and shut it down because one of the performers showed their breasts or said a word beginning with the letter "F". I can clearly remember that in Perth. I can clearly remember a previous Premier of Western Australia, Mr Dowding, running some high-profile defences in that regard. This legislation provides a defence if the material being published involves a child under the age of 16 years, but the material is regarded as having artistic merit. Proposed new section 221A(1)(c) states —

> the material to which the charge relates was —
>
> (i) of recognised literary, artistic or scientific merit; or
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> (ii) of a genuine medical character,
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> and that the act to which the charge relates is justified as being for the public good; …

I know that some people would want to perhaps object to or nitpick this particular defence. This defence is necessary. The publication of nudity is a complex area. I would be shocked if anyone in the chamber today would be offended by Michelangelo's statue of *David*, with its genitalia. I can remember when the department store David Jones—the member for South Perth might remember this —

Mr J.E. McGrath: I'm not that old!

Mr J.R. QUIGLEY: He will remember Foy and Gibson's. The old Foy and Gibson's store, which is about where Central Park now stands, brought in a replica of the statute of *David* and put it in the food hall downstairs. It was a plaster statue. The police arrived to arrest the store manager for displaying an obscene item, and a compromise was reached. It was all carried in the *Daily News*. They did not use a fig leaf, because that would wither, but they got a plastic fig leaf and glued it to the offending material.

Mr J.E. McGrath: Things have changed today.

Mr J.R. QUIGLEY: Things have changed, including its advertising catalogue. I am just saying how communities change.

Throughout da Vinci's work and the work of many of the Renaissance painters, there are depictions of nude children. People travel to Europe to look at these magnificent works of art. I would have thought that even the most conservative members of the chamber would regard them as works of art. Many of the depictions of nude children in some paintings—certainly children under the age of 16 years—are of angels, innocents et cetera. I do not think that even the most narrow-minded conservatives would say that that is pornographic. That is at the one end. At the other end is what is obviously pornographic material—the depiction of children in sexual acts et cetera. A controversy raged in Australia two years ago over a series of photographs by Bill Henson, a recognised photographer who had an exhibition in Sydney. The police initially tried to close it down, but then, after a flurry of commentary by artists and people in public life, including former Prime Minister John Howard—even in that government there was a range of views between Prime Minister Howard and Mr Malcolm Turnbull, the then environment minister—the show was allowed to go on. I can see why people argue that the photographs of Bill Henson are art, but they still take my breath away. Four of my five children are daughters, and I would not like to see my daughters in those sorts of edgy photographs. However, we as legislators cannot draw the line, and I said that during the mandatory sentencing debate. The range of material is so broad that it could not be prescribed in this chamber, because as soon as we said that a person could never publish a picture of a nude child, we would all have to belt over to the Art Gallery of Western Australia and start flicking through the catalogue to see what had to be removed from the wall. That is at one end. At the other end is that which the community would unanimously agree is clearly pornographic. It is appropriate that there be the capacity to run that defence and let the courts decide. The courts will have to decide on contemporary community standards, and that will be dictated by not only the magistrate hearing the case, but also, ultimately, the Court of Appeal of Western Australia.

Mr C.C. Porter: There's also the jury in these matters, member.

Mr J.R. QUIGLEY: Yes, there is also a jury. People will be charged on contemporary community standards. I will not go through that line of cases; the Attorney General could help us in the chamber by referring to those cases. I can remember them, but that is not the point at the moment.

As the Attorney General has commented to me, a comment with which I entirely agree, if other members of this chamber want to delete the paragraph that provides a defence to a child nudity charge if the material is of literary, artistic or scientific merit—no-one is really questioning scientific merit, such as the body of a child being used to teach students about a child's anatomy—defence counsel would soon be advising the accused to go to the previous paragraph, which provides —

> the accused person did not know, and could not reasonably be expected to have known, that the material to which the charge relates describes, depicts or represents a person or part of a person in a way likely to offend a reasonable person; …

In that situation, the artist would say, "This was all tasteful. It was done as an expression of a genuine artistic effort. I never imagined, and would not believe, that this depiction could offend a reasonable person." It is much better to retain paragraph (c) to make it clear what the defence is and exactly which hurdle the person has to jump if the person is to rely upon that defence. It is specified in paragraph (c), and the person would not have to try to contrive a defence by raising paragraph (b) as a defence.

Finally, the last line that I read out—"represents a person or part of a person in a way likely to offend a reasonable person"—brings me to another point. In some of this pornographic and inappropriate material, it is not necessarily a picture of the whole of the person that is published. Some of these terrible people only publish pictures of the bits with which they want to offend. It is appropriate that the definition extends to publishing a picture of the part of the person as well as of the whole person.

We agree with the terms of this legislation. I do not want to take up any more time because I would like to see it passed as soon as possible. This bill should become law as soon as possible to protect the exploitation of the most vulnerable in our community.

MR F.A. ALBAN (Swan Hills) [4.00 pm]: I would like to make a small contribution to the Child Pornography and Exploitation Material and Classification Legislation Amendment Bill 2009 because it deals with an issue that I feel quite strongly about. Many changes in information technology, media and communication methods make the amendments to this bill essential. This bill will bring the Western Australian legislation up to date and reflect the impact of these changes on offences such as possession and distribution of child pornography. Child pornography, by its very nature, destroys the innocence and security that every child is entitled to. This bill creates new offences, substantially increases penalties and ensures Western Australia is an effective participant in national classification matters. This bill addresses two areas—child exploitation material and the National Classification Scheme.

It is inherent in our nature to nurture and protect our young. Not only is this obvious in human beings but also in the animal kingdom: the nurturing and protecting of animal species is well documented in the animal world. The exploitation of the young, particularly exploitation of a sexual nature, is repugnant to most human beings, as is the exploitation for profit, such as occurs with child pornography, which is the extreme of this sickness. The longer that the excessive consumption of alcohol and drugs, antisocial behaviour, discrimination and pornography persist, the more they become commonplace and the norm rather than the extreme. It is the case that some current product advertising, as the previous speaker mentioned, of models in skimpy underwear, for instance, would have been viewed as offensive in a past generation. With the continual saturation of indecent and pornographic material, the public will in turn create a perception that this is acceptable conduct. We have progressed in a lot of ways but what is good is still good and what is bad is fairly obvious.

I am advised that this bill has taken quite some time to get to this Parliament so I am quite keen to see it go through. I have two areas of concern, one of which the previous speaker spoke about. One relates to section 216 of the Criminal Code and the definition of a child. Currently the code provides that a child means a person under 16 years of age. In Western Australia, the age of consent is 16 years. I am aware that the states are divided: in some states a child is a person under 16 years of age and in others it is a person under 18 years of age. I would prefer it to be 18 years of age.

Just recently we heard about the defences in proposed new section 221A(1)(c) of the Criminal Code. I accept that thousands of years ago there were naked frescoes of children. In this day and age, I see no reason at all for us to see young children naked; otherwise, it is pornography.

Ms J.M. Freeman: So none in artwork at all?

Mr F.A. ALBAN: No. I do not believe that anyone under 16 years of age should be seen naked. I find it very, very hard to accept. Pornography is pornography. If people want to do artwork, they should leave the kids alone. That is just my point of view. People use the artistic merit argument as a reason for doing that. It is not something that I believe in. Notwithstanding these two concerns, I commend this amendment bill to the house.

MR P. ABETZ (Southern River) [4.04 pm]: I rise to speak on the Child Pornography and Exploitation Material and Classification Legislation Amendment Bill 2009 because of my personal interest in matters relating to children, particularly the protection of children. I want to address the pornography aspect of the bill. Pornography seems to have invaded all levels of our society. We can see so-called soft porn every day. We just need to go to the newsagent, watch TV, see billboards or T-shirts, and it is there. The tragedy is that it desensitises us. Because it is there all the time, we often do not recognise it as pornography anymore. The sad thing is that it desensitises our children and in many ways robs them of their innocence.

The situation surrounding pornography has become so bad that recently a group comprising former Chief Justice Alastair Nicholson and 34 academics, child professionals and advocates saw the need to formally request that Canberra review the classification guidelines of magazines such as *Playboy*, *Zoo* and *Ralph*. We also hear that record amounts of child pornography are frequently seized by the Australian Customs and Border Protection Service. Much of it seems to be brought in by workers employed in remote mining areas. I am told that the rise in child pornography detections has authorities so alarmed that Customs began an education campaign last year aimed at warning remote area workers of the high penalties for anyone caught with such images. Under this bill, those penalties will be significantly increased. I commend that.

Pornography is no longer just a problem; it has become an epidemic of gigantic proportions. As more and more people use the internet, children are often inadvertently exposed to pornography at an age which really is totally inappropriate and often the content is extreme pornography. A recent United States study found that 72 per cent of participants had seen online pornography before the age of 18 years. Most exposure began between the ages of 14 and 17 years—an interesting fact bearing in mind that this bill defines a child as a person aged younger than 16 years. It is interesting that the same study also noted that a considerable number of boys and girls had seen criminal sexual activity, child pornography and sexual violence on the internet at least once before they reached the age of 18 years.

Why is pornography so much on the rise? Can we just blame the internet for it? I do not think so. The reality is that pornography is a vicious circle. Pornography gives rise to still more pornography. A well-known University of California Professor, Dr Victor Cline, has identified four stages of addiction to pornography among both adults and children. He says that the first stage is getting hooked; the second is escalation of content—in other words, people want to see something a bit more exciting and more thrilling; the third is desensitisation; and, tragically, the fourth is acting out. At that fourth stage, he says, this includes having sex with minor children as well as rape. It is therefore absolutely critical that our laws regulating child pornography and child exploitation ensure that the courts can intervene in the early years before the addiction becomes irreversible, so to speak. I am pleased to note that the bill elevates the offences relating to child pornography and treats them as real criminal matters. I am pleased to see that our government sees fit to send a very clear message to the community about the seriousness of child pornography.

With any bill, there are things that might be strengthened in some way. The member for Mindarie mentioned the age of a child. That is one issue that I would like to spend a bit of time on. This bill says that if a person under the age of 16 years is depicted in pornography, it is classified as child pornography. Under the bill, a child is a person under the age of 16 years. My understanding is that that is contrary to the recommendation made by the Standing Committee on Uniform Legislation and Statutes Review, which supported the age being set at 18 years. I appreciate that there are arguments both for and against the age limit being set at 16 or 18 years and I recognise that some members of this chamber do not agree with setting the limit at 18 years. The bill sets the age limit at 16 years because that is the age of consent. Two young people of consenting age are legally able to have sex. I guess the thinking behind it was about young people, who take pictures during that kind of activity and send them out, not getting caught up in a criminal act. I am told that a real problem has emerged in high schools; that is, young people foolishly take pictures of each other while engaging in sexual activity, or whatever, and when the relationship breaks down, the boy sends pictures of his ex-girlfriend to his mates.

Mr J.R. Quigley: Or the girl sends them; in today's age you have to say that as well.

Mr P. ABETZ: Or the girl will send them. I accept that. However, I am told that girls are much more upset when it happens. It can be devastating for the girls—and perhaps for the guys as well—when that happens. I believe we need to send a clear message to the community and to our young people that that is simply unacceptable conduct; that that is simply not on. Unfortunately, the bill does not address that.

I note with some interest that the Victorian legislation is slightly different. It sets the age limit at 18 years—as does the child pornography legislation in Tasmania, the Australian Capital Territory and the Northern Territory. The Victorian legislation has an interesting aspect in that section 70(2) of the Crimes Act 1958 provides as a defence against prosecution —

> (d) that the accused made the film or took the photograph or was given the film or photograph by the minor and that, at the time of making, taking or being given the film or photograph, the accused was not more than 2 years older than the minor was or appeared to be; or
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> (e) that the minor or one of the minors depicted in the film or photograph is the accused.

In other words, the Victorian legislation excludes a picture if the person in possession of the picture appears in the picture. That is one way of addressing the very real issue raised by the member for Mindarie.

Exploitation often includes an element of duress or oppression. There simply cannot be consent when duress or oppression prevails. I do not believe the age limit for children set in this bill needs to be consistent with the age of consent. If we add them up, the jurisdictions are split 50–50 on the use of 16 or 18 years as the age limit. I should mention that Tasmania sets the age limit at 17 years. Interestingly enough, the commonwealth in its Classification (Publications, Films and Computer Games) Act 1995 also defines a child as a person under 18 and not 16 years of age, thereby creating an interesting anomaly; that is, if someone were to print one of those photos and send it through the mail, technically they would be breaking a commonwealth law and could be prosecuted. Not that I imagine that will happen; but never mind. I understand that one of the reasons this bill was introduced was to bring us in line with the other relevant commonwealth amendments that affect the operation of the national cooperative classification scheme to which Western Australia subscribes. One of the purposes of this bill is to help us move towards national uniformity. I guess it may be a little tricky given that New South Wales, Queensland and South Australia set the age limit at 16 years and the other jurisdictions set it at 18 years.

There is no doubt in my mind that many children between the ages of 16 and 18 are still very vulnerable and really deserve the full protection of the law. There is not only the issue of children sending images between themselves, but also of people who produce pornography using children aged between 16 and 18. This bill does not allow children under 16 to be used, obviously because they are classified as children in this bill.

I believe that we need to be very serious about protecting our children. I believe that a war cannot be won with only handguns; a war needs more powerful weaponry. We should use every appropriate weapon that we have in our arsenal to protect children from being used as sex objects in pornography—not just to the age of 16 but also to 18 years. I do not believe pornography has a place in any civilised society.

Earlier, I said two issues with this bill occupied my mind. The second, also raised by the member for Mindarie, is the issue of artistic merit. In this bill, a valid defence against prosecution is to claim that the material to which the charge relates is of recognised literary, artistic or scientific merit, and that it is justified for the public good. I like the reference to the public good, because that concept has, I assume, some definition in law. I am not sure whether it has to be defined in each bill. The commonwealth Criminal Code states —

> … conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:
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> (a) enforcing a law of the Commonwealth, a State or Territory … or
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> (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or Territory … or
>
> (c) the administration of justice … or
>
> (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.

I would prefer that the artistic merit defence not be included in the act, and believe that a public benefit defence would provide stronger protection for our children. Merit is a fairly subjective concept and this bill leaves its determination to our judges or, as the Attorney General mentioned, to the jury. One would hope that they would judge wisely. However, if public benefit were clearly defined in the legislation, it would perhaps be an easier and clearer-cut measure.

In a mental exercise, I asked myself: what would be of artistic merit in pornography? I thought of the pictures in the old churches in Europe in which naked bodies are shown. But I do not see that as pornography, because they are not pictured in provocative or sexual poses. It is very different.

I believe that the average person found the Bill Henson photos, mentioned earlier, to be offensive. However, some did not find them offensive, thereby raising the question of where that line is drawn. I certainly want to argue that the provocative sexual posing of pornography never has warranted nor warrants artistic merit. Earlier this year, acting on the recommendations of the Sentencing Council and the Child Pornography Working Party, the Parliament of New South Wales introduced laws to remove the defence of artistic merit. My understanding is that there is also no artistic defence available in the Northern Territory and the ACT. Victoria has an artistic merit defence section but it cannot be relied on in a case where the prosecution proves that the minor was actually under the age of 18 years, as I mentioned earlier.

In conclusion, I reiterate that the Child Pornography and Exploitation Material and Classification Legislation Amendment Bill is an excellent bill. It sends a clear, strong message to the community that this government will not tolerate child exploitation and child pornography. These are not minor offences. Making these acts criminal offences with very significant penalties is certainly an appropriate move. I believe we need to do all we can to protect the innocent and the vulnerable. We need to ensure that none of our children is at risk. I would prefer it if the bill applied to persons under the age of 18 years, but I guess it is up to Parliament to make that decision. I

certainly think that 16 years of age is at least a great step. In terms of the strength of the bill, it is a positive thing. I commend the bill to the house.

MR M.W. SUTHERLAND (Mount Lawley — Deputy Speaker) [4.20 pm]: I listened to what the member for Mindarie said when I was in the chair. I agree with most of the points he made. There is an increasing concern about the effect of sexually explicit material in the media, in magazines and on the internet, and the effect this is having on children and in society in general. We are looking at a punitive sanction in passing this bill and trying to punish people who deal in child pornography and various aspects thereof.

The sexualisation and objectification of young girls is now becoming the norm. As we have heard, we are bombarded with images like never before. This is having an effect on young girls who are perceived as sexual objects. It is becoming a multi-effect problem. This problem is permeating our culture; unfortunately, changing it for the worst. In everyday places there is material that is deeply disturbing to many people. Professor Frank Furedi, professor of sociology at Kent University in the UK, said that our whole society has been hyper-sexualised. One of the big problems we are faced with is that adults have increasingly lost the capacity to draw a line between adult attitudes and those of children. With this pervasive penetration of pornography and objectification of children, abuse becomes unfortunately a normal part of the culture. The sexualisation of children must be resisted. The sexualisation industry has an insatiable appetite for appropriating people and things deemed innocent and changing them to suit their own purposes.

When I was in Canberra recently I managed to meet a lady by the name of Melinda Tankard Reist who wrote a very interesting book titled *Getting Real: Challenging the Sexualisation of Girls*.

Ms J.M. Freeman: Is she the same lady who used to be a *Cleo* editor?

Mr M.W. SUTHERLAND: I do not know.

Ms J.M. Freeman: She made money out of it when she needed to; she sexualised the whole concept and then she went off —

Mr M.W. SUTHERLAND: I do not know whether that is the same one.

Mr C.C. Porter: Yes, it is.

Ms J.M. Freeman: I love that, don't you?

Mr C.C. Porter: She is right now; she was wrong then!

Ms J.M. Freeman: It goes without saying!

Mr M.W. SUTHERLAND: There are a lot of people who have been wrong and right; right and wrong. The point she makes on page 11 of the book is the point the member for Mindarie made; that is, we have all seen lingerie advertisements that portray children's lingerie as frisky, seductive and mysteriously alluring. That abhorrent view of young people leads to what is known as the Lolita effect, which is a distorted and delusional set of myths about girls' sexuality and that it inculcates upon people's thoughts in our society. In that same book on page 109 —

Ms J.M. Freeman: So cultures that do not sexualise their girls through wearing veils and things like that is something the member would agree with —

Mr M.W. SUTHERLAND: No, I do not agree with that either, but there is a balance.

Ms J.M. Freeman: That is very much about not sexualising girls —

Mr M.W. SUTHERLAND: I will not argue with the member across the chamber, but I do not agree with extremes in either case. I do not agree with the burqa or people who cover their girls, or people who want to have female circumcision. I find that abhorrent, but I find the sexualisation of youth abhorrent as well.

We have heard about the photographs that Henson took—the member for Mindarie covered it quite well—and the defences that are available in the act, which I think could be open to abuse because the accused person can show that he or she did not know, and could not reasonably be expected to have known, that the material to which the charge relates describes, depicts or represents a person or part of a person in a way likely to offend a reasonable person. There will be arguments on that point, and with proposed section 221A(1)(c) which states —

> the material to which the charge relates was —
>
> (i) of recognised literary, artistic or scientific merit …

We have two totally opposite views. We heard about Mr Henson's photography. Of course the chattering classes, or the very sensitive artistic set, said that these photographs were acceptable. Kevin Rudd stated that the photos

were absolutely revolting. I agree with what Kevin Rudd said on that particular occasion. I do not know what Mr Turnbull said but, anyway, I heard the member for Mindarie raise something about him.

The artistic intelligentsia raised an argument that there has been moral panic that will cause untold damage to the Australian cultural world if we do not allow pictures of the type that were put out by Mr Henson. We heard similar bleating over offensive artwork not so long ago. People would remember *Piss Christ.* The average man in the street would have been grossly offended, but of course the glitterati or the artistic elite thought it was fantastic. I thought it was most unfortunate and objectionable.

Mr J.R. Quigley: I found *Piss Christ* personally offensive —

Mr M.W. SUTHERLAND: I do as well.

Mr J.R. Quigley: — but for those who are not Christians or that way inclined, is art not also there to challenge us or confront us?

Mr M.W. SUTHERLAND: Member for Mindarie, we live in a world in which, let us say, a person decides to be confronting in art and publishes six photographs of Mohammed in cartoon form. If that person thought he or she was under pressure before, he or she would be under real pressure then! When artistic merit belittles the western culture and Christians, it is acceptable, but when it moves into another dimension it becomes totally unacceptable.

The problem is that this continues. The sexualisation of children is not a fringe phenomenon inflicted by perverts on a protesting society, but a fundamental change furthered by legitimate industries. It could be whatever lingerie is advertised—the artistic industries are the ones that carry on with the sexualisation of youth. The horrible reality is that there is this move constantly towards the Lolita culture where people think because this girl is young but is depicted in an older form, be it because of dress or whatever, she is fair game. We have a societal problem. I do not think the laws will be able to fix it. I would also prefer the age of consent for a child to be 18 rather than 16 years. We should get this bill through Parliament, however, and perhaps we could look at it again in the future. It is something that at least moves towards improving what can be a very bad situation.

MR C.C. PORTER (Bateman — Attorney General) [4.29 pm] — in reply: I thank all the members for their contributions. I realise that it is late on Thursday afternoon after a long session of Parliament. It may be that, given the comments that the member for Mindarie has raised, and I thank him for them, we are relieved of the necessity to go into consideration in detail on this bill. I will take this opportunity to make some comments about legitimate points that have been raised by a number of members, several from the other side of the house.

It is probably strange to be thinking on a Thursday afternoon of one's first prosecution on child pornography matters, but it is the thing that is going through my mind at the moment. The member for Mindarie will be very pleased to hear that I actually made a mistake in that prosecution, and it went all the way to the High Court. It was the prosecution I did of a young fellow who was an Edith Cowan University student. He had been found with a large amount of child pornography on his computer system and it became a prosecution. Of course, one of the things that this bill does is to move the relevant provisions for possessing child pornography from the Censorship Act into the Criminal Code. The young fellow also had some RC material, which is refused classification material. In that matter a number of counts dealt with censorship material and possessing pornography, which were indictable. The RC possession material was a summary offence, but was contained on the indictment. This matter went all the way to the High Court eventually. It was a mistake that I made, although not to pick up the mistake was a mistake that everyone made, including the Director of Public Prosecutions and the trial judge.

Nevertheless, the point that I make is that in that prosecution I recall the person in question had multiple images. In all the prosecutions that I recall going through, both the ones I was involved in and others that I was aware of at the Office of the Director of Public Prosecutions, people who were caught and charged with possession of child pornography usually had in their possession hundreds, if not thousands, of images. I will start by making this point: I cannot recall any case in which someone was prosecuted for one or two images for which the question was whether or not the person in the image was under 16 or 16 to 18 years of age. The images that I recall in the matter of the young university student I mentioned were multiple images. They were grotesque. They were so obviously child pornography and so obviously depicting children—very, very young children and babies in some instances—that it was not a question of whether or not people were between 16 and 18 years of age. I would imagine that the number of prosecutions in which the case turned on the possession of an image of someone between 16 and 18 years of age, in a practical sense, would be very, very limited.

I will come back in a moment to this issue of the sexualisation of children, because I think that is a slightly different issue. Let me assure the house that in my experience people who are charged for possession of child pornography have hundreds or thousands of images, often images depicting babies right up to people of older age—what would be standard pornography. The difficulty is not finding an image that contravenes the act. In

fact, the people have become so addicted to the practice and they carry so many images that I think it would be very unlikely to conceive of instances in which we would say that we wished we had a law that said that the image could relate to someone between 16 and 18 years of age, because we could have prosecuted the person when we otherwise could not. I think that would be very, very unusual. There is a danger that I perceive in the 16 to 18 age group. I will come to that in a moment, because that was one of the obvious issues that were addressed.

When this matter was considered in the other place one of the issues raised was whether the bill should have in its title "child pornography and exploitation material" or simply "exploitation material". The question was whether we should keep that linguistic concept of child pornography. Hon Nick Goiran from the other place made to me a fair, and ultimately persuasive, suggestion that the bill should still contain the words "child pornography". New section 216 of the Criminal Code on page 3 of this bill states —

> ***child exploitation material*** means —
>
> (a) child pornography; or

It then provides a definition of child exploitation material. Many of the other jurisdictions have moved simply and exclusively to child exploitation, the definition of which includes child pornography. By virtue of the suggestion made by Hon Nick Goiran in the other place, which I and the government have accepted, we have gone on a slightly different path and kept in the term "child pornography". The argument that was put to me is a strong one, because "child pornography" has a plain, known, colloquially accepted meaning that people understand. "Child exploitation material" is meant to capture other egregious behaviour and images, but it is something that I do not think has the same ring in people's ears that child pornography has. If we can keep the definition, I think that was a wise thing to do. We have accepted that, and so in that respect our legislation is slightly different from that of the other states, although this is in part a process of harmonisation to have general consistency between the states. In that respect, we are doing something slightly different.

This then goes to the issue of a definition of "child pornography" and a definition of "child". As has been pointed out by the member for Southern River and others, the commonwealth, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory—so basically the commonwealth states and Victoria—have said that this will be a law that will apply to images of children between 16 and 18 years of age and under 16 years of age. Our jurisdiction, South Australia, Queensland and New South Wales—so the code states—have determined to go down the path of applying it only to images of children who are under 16 years of age. So that everyone has clear in his or her head what that would mean, it would criminalise the possession of a pornographic image of a child under 16 years of age but would not criminalise, under the Criminal Code, the possession of an image of a child between 16 and 18 years of age, which might otherwise colloquially constitute child pornography.

Two issues arise out of that: I think one is enforcement and the other is the issue that the member for Southern River raised, which is the idea of the sexualisation of children. Let us deal with the enforcement issue first.

Ms J.M. Freeman: Will you take an interjection?

Mr C.C. PORTER: Of course.

Ms J.M. Freeman: How can you tell when you download it, and is there a defence that you cannot tell?

Mr C.C. PORTER: The defence is not so much that a person cannot tell, but if a person inadvertently downloads something that is on the internet, or it comes by text or by some other mechanism—so if it is unsolicited—there is a defence to a charge —

Ms J.M. Freeman: That is unsolicited. What happens if you download pornography and you do not know that you are downloading pornography?

Mr C.C. PORTER: I would say that would fall into the concept of it being unsolicited. If that were the case, it would have to be shown that the material to which the charge related came into the accused person's possession unsolicited and that as soon as the accused person became aware of the nature of the material, the accused person took reasonable steps to get rid of it. What is found in these circumstances, and often they arise during the course of other investigations when police, by warrant, have the ability to go through someone's computer, is that the police find thousands of images of child pornography. Often people say that they are staggered by it and that they downloaded them without knowing because they thought they were downloading a cookbook or whatever it might be. That is what people say. Of course, it has to be shown that the person did not take reasonable steps to get rid of the material. Yes, it is a defence if it is unsolicited but it also involved downloading something by accident.

Ms J.M. Freeman: But if you download anyway, so you download pornography, but suddenly there are parts of it where you did not know there was a 15-year-old, you would argue that it is unsolicited.

Mr C.C. PORTER: A person would argue that it is unsolicited but a person would get rid of it.

Ms J.M. Freeman: Once you find out.

Mr C.C. PORTER: Yes.

Ms J.M. Freeman: But if you do not find out?

Mr C.C. PORTER: If a person does not know it is there, it becomes a question of the knowledge of the actual existence of the material, which is a larger defence.

Ms J.M. Freeman: You just do not know the age, because how do you know? Take a 15-year-old, for example.

Mr C.C. PORTER: Perhaps if I come back to a defence in a moment, because I will structure them through.

This issue of 16 to 18 or just under 16 years of age is finely balanced. To give some comfort to members such as the member for Southern River, who made the statement that a pornographer could possibly sell, distribute or possess sexual images of a child of 17 years of age, that would not be the case, because there are other prohibitions on the possession and distribution of sexual images of children between 16 and 18 years of age; that is, under the Censorship Act, which will still be in place in this jurisdiction, they will be what is known as refused classification images. That is not a criminal offence in the sense that it is an indictable offence. It is otherwise a summary offence and punishable by a penalty of up to $10 000.

Coming back to the prosecution in which I made an error, there were a whole range of counts of possession of child pornography and there was the possession of refused classification material. It is often found in child pornography prosecutions that there will be a whole range of criminal offences and a whole range of other material, such as refused classification, bestiality and all sorts of strange and bizarre things that people will possess. It is not the case that someone, whether it be a pornographer or Myer, will be able to have pornographic images of people aged between 16 and 18 and be without penalty. It is simply that that penalty will be for "refused classification material". There is not a jail term at the end of it but a potential fine of up to $10 000. I will come back to that in a moment.

As to the issue of age, it is a very finely balanced issue. On balance, I have a preference—I would not describe it as much more than a mild preference—for the way in which this legislation tackles the issue. The legislation in Queensland, New South Wales and South Australia tackles the issue over what I will call the commonwealth position. I say that because we lose or gain something in either event. If we criminalise the possession of any sexual images of a child aged 18 years and under, we gain the ability to prosecute for a criminal offence someone who possesses sexualised images of a child aged between 16 and 18. By going down this path, all we can do in that circumstance is get the offender for a refused classification offence, which is a slightly lesser penalty. However, the danger in the aged 18 position, which was raised with clarity by the member for Mindarie, is that we know consensual sexual relationships occur between boys and girls at the age of 17.

Ms J.M. Freeman: Men and women.

Mr C.C. PORTER: Men and women—I am showing my age. Inside those relationships, what is happening with greater degrees of regularity is that they are taking images of one another. It is possible—I accept this, as the member for Southern River says—that there might be some condition or qualification, as there is in Victoria, that it is not possible to, in effect, prosecute the boy for possessing a picture of his naked 17-year-old girlfriend. We can have some kind of formulation of that type. What it becomes impossible to legislatively formulate for is the circumstance in which, when things go bad in the relationship, or, just for a lark, the 17-year-old boy sends on that nude image to 10 people and those 10 other 16, 18 or 22-year-olds keep the image. It is not unsolicited because they have downloaded it. They do not get rid of it because they think it is funny or they send it to their friends. In that circumstance that 17-year-old recipient who has downloaded and kept it could be charged with the possession of child pornography, which carries a seven-year maximum sentence. If he stupidly sends it to his friends, he could be charged with distributing child pornography, which carries a maximum penalty of 10 years' imprisonment. I agree with the member for Southern River that that situation of a 17-year-old who receives it and on-sends it or sends it in the first place is something we must work very hard to combat. However, I do not agree that the tool with which we should be trying to combat that behaviour is a 10-year criminal penalty. That would be truly taking a sledgehammer to crack, if not a walnut, something bigger or whatever it is we usually crack with a sledgehammer. We need to be very careful here.

This is something of a cautionary approach. I do not mind stating here publicly that I have watched this very carefully. If the DPP or police come to me and say they are having a rush of people who clearly have pornographic images of girls aged 16 to 18 on their computers and they are left with no way of prosecuting them criminally—I doubt they will, but if that happens—I will revisit this issue. At the moment, I am content to think that this is the slightly better way of going about it simply because of the danger. Think about this: there is nothing worse than a law on the statute book that is never used or is used improperly for ulterior purposes. I imagine that, in the exercise of their commonsense discretion, the police will not go around and seek to have a

10-year maximum jail penalty imposed on the 17 kids who kept an image that had been sent around at a senior high school. Even though the police could quite technically and properly do that, that would be unlikely. It is likely that an offence would be on the statute book that would never or rarely be used in circumstances in which it should be used if the law is being applied literally.

Mr J.R. Quigley: Like keeping premises at the moment

Mr C.C. PORTER: Indeed. The member knows that I will be fixing that very swiftly.

The other point is about the sexualisation of children. I also find the way in which children are used in advertising material—the member for Mindarie used the example of Miranda Kerr—to be quite disturbing. It is new in the sense that it was not apparent in magazines and newspapers 10 or 15 years ago. Without being a psychologist, I suggest its effects are unlikely to be very healthy on the wider society at large or, indeed, the age group of the people who are depicted. The point is that using these types of criminal provisions to stop that sort of excessive gratuitous advertising behaviour cannot happen under the provisions of this legislation, and it would be unwise if it could. I imagine that the measure of this legislation and legislation of its type being successful versus unsuccessful is by getting many people who possess many images. Unsuccessful use of the legislation would be if it is used to prove points about advertising, about behaviour in school or about the artistic or otherwise merit of a situation, such as the issues the member for Mindarie was talking about when police used to make points in bawdy houses by stopping shows that involved topless women or whatever it might have been. That is not very sensible use of the legislation. This will have a practical on-the-ground effect so that when people are found with massive amounts of images on their computers, there is a swift and robust way of policing it.

To come back to the sexualisation of children point, child pornography is defined in the bill as follows —

> material that, in a way likely to offend a reasonable person, describes, depicts or represents a person, or part of a person, who is, or appears to be a child —
>
> (a) engaging in sexual activity; or
>
> (b) in a sexual context;

If we take the worst type of advertising that involves a 16-year-old model or a 15-and-a-half-year-old model such as Miranda Kerr in lingerie, it is not unarguable that that falls within that definition. Indeed, ultimately, that question would have to be decided by a jury. Two or three juries might make different decisions. The history of public behaviour morality of standards trials is that when they are put in front of a jury, we never know what will be the outcome. People like the member for Southern River and I think that type of advertising is unwieldy, excessive and driven by commerciality at the expense of the ability to deliver good, ethical outcomes for individuals and the community at large. The worst possible place to make that argument is in front of a jury by police and a prosecutor taking to task Myer or whoever it might be. When I refer to Myer, it is not because I have any example in mind, but because it is a big retailer.

I think we need to be careful in equating the two issues. The member properly raises the issue about child sexualisation, but this legislation is not designed to shift moral standards in advertising. There must be other ways we might go about doing that. On the definition of "child", there are some more minor matters that we need to consider. Obviously, the age of consent is 16. As I have said, material that is refused classification that involves men or women aged between 16 and 18 in sexualised photographs also carries a penalty. Anomalies would be created with the present hierarchy of offences under the Criminal Code as they apply to persons aged 13 to 16 years, 16 years and above, and 18 years and above. It is a minor matter and not a reason to say no to the sorts of changes in age that have been suggested. My view about why this is a better and more cautious way to go is that raising the age limit to 18 years would capture behaviour that we would not otherwise want to capture. It would leave the police with the difficulty of being constantly confronted with a series of acts that they knew technically met the definition and could be shown beyond reasonable doubt to activate a possible 10-year maximum sentence. But they would be very disinclined to use that. That would not necessarily be the best outcome for this legislation.

Mr P. Abetz: On the 16 to 18-year-old and the refused classification offence, could that be used as a warning to a 16 to 18-year-old who sent pictures around of his ex to other people if the behaviour persisted?

Mr C.C. PORTER: In Western Australia, unlike other jurisdictions, there is an added protection because material depicting persons over the age of 16 but under the age of 18 in a sexual or otherwise inappropriate context would be classified as refused classification material. Just about any conceivable circumstance of the possession and distribution of that type of material that depicted a person between 16 and 18 years of age could be captured. A fine but not a criminal penalty would be imposed in those circumstances.

Mr P. Abetz: That addresses the issue that I was concerned about.

Mr C.C. PORTER: It does to an extent, but without overstating it. It is a fine and not a criminal penalty.

Ms J.M. Freeman interjected.

Mr C.C. PORTER: That is a prosecution that occurs, just as any other prosecution does here, because we have mirror legislation for the Censorship Act, as does each jurisdiction.

Ms J.M. Freeman: Are the police the only people who can prosecute?

Mr C.C. PORTER: The police would make a brief and send it to the DPP. The type of material that usually falls into this category is pictures of bestiality and pictures that involve nude people doing terrible things like urinating on each other. These are the types of images which come up as refused classification and for which people are regularly prosecuted and fined. It is hard to believe that it is out there, but unfortunately it is.

I will move on to the artistic merit defence and answer some of the questions raised by the member for Nollamara. The offences basically involve a child in the production of material, whether it be child pornography or exploitation material; the production of the material; the distribution of the material; and the possession of the material. The last of those offences carries a seven-year maximum term of imprisonment. The defences and exclusions—this is a summary—are that it is no defence to show that there was a lack of knowledge about the age of the child and there is no defence to a charge to prove that the accused person did not know the age of the child to whom the charge relates or the age of the child described, depicted or represented in the material to which the charge relates, or believe that the child was of or over 16 years of age. It is a defence if the material was classified other than RC. If there were some other classification of images that might otherwise fall into that scenario—a nude image of a girl under 16—it is not inconceivable that there could be that sort of classification. It might be an artwork that is formally classified, even though it involves nudity. The example I think of is a statue that was erected somewhere in Nedlands or Claremont of a young ballerina who was naked from her top up. The other defences are that the person did not know or could not reasonably expect to have known that it was offensive to the public.

There also is the artistic merit defence. Pornography in one shape or form has been with us for some time. Frankly, the distinction between pornography and art is a fine one. The image that springs to my mind—it must be late in the day—is John William Waterhouse's *Hylas and the Nymphs*, which is a fantastic painting, but some people may regard that as pornographic. There are conceivable circumstances, however narrow those circumstances are, which is why I would be inclined to have the artistic merit defence, when an artistic piece depicting a boy or a girl under the age of 16 without clothes on was artistic and not offensive. That is at least conceivable. The member for Mindarie used the example of the cherubs in Renaissance paintings. The example that springs to my mind—I cannot remember the name of the artist—is a statue somewhere in the western suburbs of a young girl in a ballerina tutu who was naked from the top up. That, to me, it seems, could legitimately be called art. I do not happen to view the Bill Henson photographs as falling into that category. In fact, I think they are horrifically outside that category. Ultimately, it would be up to a jury to make a decision as to whether that defence held good. Twelve ordinary men and women in a jury box would determine whether the material to which the charge relates was of recognised literary, artistic or scientific merit or of a genuine medical character and whether the act to which the charge relates was justified as being for the public good. Because these issues are so finely balanced, I would prefer to have that definition. If it ever came to it, 12 good men and women in a jury would apply community standards as members of the community and would make that decision.

The other point raised by the member for Mindarie is a fair one and is one that I agree with. If we take away the defence of artistic merit, the Hensons of the world who go down the path of producing that type of material will avail themselves of another defence that precedes the artistic defence, which is that they will try to show that the material to which the charge relates depicts or represents a person in a way that is not likely to offend a reasonable person. That is what they would argue in front of a jury. They would have a defence to activate. In some ways, the literary, artistic or scientific merit defence is a harder defence because there are more stages to go through than simply throwing it in front of a jury and asking the jurors what they think. I would imagine that, by and large, 12 people would agree that the Henson photographs were neither in the public interest nor artistic, although one never knows what will happen in front of a jury.

In summary, I am content with the way in which the legislation goes about the task of criminalising this type of behaviour. It is a huge and important step to move it from the Censorship Act into the Criminal Code. That in itself offers greater protection and brings a degree of harmonisation and consistency. I genuinely accept that the arguments about whether the age should be raised from 16 to 18 are legitimate arguments. I can even concede that in time there might be better arguments. However, at this time, given the types of people who are actually offending and whom we want to catch, this slightly more cautionary approach, which stops us from getting into

all sorts of tangles with respect to teens at high schools passing images on to each other is going to do the job. As to the issue of sexualisation through images and advertising, that is a fight that is definitely worth having but we have the unfortunate tendency sometimes to have those types of morality fights in the court of criminal law, and that is not good for either winning the morality fight or for the criminal law. I commend the bill to the house and thank all members for their contributions to the second reading debate.

Question put and passed.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Mr C.C. Porter (Attorney General)**, and passed.