

Criminal Law Amendment (Intimate Images) Bill 2018

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Western Australia

LEGISLATIVE ASSEMBLY

(As amended in Committee)

**Criminal Law Amendment (Intimate Images)
Bill 2018**

A Bill for

An Act to amend *The Criminal Code* to introduce offences of distributing an intimate image and threatening to distribute an intimate image and to make consequential and other amendments to the *Restraining Orders Act 1997* and the *Working with Children (Criminal Record Checking) Act 2004*.

The Parliament of Western Australia enacts as follows:

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Part 1 — Preliminary matters

1. Short title

This is the *Criminal Law Amendment (Intimate Images) Act 2018*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

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Part 2 — *The Criminal Code* amended

3. Act amended

This Part amends *The Criminal Code*.

4. Chapter XXVA inserted

After section 221B insert:

Chapter XXVA — Intimate images

221BA. Terms used

In this Chapter —

consent has the meaning given in section 221BB;

distributes an intimate image of a person includes the meaning given in section 221BC;

engaged in a private act means —

- (a) in a state of undress; or
- (b) using the toilet, showering or bathing; or
- (c) engaged in a sexual act;

intimate image, of a person —

- (a) means a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy —
 - (i) the person’s genital area or anal area, whether bare or covered by underwear; or
 - (ii) in the case of a female person, or transgender or intersex person identifying as female, the breasts of the person, whether bare or covered by underwear; or

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- 1 (iii) the person engaged in a private act;
2 and
3 (b) includes an image, in any form, that has been
4 created or altered to appear to show any of the
5 things mentioned in paragraph (a);
- 6 **law enforcement agency** means —
- 7 (a) the Police Force of the State; or
8 (b) the Police Service of the State; or
9 (c) the Office of the Director of Public
10 Prosecutions of the State; or
11 (d) the Corruption and Crime Commission; or
12 (e) any entity of another State or a Territory, the
13 Commonwealth or another country that has
14 functions similar to functions of an entity
15 referred to in paragraph (a), (b), (c) or (d).

16 **221BB. Term used: consent**

- 17 (1) In this Chapter a reference to **consent** is a reference to
18 consent freely and voluntarily given.
- 19 (2) Without limiting the generality of subsection (1),
20 consent is not freely and voluntarily given if it is
21 obtained by force, threat, intimidation, deceit or any
22 fraudulent means.
- 23 (3) A person who consents to the distribution of an
24 intimate image of themselves on a particular occasion
25 is not, only because of that fact, to be regarded as
26 having consented to the distribution of the image or
27 any other image on another occasion.
- 28 (4) A person who consents to the distribution of an
29 intimate image of themselves to or by a particular
30 person or in a particular way is not, only because of
31 that fact, to be regarded as having consented to the

- 1 distribution of the image or any other image to or by
2 another person or in another way.
- 3 (5) A person who distributes an intimate image of
4 themselves is not, only because of that fact, to be
5 regarded as having consented to any other distribution
6 of the image or any other image.
- 7 (6) A person under 16 years of age is incapable of
8 consenting to the distribution of an intimate image.
- 9 (7) This section does not limit the grounds on which it may
10 be established that a person does not consent to the
11 distribution of an intimate image.

12 **221BC. Term used: distributes**

13 In this Chapter a person *distributes* an intimate image
14 of a person by —

- 15 (a) communicating, exhibiting, selling, sending,
16 supplying, offering or transmitting the image to
17 a person other than themselves or the person
18 depicted in the image; or
- 19 (b) making the image available for access by
20 electronic or other means by a person other
21 than themselves or the person depicted in the
22 image; or
- 23 (c) entering into an agreement or arrangement to
24 do anything referred to in paragraph (a) or (b).

25 **221BD. Distribution of intimate image**

- 26 (1) In this section —
- 27 *media activity purposes* means the purposes of
28 collecting, preparing for the distribution of, or
29 distributing —
- 30 (a) material having the character of news, current
31 affairs or a documentary; or

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1 (b) material consisting of commentary or opinion
2 on, or analysis of, news, current affairs, or a
3 documentary.

4 (2) A person commits a crime if —

5 (a) the person distributes an intimate image of
6 another person (the *depicted person*); and

7 (b) the depicted person does not consent to the
8 distribution.

9 Penalty for this subsection: imprisonment for 3 years.

10 Summary conviction penalty for this subsection:
11 imprisonment for 18 months and a fine of \$18 000.

12 (3) It is a defence to a charge under subsection (2) to prove
13 that —

14 (a) the distribution of the image was for a genuine
15 scientific, educational or medical purpose; or

16 (b) the distribution of the image was reasonably
17 necessary for the purpose of legal proceedings;
18 or

19 (c) the person who distributed the image —

20 (i) distributed the image for media activity
21 purposes; and

22 (ii) did not intend the distribution to cause
23 harm to the depicted person; and

24 (iii) reasonably believed the distribution to
25 be in the public interest;

26 or

27 (d) a reasonable person would consider the
28 distribution of the image to be acceptable,
29 having regard to each of the following (to the
30 extent relevant) —

31 (i) the nature and content of the image;

- 1 (ii) the circumstances in which the image
- 2 was distributed;
- 3 (iii) the age, mental capacity, vulnerability
- 4 or other relevant circumstances of the
- 5 depicted person;
- 6 (iv) the degree to which the accused's
- 7 actions affect the privacy of the depicted
- 8 person;
- 9 (v) the relationship between the accused
- 10 and the depicted person;
- 11 (vi) any other relevant matters.
- 12 (4) Nothing in subsection (2) makes it an offence —
- 13 (a) for a member or officer of a law enforcement
- 14 agency or their agents to distribute an intimate
- 15 image when acting in the course of their official
- 16 duties; or
- 17 (b) for a person to distribute an intimate image in
- 18 accordance with, or in the performance of the
- 19 person's functions under, a written law or a law
- 20 of the Commonwealth or another State or
- 21 Territory; or
- 22 (c) for a person to distribute an intimate image for
- 23 the purposes of the administration of justice.

221BE. Court may order rectification

- 24 (1) In this section —
- 25 *intimate image offence* means —
- 26 (a) an offence under section 221BD; or
- 27 (b) an offence under section 338A or 338B, if the
- 28 offence involves a threat to distribute an
- 29 intimate image of a person; or
- 30

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- 1 (c) an offence under section 338C, if any of the
2 following relate to the distribution of an
3 intimate image of a person —
- 4 (i) the threat referred to in
5 section 338C(1)(a);
- 6 (ii) the intention, proposal, plan or
7 conspiracy referred to in
8 section 338C(1)(b); or
- 9 (iii) the belief, suspicion or fear referred to
10 in section 338C(2)(a).
- 11 (2) If a person is charged with an intimate image offence,
12 the court may order the person to take reasonable
13 actions to remove, retract, recover, delete, destroy or
14 forfeit to the State any intimate image to which the
15 offence relates within a period specified by the court.
- 16 (3) The court may make an order under subsection (2)
17 whether or not the person is convicted of the offence.
- 18 (4) In considering whether or not to make an order under
19 subsection (2), and the content of that order, the court
20 must have regard to any other similar obligations the
21 person is under in relation to the image.
- 22 (5) This section does not limit the court's powers under
23 section 731 or under the *Criminal Property*
24 *Confiscation Act 2000*.
- 25 (6) A person who, without reasonable excuse, fails to
26 comply with an order made under subsection (2)
27 commits an offence.
- 28 Penalty for this subsection: imprisonment for
29 12 months and a fine of \$12 000.

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221BF. Review of amendments made by *Criminal Law Amendment (Intimate Images) Act 2018*

- (1) The Minister must review the operation and effectiveness of the amendments made to this Code, the *Restraining Orders Act 1997* and the *Working with Children (Criminal Record Checking) Act 2004* by the *Criminal Law Amendment (Intimate Images) Act 2018*, and prepare a report based on the review, as soon as practicable after the 3rd anniversary of the day on which the *Criminal Law Amendment (Intimate Images) Act 2018* section 4 comes into operation.
- (2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 3rd anniversary.

5. Section 338 amended

In section 338:

- (a) in paragraph (d) delete “not.” and insert:

not; or
- (b) after paragraph (d) insert:

(e) distribute an intimate image (within the meaning given to those terms in section 221BA) of any person other than the distributor.

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1 **6. Section 338B amended**

2 In section 338B delete “(c) or (d)” and insert:

3

4 (c), (d) or (e)

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6 **7. Section 338C amended**

7 (1) In section 338C(1):

8 (a) in paragraph (a) delete “(c) or (d)” and insert:

9

10 (c), (d) or (e)

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12 (b) in paragraph (b) delete “(c) or (d),” and insert:

13

14 (c), (d) or (e),

15

16 (2) In section 338C(2)(a) delete “(c) or (d)” and insert:

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18 (c), (d) or (e)

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1 **Part 3 — *Restraining Orders Act 1997* amended**

2 **8. Act amended**

3 This Part amends the *Restraining Orders Act 1997*.

4 **9. Section 3 amended**

5 In section 3(1) insert in alphabetical order:

6
7 *distributes* has the meaning given in *The Criminal*
8 *Code* section 221BA;

9 *intimate image* has the meaning given in *The Criminal*
10 *Code* section 221BA;

11
12 **10. Section 5A amended**

13 Delete section 5A(2)(k) and insert:

14
15 (k) distributing an intimate image of the family
16 member without the family member’s consent,
17 or threatening to distribute the image;

18
19 **11. Section 10G amended**

20 Delete section 10G(2)(g) and insert:

21
22 (g) distributing an intimate image of the person
23 seeking to be protected, or threatening to
24 distribute the image;

25
26 **12. Section 30A amended**

27 In section 30A(1)(b)(ii) delete “and domestic”.

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1 **Part 4 — *Working with Children (Criminal Record***
2 ***Checking) Act 2004* amended**

3 **13. Act amended**

4 This Part amends the *Working with Children (Criminal Record*
5 *Checking) Act 2004*.

6 **14. Schedule 2 amended**

7 In Schedule 2 under the heading “*The Criminal Code*” insert in
8 numerical order:

9

s. 221BD Distribution of intimate image where image is of a child

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