

CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

EXPLANATORY MEMORANDUM

Part 1 – Preliminary matters

1. Short Title	Clause 1 provides that the short title of the proposed Act is the <i>Criminal Law Amendment (Intimate Images) Act 2018</i> .
2. Commencement	Clause 2 provides that: Part 1 will come into operation on the day on which the Act receives Royal Assent; and the remainder of the Act on a day or days fixed by proclamation.

Part 2 – *The Criminal Code* amended

3. Act amended	Clause 3 provides that Part 2 amends <i>The Criminal Code</i> .
4. Chapter XXVA inserted	<p>Clause 4 inserts new 'Chapter XXVA – Intimate Images' into <i>The Criminal Code</i>. The new Chapter is to be situated within Part IV of the Code (Acts injurious to the public in general), immediately after section 221B (Chapter XXV – Child exploitation material).</p> <p>Proposed new Chapter XXVA contains the following proposed new provisions:</p> <ul style="list-style-type: none">• 221BA. Terms used• 221BB. Term used: consent• 221BC. Term used: distributes• 221BD. Distribution of intimate image• 221BE. Court may order rectification <p>-----</p> <p>--</p> <p>Proposed section 221BA (Terms used) defines a number of terms for the purposes of proposed Chapter XXVA.</p> <p>Consent is defined with reference to the meaning given in proposed section 221BB.</p> <p>Distributes is defined to include the meaning given in section 221BC. The use of the term 'includes' indicates that section 221BC does not provide an exhaustive account of the conduct that may constitute distribution for the purposes of this Chapter.</p> <p>Engaged in a private act is defined to mean:</p>

(a) in a state of undress; or

(b) using the toilet, showering or bathing; or

(c) engaged in a sexual act

As explained immediately below, this expression is used in the definition of 'intimate image'.

Intimate image of a person is defined to mean:

- A still or moving image in any form; that
- Shows, in circumstances in which the person would reasonably expect to be afforded privacy:
 - The person's genital area or anal area, whether bare or covered by underwear; or
 - 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
 - The person engaged in a private act;
- And includes an image, in any form, that has been created or altered to appear to show any of the things mentioned above.

The references to an image 'in any form' are intended to include a broad range of images including hard-copy images (for example, printed photos); images that are captured on video or film; images in digital form, either online or on a hardware storage device; and any other technological formats that may exist now or in the future.

The reference to 'in circumstances in which the person would reasonably expect to be afforded privacy' reflects the reality that the intimate character of an image is determined by not just *what* is depicted, but by the attendant circumstances. For example, an image of a person without clothing may not be an 'intimate image' if it is taken when the person is 'streaking' at a public sporting event or modelling underwear on a catwalk.

Sub-paragraphs (i)-(iii) set out what must be depicted for an image to be eligible for consideration as an intimate image. An image may be intimate on the basis of the body parts or behaviours it depicts.

The reference to images 'created or altered to appear to show any of the things' mentioned above addresses the phenomenon whereby digital technology is used to create or doctor images that appear to depict a particular person in an intimate setting. The distribution of such images can cause distress and harm to the person who is purported to be depicted, notwithstanding their artificial nature.

Law enforcement agency is defined to mean:

- the Police Force of the State; or
- the Police Service of the State; or
- the Office of the Director of Public Prosecutions of the State; or
- the Corruption and Crime Commission; or
- any entity of another State or Territory, the Commonwealth or another country that has similar functions to an entity listed in paragraphs (a)-(d).

This term is used in proposed new subsection 221BD(4)(a), which exempts distributions carried out by officers of a law enforcement agency in the performance of their functions from the ambit of the proposed distribution offence.

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Proposed new section **221BB (Term used: consent)** provides the meaning of consent for the purposes of proposed new Chapter XXVA. The significance of this term is that the distribution offence created by proposed section 221BD does not apply to a distribution to which the person depicted consents.

Proposed subsection (1) sets out the general position that a reference in this Chapter to consent is a reference to consent freely and voluntarily given.

Proposed subsection (2) elaborates on the meaning of 'freely and voluntarily' by providing that consent is *not* free and voluntary if it is obtained by force, threat, intimidation, deceit or any fraudulent means'.

The above subsections mirror the definition of consent in s319(2) of *The Criminal Code* for the purposes of Chapter XXXI – sexual Offences.

Proposed subsections (3)-(5) set out matters that do not, of themselves, establish consent. To summarise:

- Subsection (3) provides that consent granted on one occasion does not, of itself, establish consent for another occasion;
- Subsection (4) provides that consent to distribution to a particular person, by a particular person or in a particular way does not, of itself, establish consent in relation to distribution to or by other persons, or in other circumstances;

	<ul style="list-style-type: none"> • Subsection (5) provides that the fact that a person distributes an intimate image of themselves does not, of itself, establish consent for further distribution. <p>Proposed subsection (6) provides that a person under the age of 16 is incapable of providing consent to the distribution of an intimate image. This accords with the general position under <i>The Criminal Code</i> that persons under 16 cannot consent to conduct of a sexual nature.</p> <p>Proposed subsection (7) provides that this section does not exhaustively describe the grounds on which it may be established that a person does not consent to the distribution of an intimate image.</p> <p>-----</p> <p>-- Proposed new section 221BC (Term used: distributes) sets out the circumstances in which a person ‘distributes’ an intimate image for the purposes of this Chapter.</p> <p>The definition is consistent with the definition of distribute in section 219 of <i>The Criminal Code</i>. It encompasses both active distribution (in the form of communicating, exhibiting, selling, sending, supplying, transmitting, offering); passive distribution (where the image is made available for access by others); or entering into an agreement to do either of the above.</p> <p>Importantly, the definition specifies that to constitute a distribution, a person must distribute the image to a person other than themselves or the person depicted in the image. This is intended to protect the private sharing of images between consenting persons.</p> <p>-----</p> <p>--</p> <p>Proposed new section 221BD (Distribution of intimate image) creates a new offence of distributing an intimate image without consent, as well as stipulating the associated defences and exceptions. Subsection (1) provides a definition for ‘media activity purposes’ for the purpose of one of the defences. Subsection (2) creates the offence; subsection (3) sets out the defences; and subsection (4) sets out the exceptions.</p> <p>Proposed subsection (2) creates the offence. It provides that a person commits a crime if:</p> <ul style="list-style-type: none"> a) The person distributes an intimate image of another person (the depicted person); and
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	<p>b) The depicted person does not consent to the distribution.</p> <p>This offence provision relies on the meaning of ‘consent’, ‘distributes’, ‘intimate image’ provided in proposed sections 221BA, 221BB and 221BC. The reference to ‘another person’ in paragraph (a) ensures that a distribution of an image by the person depicted is not captured by the offence.</p> <p>Proposed subsection (3) provides four defences against a charge under subsection (2).</p> <p>The first applies where the distribution was for a genuine scientific, educational or medical purpose.</p> <p>The second applies where the distribution was reasonably necessary for the purpose of legal proceedings.</p> <p>The third applies where the distribution was for a ‘media activity purpose’ as defined in subsection (1). The defence is only available where the person distributed the image for a media activity purpose, and did not intend the distribution to cause harm to the person depicted, and reasonably believed the distribution to be in the public interest.</p> <p>The fourth applies where the distribution was in circumstances where a reasonable person would consider the distribution of the image to be acceptable, having regard to the following factors:</p> <ul style="list-style-type: none"> • The nature and content of the image; • The circumstances in which the image was distributed; • The age, mental capacity, vulnerability or other relevant circumstances of the depicted person; • The degree to which the accused’s actions affect the privacy of the depicted person; • The relationship between the accused and the depicted person; and • Any other relevant matters. <p>The ‘reasonable person’ defence is intended to give courts the capacity to consider the myriad factors that may amplify or diminish the criminality of a given distribution. It recognises that there are circumstances in which the distribution of an intimate image is consistent with community standards and should therefore not give rise to criminal liability; for example, where a parent sends a photo of their naked baby in the bath to the other parent.</p> <p>Proposed subsection (4) excludes the following distributions from the ambit of the distribution offence:</p>
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- Distribution by a member or officer of a law enforcement agency or their agents when acting in the course of their official duties;
- Distribution in accordance with, or in the performance of functions under, a written law or a law of the Commonwealth or another State or Territory;
- Distribution for the purposes of the administration of justice.

These exceptions are intended to ensure that the distribution offence does not modify the behaviour of public officials in a way that would frustrate legitimate law enforcement activities, the giving of effect to the will of Parliament as expressed in statute, or the administration of the justice system. The second exception is also intended to protect persons reporting or complaining of unlawful conduct to a body performing a function under a statute, such as the Commonwealth Office of the E-Safety Commissioner.

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Proposed new section **221BE (Court may order rectification)** empowers the court to order that a person who is charged with the distribution offence, or a threat offence that is linked to the distribution of an intimate image, must take reasonable steps to remove, retract, recover, delete, destroy or forfeit to the State, any intimate image to which the offence relates, within a period specified by the court.

Rectification orders are complementary to the new offences created in the Bill. Whereas the offences are concerned with holding the perpetrator to account, rectification orders aim to benefit victims by compelling the perpetrator to take action to prevent or mitigate further harm arising as a result of the distribution.

Subsection (1) defines 'intimate image offence'; being the offences that can give rise to a rectification order under subsection (2).

Subsection (2) establishes the capacity of the court to make a rectification order.

Subsection (3) makes clear that a court may make a rectification order under subsection (2) whether or not the person is convicted of the offence.

Subsection (4) requires a court considering whether or not to make a rectification order to have regard to any other similar obligations the person is under in relation to the image. The intent of this provision is to require the court to turn its mind to whether the accused is subject to a duplicative or inconsistent rectification

	<p>order, or obligation, under another Western Australian or Commonwealth law.</p> <p>Subsection (5) provides that this proposed section does not limit the court's powers under:</p> <ul style="list-style-type: none"> • section 731 of <i>The Criminal Code</i> (Forfeiture etc. of property used to commit offence), which empowers a court that convicts a person of an offence under the <i>Code</i> to order the destruction, disposal or forfeiture to the State of anything used for or in the commission of the offence; or • the <i>Criminal Property Confiscation Act 2000</i>. <p>Subsection (6) provides that failure to comply with a rectification order is an offence punishable by imprisonment for 12 months and a fine of \$12,000.</p>
<p>5. Section 338 amended</p>	<p>Clause 5 amends section 338 of <i>The Criminal Code</i> (Term used: threat).</p> <p>Section 338 is the first section of Chapter XXXIIIA — Threats. The definition of 'threat' provided by this section informs the threat-related offences in sections 338A-E.</p> <p>The amendment inserts a new paragraph (e) into section 338. The effect of this insertion is that a reference to 'a threat' in Chapter XXXIIIA includes a threat 'to distribute an intimate image (within the meaning given to those terms in section 221BA) of any person other than the distributor.'</p> <p>The qualifying reference to 'other than the distributor' means that a threat to distribute an image of oneself is not criminal conduct for the purposes of the offences in this Chapter.</p>
<p>6. Section 338B amended</p>	<p>Clause 6 amends section 338B of <i>The Criminal Code</i> (Threats).</p> <p>This section provides that a person who threatens to unlawfully do anything mentioned in the meaning of threat provided in section 338 is guilty of a crime.</p> <p>The proposed amendment inserts a reference to proposed paragraph (e) of s.338. As mentioned previously, proposed paragraph (e) refers to the distribution of an intimate image.</p> <p>The effect of the amendment is that a threat to unlawfully distribute an intimate image becomes a crime under this section. A distribution is unlawful if it would constitute an offence under proposed new section 221BD, another provision of <i>The Criminal Code</i>, or another law.</p>

7. Section 338C amended	<p>Clause 7 amends section 338C of <i>The Criminal Code</i> (Statement or act creating false apprehension as to existence of threat or danger). To summarise, this section makes it a crime to foster an erroneous belief in the existence of a threat, or a plan to carry out or the actual or attempted carrying out of conduct referred to in section 338 (Threat).</p> <p>As with clause 6, clause 7 inserts reference to new paragraph (e) of section 338 with the effect of bringing actions relating to the distribution of intimate images within the ambit of the offences in this section.</p>
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Part 3 — Restraining Orders Act 1997 amended

8. Act amended	<p>Clause 8 provides that Part 3 amends the <i>Restraining Orders Act 1997</i> ('RO Act').</p>
9. Section 3 amended	<p>Clause 9 amends section 3 of the RO Act (Terms used). The amendment inserts definitions of 'distribute' and 'intimate images'. In each case, the term is given the meaning provided in proposed new section 221BA of <i>The Criminal Code</i>. Section 221BA (Terms used) is one of the sections proposed to be introduced via clause 4 above.</p>
10. Section 5A amended	<p>Clause 10 amends section 5A of the RO Act (Term used: family violence). The amendment applies to subsection 5A(2)(k), which provides that certain conduct relating to intimate images may constitute family violence for the purpose of seeking a restraining order.</p> <p>The effect of the amendment is to align the terminology used in this provision with the terminology that is to be inserted into <i>The Criminal Code</i> pursuant to clause 4 above.</p>
11. Section 10G amended	<p>Clause 11 amends section 10G of the RO Act (Restraints on respondent). The amendment applies to subsection 10G(2)(g), which provides that a family violence restraining order may restrain the person bound from certain behaviour in relation to intimate images.</p> <p>The effect of the amendment is to align the terminology used in this provision with the terminology that is to be inserted into <i>The Criminal Code</i> pursuant to clause 4 above.</p>
12. Section 30A amended	<p>Clause 12 amends section 30A of the RO Act (When police order may be made). The amendment removes an errant reference to</p>

	'domestic' violence; a term that is no longer used in the RO Act as a result of amendments that came into effect on 1 July 2017.
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Part 4 — Working with Children (Criminal Record Checking) Act 2004 amended

13. Act amended	Clause 13 provides that this Part amends the <i>Working with Children (Criminal Record Checking) Act 2004</i> .
14. Schedule 2 amended	<p>Clause 14 inserts into Schedule 2 of the Act a reference to the offence created by proposed new section 221BD of <i>The Criminal Code</i> (Distribution of intimate image) where the image is of a child. 'Child' is defined in the Act to mean a person under the age of 18.</p> <p>The effect of this amendment is that a conviction under proposed new section 221BD where the person depicted in the image was a child, will provide grounds for the refusal of accreditation under the Working With Children scheme, unless particular or exceptional circumstances apply (as provided in section 12 of the Act).</p>