

CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

Introduction and First Reading

Bill introduced, on motion by **Mr J.R. Quigley (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.R. QUIGLEY (Butler — Attorney General) [10.16 am]: I move —

That the bill be now read a second time.

The Criminal Law Amendment (Intimate Images) Bill 2018 implements the government's pre-election commitment to criminalise the non-consensual distribution of intimate images, a form of image-based sexual abuse. This conduct is often colloquially referred to as "revenge porn". This term is a misnomer. The non-consensual distribution of intimate images is a degrading and dehumanising practice that violates personal privacy and dignity. It is a form of abuse, and should be labelled as such.

Despite the impression created by the term "revenge porn", image-based abuse extends beyond the "relationship gone sour" scenario where a jilted ex-lover shares an intimate image without consent to seek revenge. According to a comprehensive Australian study on image-based abuse by Dr Nicola Henry at RMIT University and Monash University, image-based abuse is perpetrated for a variety of reasons, including control, intimidation, sexual gratification, monetary gain and social status building. It is also used to threaten, harass, objectify, humiliate, shame and instil fear. These motivations are often apparent from the degrading commentary that can accompany images when they are posted online.

As the Minister for Prevention of Family and Domestic Violence knows all too well, image-based abuse has also emerged as an increasingly common feature in family and domestic violence cases, used as a means of coercing and controlling the victim. It is also used to facilitate so-called "sextoition", whereby perpetrators threaten to distribute intimate images to compel the victim to engage in unwanted sexual acts or to extract monetary payment.

The damage that image-based abuse can cause is profound. Victims experience damage to reputation, employment prospects, educational attainment, interpersonal relationships and mental health. If victims speak out, they then also are often the target of further online harassment, abuse and intimidation. These harms are exacerbated by a pervasive culture of victim blaming. Far too often in these cases, it is the behaviour of the victim that is called into question rather than the harmful actions of the perpetrator. Victims are made to feel that they are to blame for sending an intimate image in the first place rather than the perpetrator who has distributed the image without consent. Such attitudes shift accountability away from the perpetrator and discourage victims from speaking out or seeking help as they fear they will be blamed and shamed. The Criminal Law Amendment (Intimate Images) Bill 2018 delivers the government's commitment to criminalise this behaviour and denounce it as unacceptable. It will enable our police and courts to hold perpetrators to account and provide victims with an avenue for justice. It will also make clear that blame for the harm caused by non-consensual distribution lies firmly with the distributor, not the victim, and it will send an unambiguous message to the community that image-based abuse is serious and harmful and will not be tolerated.

Before turning to the detail of the bill itself, I will outline what the bill does not do. The bill does not criminalise the consensual sharing of images between consenting individuals. It does not criminalise a person who sends an image of themselves to another person. This is not a public morality bill; rather, it is a bill that squarely focuses on the violation of privacy and agency that comes with the non-consensual distribution of intimate images.

I now turn to the bill itself. The bill amends the Western Australian Criminal Code to do three things. First, it creates a new offence relating to the non-consensual distribution of intimate images. Second, it empowers courts to make a rectification order requiring a person charged with the new offence to remove or destroy the images in question. Third, it ensures that existing threat offences apply to a threat to distribute an intimate image. The bill has been developed having regard to similar recent legislation enacted in other states and territories and with detailed consultation with local stakeholders, including the Director of Public Prosecutions, the WA Police Force and the Commissioner for Children and Young People. It also accords with the national statement of principles agreed to by the former Law, Crime and Community Safety Council on 19 May 2017.

I will now summarise the content of the bill. Part 1 of the bill addresses preliminary matters. Part 2 amends the Criminal Code. Clause 4 inserts new chapter XXVA, titled "Intimate images", into the Criminal Code. New chapter XXVA contains the new offence of distributing an intimate image without consent, defences and exceptions to this new offence, supporting definitions and provision for "rectification orders". The new offence at the core of this legislation is created by proposed new section 221BD of the Criminal Code, titled "Distribution of intimate image". For the offence to be committed, three elements must be established. There must be a distribution of an intimate image of another person without the consent of the person depicted in the image. The reference to an intimate image

“of another person” ensures that the offence does not apply when a person distributes an image that depicts only himself or herself. Consistent with the national statement of principles, there is no requirement to prove that the accused person intended to cause any particular harm to the person depicted in the image, or that the victim suffered any particular harm or injury. This is because the non-consensual distribution of intimate images is, of itself, an unacceptable harm. The criminality exists independently of the associated motivations and consequences. The new offence is an either-way offence. The penalty on indictment is imprisonment for three years. The summary conviction penalty is imprisonment for 18 months and a fine of \$18 000.

Each of the key terms used in the offence provision are defined in proposed new sections 221BA, 221BB and 221BC. “Intimate image” is defined in proposed new section 221BA to mean a still or moving image in any form that shows, in circumstances in which a person would reasonably expect to be afforded privacy, the person’s genital or anal area, whether bare or covered by underwear; 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, which is defined separately to mean in a state of undress, using the toilet, showering or bathing or engaged in a sexual act. The reasonable expectation-of-privacy requirement is an important part of the definition. It excludes from the ambit of the offence images captured in circumstances in which there is no reasonable expectation of privacy—for example, a lingerie model on a catwalk. Importantly, the definition of “intimate image” also includes an image that has been created or altered to appear to show any of the things mentioned above. This is intended to encompass recent software developments that have led to the proliferation of fake pornography videos and doctored images in which a person’s face is superimposed onto another body.

The definition of “distributes” in proposed section 221BC is modelled on the existing definition of “distribute” in chapter XXV of the Criminal Code, which deals with child exploitation material. To distribute includes to communicate, exhibit, sell, send, supply, offer or transmit the image, to make the image available for access by electronic or other means or to enter into an agreement to do either of those things. Consistent with the national principles, the definition is broad and aims to encompass existing and emerging technologies. Importantly, the definition of “distributes” excludes distribution to the person depicted in the image. Of course, such a distribution may be unlawful under other existing criminal offence provisions if, for example, it is accompanied by a threat, forms part of a course of conduct that constitutes stalking or constitutes harassment. The definition also makes clear that a person who sends an image to him or herself—for example, by emailing an image from a phone to a laptop—does not distribute an image for the purposes of this chapter.

The definition of “consent” provided in proposed section 221BB is modelled on the definition contained in chapter XXXI of the Criminal Code, which deals with sexual offences, but with several context-specific additions. The overarching requirement is that consent be free and voluntary. Consent is not free and voluntary if it is obtained by force, threat, intimidation, deceit or any fraudulent means. The definition also expressly provides that consent on one occasion does not of itself establish consent on another occasion; that consent to distribution to or by a particular person does not of itself establish consent to distribution to or by a different person; and that distribution of an intimate image by the person depicted does not of itself establish consent for further distribution by another person. There is no requirement to prove an additional element that the accused knew that the person depicted did not want to consent or was reckless as to that fact. This is consistent with the structure of other analogous offences in the Criminal Code, such as sexual penetration without consent—see section 325. When an accused believed that the victim had consented to the distribution of the intimate image, he or she may seek to rely on the general defence of honest and reasonable mistake of fact. Finally, the definition also provides that a person under the age of 16 is incapable of consenting to the distribution of an intimate image. This is consistent with the general position in the Criminal Code that a child under 16 cannot consent to conduct of a sexual nature.

Proposed section 221BD also sets out a number of defences and exclusions to the new distribution offence. These are modelled in part on defences in relation to child exploitation material offences, with appropriate adjustments. It will be a defence to a charge to prove that the distribution was for a genuine scientific, educational or medical purpose; the distribution of the image was reasonably necessary for the purpose of legal proceedings; the distribution was for the purpose of media activities and the distributor did not intend to cause harm and reasonably believed that the distribution was in the public interest; or a reasonable person would consider the distribution of the image to be acceptable having regard to a list of factors, including the nature and content of the image, the circumstances in which it was distributed, the age and vulnerability of the person depicted, and other factors. This defence may apply, for example, when a mother sends a photo of her child in the bath to a family member.

In addition to the defences listed above, proposed section 221BD also stipulates that nothing in the bill will make it an offence for a law enforcement officer to distribute an image in the course of their official duties; for a person to distribute an intimate image in accordance with or in the performance of functions under a written law—for example, as part of making a complaint to the Office of the eSafety Commissioner pursuant to the enabling legislation for that office; or for a person to distribute an intimate image for the purposes of the administration of justice.

If the accused person raises evidence that one of the exceptions applies, the onus is on the prosecution to disprove that fact. This is in contrast to the defences under which the onus is on the accused to establish on the balance of probabilities that the defence applies. The rationale for this difference is that the question of criminality should not normally arise in the circumstances that are the subject of the exclusions. The defences and exclusions have also been drafted with a view to maintaining consistency with similar legislation that is currently before the commonwealth Parliament—the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017.

The new distribution offence is supported by proposed section 221BE, which empowers the court to require a person charged with the offence to remove, delete or destroy the image, or images, in question. This is known as a rectification order. A person who without reasonable excuse fails to comply with a rectification order will commit a summary offence, the penalty for which is 12 months' imprisonment and a fine of \$12 000. This provides the court with a mechanism to help reduce further harm arising as a result of the distribution that is the subject of the charge.

Clause 5 of the bill amends the existing threat offences in chapter XXXIII of the Criminal Code to ensure that a threat to distribute an intimate image is an offence. This is achieved by inserting reference to the distribution of an intimate image into section 338, which lists the categories of threat that can give rise to an offence under this chapter of the Criminal Code. The reference to the distribution of intimate images is provided in new paragraph (e). Where necessary, reference to new paragraph (e) is inserted into the offence provisions. The effect of these amendments is that the offences of threat with intent to gain, threat to unlawfully do something mentioned in section 338 and a statement or act creating false apprehension as to existence of a threat or danger will apply when the threat, statement or act relates to the distribution of an intimate image. The policy context for the threat offences is that threats to distribute intimate images are often used in the context of relationship breakdowns and family violence situations as a means to coerce, control or manipulate a victim. Threats to share an intimate image can be used, for example, to force a victim to engage in an unwanted sexual act, to prevent them from leaving a relationship or commencing legal proceedings, or to blackmail them for monetary payment.

These examples underscore the fact that threats to distribute intimate images can have more sinister motivations than the act of distribution itself. This is reflected in the penalties available under chapter XXXIII of the Criminal Code; for example, threats with intent to gain a benefit, cause harm or to prevent or compel a person from doing something attract a maximum penalty of seven years' imprisonment.

Part 3 of the bill amends the Restraining Orders Act 1997. The purpose of these amendments is to align the relevant terminology and definitions used in the Restraining Orders Act with the terminology and definitions introduced to the Criminal Code via the present bill. Part 4 of the bill amends the Working with Children (Criminal Record Checking) Act 2004. The amendment lists the new distribution offence, when it is committed against a child, in schedule 2 of the act. The result is that a person with such a conviction will not be permitted to work with children unless exceptional circumstances apply.

I would like to briefly touch on the application of the bill to young people. Young people are not exempt from the new distribution offence. The criminal law does not permit children who have reached the age of criminal responsibility to steal or to commit physical assaults; nor should it permit them to violate another person's privacy and dignity by, for example, posting their intimate image online without consent. At the same time, the bill has been crafted to provide an appropriate, proportionate response to young offenders. It does this in three ways. First, it preserves the applicable protections and diversionary measures under the Young Offenders Act 1994 of Western Australia for a young person who is charged with one of the new offences, including the issuance of a caution or referral to a juvenile justice team. Second, the distribution offence itself has been constructed so as not to apply to a person who distributes an intimate image of themselves, or to the person depicted, thus avoiding the criminalisation of sexting between young people. Third, a conviction under the new distribution offence will not result in sex-offender registration under the Community Protection (Offender Reporting) Act 2004 of Western Australia. This recognises the reality that young persons convicted of the new offence are unlikely to have displayed the type of sexual deviancy that would suggest an ongoing risk to the community. Existing offences relating to child exploitation material, which do result in registration, will continue to be available in cases involving serious sexual offending.

The measures contained in this bill are just one spoke in the broader wheel of policy responses to this problem. At the commonwealth level, the Office of the eSafety Commissioner works with internet service providers and social media organisations to expunge images posted without consent from the internet. Since 1 July 2017, it has also been possible to seek a family violence restraining order under the Restraining Orders Act 1997 of Western Australia on the grounds of image-based abuse, which provides another avenue of protection for victims in Western Australia.

It follows that should this bill be enacted, victims of image-based abuse will have access to justice through the criminal law, protection through the restraining order system and rectification through the eSafety Commissioner. Although cultural attitudes cannot change overnight, one way to begin this shift is to change the way we talk about this matter. As a start, I encourage all members of Parliament to refrain from using the term “revenge pornography”

on the floor of this Parliament, and instead use “image-based sexual abuse”, a term that victims very much prefer. I commend the bill to the house.

Debate adjourned, on motion by **Mr Z.R.F. Kirkup**.