CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [3.51 pm]: 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 and colleagues 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.

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 on 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 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 the 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 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 Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images" agreed 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 of the bill amends the Criminal Code. Clause 4 inserts a 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. Each of the key terms used in the offence provision are defined in proposed new sections 221BA, definition of "intimate image"; 221BB, definition of "consent"; and 221BC, definition of "distributes". 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 a proliferation of fake pornography videos and doctored images in which a person's face is superimposed onto another person's body, or vice versa.

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. Proposed section 221BD also sets out a number of defences and exclusions to the new distribution offence. 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. The defences and exclusions are intended to protect conduct that is considered to be reasonable and acceptable having regard to current community standards.

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. 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.

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 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. 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 on the grounds of image-based abuse, which provides another avenue of protection for victims in Western Australia.

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", which is a term that victims and survivors prefer.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill for the following reasons. Firstly, it does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party. Secondly, it does not by reason of its subject matter introduce a uniform scheme or uniform laws throughout the commonwealth.

Although the drafting of the bill was informed by the "National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images" agreed by the former Law, Crime and Community Safety Council on 19 May 2017, these principles are non-binding. The principles were designed to articulate —

> … best practice principles to be considered as each jurisdiction continues to develop and review its criminal law, policy and practices to suit local needs, and for each jurisdiction to adopt and implement as that jurisdiction sees fit.

The non-binding nature of the principles means that jurisdictions retain discretion on whether to legislate in this area; and, if so, the form that the legislation should take. A number of other states and territories have opted to legislate in this area and have done so in a manner that is generally consistent with the principles; however, the legislative responses differ in their particulars and are not co-dependent, reciprocal or uniform in nature.

I commend the bill to the house and table the explanatory memorandum.

[See paper 1651.]

Debate adjourned, pursuant to standing orders.