CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

Second Reading

Resumed from 16 October.

HON SUE ELLERY (South Metropolitan — Leader of the House) [5.41 pm] — in reply: I thank members for their support of the legislation, and in particular note their appreciation for the briefing that was provided to them. I am going to give an extensive response because a number of very specific issues were raised. By way of explanation to the house, we need to stop at about quarter past six to deal with some disallowances. If we are still proceeding, I will seek leave to continue my remarks at a later stage and ask my Whip at that point to adjourn the matter if we are still going, so everybody knows where we are at.

Hon Michael Mischin: Knock off now, if you like.

Hon SUE ELLERY: We have work to do so we need to continue to do it.

I will begin with the issues raised by Hon Michael Mischin. In the first instance, he had a question about how the offence will be proved particularly in cases where there is no complainant. The drafting of the Criminal Law Amendment (Intimate Images) Bill draws on several existing concepts within the Criminal Code that are already understood and applied by prosecutors in the state. For example, the definition of "distributes" in proposed section 221BC is closely modelled on the equivalent definition provided in section 219 of the Criminal Code, which deals with the distribution of child exploitation material. Similarly, the definition of "consent" provided in proposed section 221BA draws on the definition provided in chapter XXXI of the code, which deals with sexual offences. The WA Police Force and the Office of the Director of Public Prosecutions, the two agencies that will be responsible for prosecuting the new offence, were engaged at every stage of the drafting process. With respect to whether a complainant will be required for the prosecution to proceed, the government anticipates this will be true in most cases. However, the main challenge associated with prosecuting an offence without a complainant will be how to establish the absence of consent. That would normally require complainant evidence. However, exceptions may arise when it is clear that the person depicted was unaware that the image was being taken; for example, where a camera is hidden in a public toilet. In these circumstances, it would be possible to infer lack of consent to any distribution of the image.

The honourable member suggested that the definition of "intimate image", in particular the wording "in circumstances in which the person would reasonably expect to be afforded privacy", would prevent such inferences being drawn by requiring the court to consider the subjective privacy expectations of the person depicted in the image. However, we have a different view. If the intent had been to require the court to consider the complainant's subjective expectation, the phrase could have been drafted as a person "had a reasonable expectation of privacy". The wording that has been used, "the person would reasonably expect", invites the court, effectively, to stand in the shoes of the person depicted and consider from that perspective the objective question of whether there were reasonable grounds to expect privacy.

A question was also raised about the experience of other jurisdictions. I am advised that, given when these notes were prepared, about three or four weeks ago, a New South Wales man became one of the first in that state to be sentenced to a term of imprisonment for committing the distribution offence equivalent to that in the bill before us now. When asked what he would say to other potential revenge porn perpetrators, he said, "Just don't do it; have a good think about what you are really doing to someone." The court's decision and offender's message to the community were then beamed into thousands of households across the country through the media. That is an example of this type of offence working as intended. The victim secured justice; the offender was held to account and a clear message was sent to the community via the media reporting on that case.

Hon Michael Mischin: I want to relate what you said regarding the framing of the term "the person would reasonably expect".

Hon SUE ELLERY: Do you want me to go back over that?

Hon Michael Mischin: Yes, I am sorry, I was just trying to find it in the bill.

Hon SUE ELLERY: Hon Michael Mischin had suggested that the definition of "intimate image", in particular the wording "in circumstances in which the person would reasonably expect to be afforded privacy", would prevent such inferences from being drawn. Our view is that if the intent had been to require the court to consider the complainant's subjective expectations, the phrase could have been drafted as the person "had a reasonable expectation of privacy". By saying the person "would reasonably expect", we are inviting the court to stand in their shoes.

Hon Michael Mischin: Although it is not conclusive, it is still arguable it is open in the government's view that if the evidence circumstantially supports it, there could be a prosecution without a complaint?

Hon SUE ELLERY: Correct.

Hon Michael Mischin: Okay.

Hon SUE ELLERY: Data provided by the New South Wales Bureau of Crime Statistics and Research shows that 43 convictions under the new distribution offence were recorded in its 11 months of operation. The majority of those happened in the second half of the reporting period. During the drafting process, the Department of Justice scrutinised legislative models that had already been enacted in other jurisdictions.

The honourable member also asked why the bill did not include a recording offence, because one was in the equivalent New South Wales legislation. I am advised that this option was considered during the drafting process; however, on advice from the State Solicitor's Office, it was concluded that existing recording offences contained in the Surveillance Devices Act 1998 and the Criminal Code provide sufficient coverage. In particular, the type of conduct that would have been captured by a recording offence under this bill would likely be captured by section 6 of the Surveillance Devices Act, which criminalises the recording of a private activity.

The honourable member queried why the reference to "engaged in a sexual act" is not qualified by reference to an act that is not normally done in public. The reference to "engaged in a sexual act" forms part of the definition "engaged in a private act" which, in turn, feeds into the definition of "intimate image". There is a sequencing, if you like. Qualifying the reference to "engaged in a sexual act" with a privacy requirement would, effectively, be duplicating the reference. That is because the overarching definition of "intimate image" already requires that the relevant conduct be depicted in circumstances in which the person would reasonably expect to be afforded privacy. The honourable member also queried what form of breach of privacy the bill seeks to protect. It is the depiction of a private act or the invasion of privacy associated with non-consensual distribution. Elements of the offence pick up both of the dimensions of privacy that the member referred to. For the offence to be committed, the image must depict the person in private circumstances and the image must have been distributed without consent.

Both Hon Michael Mischin and Hon Nick Goiran asked questions about how we settled upon the definition of "consent" contained in proposed section 221BB. I will step the members through the different parts of the definition. Proposed subsections (1) and (2) mirror the definition of "consent" contained in chapter XXXI of the Criminal Code, which deals with sexual offences. The government considers it desirable to retain these concepts as they are already understood and applied by prosecutors. Proposed subsections (3) to (5) provide additional features that are specific to the distribution of intimate images. By emphasising the importance of ascertaining consent on each and every occasion, these additional features reaffirm that individuals have control over the distribution of their images, and for closed legal arguments, that would amount to victim shaming—for example, the idea that because a person forwarded an intimate image of himself or herself to another person, they were asking for the image to be distributed more broadly. Hon Nick Goiran asked whether or not the inclusion of these features effectively amounted to cherrypicking. The government considers that these additional features capture the range of past actions by the victim that could give rise to unacceptable assumptions about future consent in this context. A related question was raised about why the definition does not mention informed consent. This option was considered during the drafting process but was not ultimately included on the basis that the overarching requirement for free and voluntary consent sufficiently addresses the issue. The drafters were also mindful that the inclusion of such a reference would have created an inconsistency with the equivalent definition in chapter XXXI of the code that, unlike additional features in proposed subsections (3) to (5), could not be explained with reference to factors that are specific to the distribution of intimate images.

A question was also asked about whether the media activity defence could apply when a member of the paparazzi photographs a celebrity who is naked in their own backyard as a result of a wardrobe malfunction. The media activity defence is not intended to protect the distribution of media material produced for the sole purposes of titillation. A defendant seeking to run this argument would have at least two significant hurdles to overcome. First, they would need to establish that the material had the character of news or current affairs. Second, they would need to establish that the distributor reasonably believed the distribution to be in the public interest. The honourable member also queried how a judge would direct the jury in relation to proposed section 221BD(3)(d)(vi), which provides that the court is to consider any other relevant matters in determining whether the acceptable conduct defence applies. The scope of "any other relevant matters" is constrained by the wording of proposed section 221BD(3)(d), which establishes the defence itself. Other matters will be relevant only if they go to the distribution of whether a reasonable person would consider the distribution of the image to be acceptable. If the defence raises matters that do not go to that central question, those are not relevant matters for the purposes of proposed subparagraph (vi).

The honourable member raised several questions about rectification orders, as did several other members, so I will canvass all of those. The first issue was what would happen in cases in which the accused person cannot realistically expunge the image from the internet. A rectification order will not compel the person to achieve a particular outcome but, rather, to take reasonable actions. This recognises that once an image finds its way onto the internet, it is beyond the power of any one individual to expunge it altogether. Despite this, there will always be reasonable actions that the accused can take with a view to at least mitigating the damage that has been caused.

What those actions are will depend on the circumstances of the case but, for example, if the person has distributed an image to his friends, he could demonstrate that he has asked his friends to delete the images. If he has posted images on a website, he could demonstrate that he has taken them down or that he has asked the website administrator to do the same.

Another question was why the offence was not a continuing offence. The rationale for that is that the penalty provided—that is, 12 months' imprisonment—is deemed to be a sufficient deterrent to noncompliance. The member also asked why the bill does not provide for the agency that conveys the offending image, such as the internet service provider, to be held accountable. This function sits squarely within the remit of the commonwealth eSafety Commissioner. New commonwealth laws that commenced on 1 September 2018 have given the eSafety Commissioner additional powers to combat image-based abuse. The eSafety Commissioner will now be able to issue removal notices to websites, content hosts and social media providers. Corporations that do not comply with a removal notice can be fined up to $525 000. The maximum penalty for individuals is $105 000.

Another issue was why the bill did not provide for forfeiture to the victim. The government considers that this would be discordant with the nature and form of the material in question. Digital images are not scarce resources and the victim presumably already has access to a digital copy. Physical copies of the digital images are similarly unlikely to be of value to the victim. The government is satisfied that destruction or disposal, as provided for in section 731 of the code, is likely to be the appropriate course of action.

Going back to the issue of rectification orders and issues raised by both Hon Alison Xamon and Hon Charles Smith, the government agrees that the earlier in the justice process that a rectification order is made, the more effective the order is likely to be. That is why the bill provides for such an order to be made on charge rather than only on conviction. Although we cannot confirm whether this will be the subject of a specific prosecution protocol, the Department of Justice will raise the importance of timeliness directly with the WA Police Force and the Office of the Director of Public Prosecutions during the implementation process for the legislation.

Hon Charles Smith queried why the rectification provisions do not include concepts such as destruction or deletion. The honourable member is correct in identifying that the rectification provisions are primarily concerned with unwinding the effects of the distribution rather than removing the images from the possession of the accused person. This is primarily because the forfeiture of things used in the commission of an offence is already addressed in section 731 of the Criminal Code. In respect of the rectification provisions, Hon Nick Goiran had a query about what recourse will be available to a person who initially consents to the distribution of an intimate image but later changes their mind and wishes to have the image removed from the internet. This scenario is not addressed in the bill before us. Rectification orders are available when charges have been laid. If the person depicted in the image consented to its distribution, the distributor did not commit the offence and the question of a rectification order does not arise. However, the commonwealth eSafety Commissioner does have powers to address this issue. The commonwealth Enhancing Online Safety Act 2015 distinguishes between a complaint, which applies when an image is posted without consent, and an objection notice, which applies when a person initially consents to the posting of the intimate image or video but later wants it removed. The eSafety Commissioner can take removal action in response to both complaints and objection notices.

Hon Nick Goiran also raised a more general question about the interaction between state and commonwealth regimes. The government considers the bill and the commonwealth regime to be complementary. The bill is primarily concerned with the criminalisation of non-consensual distribution. The commonwealth legislation is primarily concerned with the removal from the internet of images posted without the consent of the person depicted. I note that the commonwealth Attorney-General has specifically stated that the measures contained in the commonwealth legislation that came into force on 1 September are intended to complement state and territory laws in this area. The rectification order provisions do, to an extent, overlap with the functions of the eSafety Commissioner. Ultimately, the government concluded that if a person is before a court on criminal charges and there is some step that the person could take to remedy the situation they have created, the court should have the capacity to compel that action.

It was also asked why the definition of "intimate image" does not follow the lead of the commonwealth legislation and include an image depicting a person wearing their usual religious or cultural attire. It is important to note that the commonwealth definition to which the honourable member referred operates only in the civil arena. The commonwealth legislation does not criminalise the distribution of an image that depicts a person without their usual religious or cultural attire. Civil penalties may apply when the distributor is given notice to take down such an image but fails to comply, but the penalty flows from noncompliance with the order, not the original distribution.

Hon Alison Xamon canvassed a range of issues around her concern about the potential over-criminalisation of young people. Young people are not exempt from the new distribution offence. As was stated in the second reading speech, 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 distributing their intimate image without consent. It is the case that such conduct by young people will often be

linked to naivety or immaturity. These behaviours are immature, but they are also criminal, and are already recognised as such under the law. We say that the answer is not to exempt young people from the law, but to ensure that the justice system responds to offending by young people in a way that is sensitive to their age-related circumstances and needs. That is enshrined in the Young Offenders Act 1994.

The honourable member also asked whether the bill would criminalise the distribution of a lewd caricature. I am advised that the definition of "intimate image" in proposed section 221BA requires that the image show, or appear to show, one of the things mentioned in paragraphs (i) to (iii) of the definition—that is, the definition includes both what we might call "authentic" intimate images, and images that appear to contain intimate content but are in fact fake. This language is intended to capture convincing fakes, not satirical mock-ups. No-one would view a lewd caricature and conclude that it appears to show actual intimate content. Let us assume for a moment that an enterprising prosecutor is able to persuade the court that a caricature constitutes an "intimate image". The accused person could then seek to rely on the reasonable conduct defence contained in paragraph (d) of proposed section 221BD(3).

The honourable member also queried whether the bill could inadvertently criminalise distribution for the purposes of reporting misconduct, so that someone reporting it could get into trouble—for example, a schoolteacher, principal or parent. The bill contains provisions that will guard against the inappropriate criminalisation of persons acting in good faith who report image-based abuse to relevant authorities. Proposed section 221BD(4) provides that the new offence does not apply to a distribution that is carried out in accordance with, or in the performance of functions under, a written law or a law of the commonwealth or another state or territory. The School Education Act gives schoolteachers and principals specific functions that would likely bring good faith distribution within the ambit of the exclusion in proposed section 221BD(4). Specifically, section 63 gives school principals the function of ensuring the safety and welfare of students, and section 64 gives teachers the function of supervising students and maintaining proper order and discipline.

There was a question about when the defence of genuine scientific, educational or medical purpose may apply. The government does not anticipate that these defences will be relevant in a significant number of cases. That is because it will normally be possible and appropriate to obtain consent prior to distribution for one of these purposes. However, there may be rare scenarios in which consent is not obtained for legitimate reasons, and the defence may therefore become relevant.

I would like to conclude my reply by touching on the issue of community education and advise the house that the government recognises the need to educate the community about the new laws. The Department of Justice is currently liaising with a range of stakeholders to ensure that relevant messages are disseminated to the general community and target audiences. Relevant information will be uploaded to respective state government websites, including the Victims of Crime website. This is important because Google is one of the first resources that victims will turn to when seeking information about available responses. A series of media events will be organised to disseminate information and a public forum is being considered. A plan to disseminate relevant messages via social media is also being developed. This will draw on existing networks. At the recommendation of the Department of Education, the Department of Justice is planning to invite representatives of Catholic Education Western Australia, the Association of Independent Schools of Western Australia and the School Curriculum and Standards Authority to participate in a working group to develop and disseminate relevant messages. Initial meetings are scheduled to be held—the notes say within the next fortnight, so around about now. I can confirm that school education addresses both potential perpetrators and potential victims. The Department of Justice has also met with the Ministerial Youth Advisory Council to discuss options for reaching young people who are not involved in formal schooling.

Honourable members, that is the response to the range of issues that were raised. I again thank members for their contributions and I commend the bill to the house.

Question put and passed.

Bill read a second time.