CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

Second Reading

Resumed from an earlier stage of the sitting.

MR T.J. HEALY (Southern River) [5.45 pm]: I pass my congratulations to the new member for Darling Range on her first speech. I certainly acknowledge her defeat by the people of the East Metropolitan Region and her defeat by the people of the City of Kalamunda, and now her election here, so congratulations.

We are in changing times. I seek to make a short contribution on the Criminal Law Amendment (Intimate Images) Bill 2018. I wish to speak about the grave dangers for young people and of my experiences as a high school teacher. I am very honoured to have taught at two of the three high schools in my electorate. I was a teacher at Southern River College most recently. I have student services experience, which is the pastoral care wing of most schools; I have been a year 10, 11 and 12 coordinator and a workplace learning coordinator; and I have assisted with TAFE applications. Unfortunately, I have found that the sharing of intimate images is a very prolific and common thing amongst our young people. This bill is very important, because it will create an appropriate offence and punishment. One thing I seek to discuss in my contribution is, unfortunately, the sheer number of images that are shared by young people. That is a cause for concern. An education and awareness program about these new laws is needed. I am very proud to say that I have already spoken to some of the principals in my electorate about how they are going to continue to raise that awareness.

The member for Scarborough mentioned earlier that these images are online forever, which is one thing young people need to understand. I do not seek to draw any fun from this situation, but I recall the Liberal Party launch of 2017—that was not intimate, but it was certainly offensive. I remember *One More Time*. That is an offensive image that is burnt in my mind.

To draw back directly to this bill, dating has changed. The member for Cottesloe said that courtship had changed. I was going to say dating, but courtship has changed. I would summarise it as a very relaxed attitude by young people to the sharing of intimate images. We now have within our pockets phones that can take complex videos and photos. We have iPads and other devices that are equipped for this. As the member for Morley said, it is definitely a concern that so many young people have access to this technology. One thing we need to understand is that young people interact in a different way, which will be greatly affected by this bill. I mentioned that I have approached the schools in my electorate about the effects of this bill. They are already dealing with these situations. As a teacher, I know this is something that is dealt with on a day-to-day basis, and certainly within student services. The bill will address and create those crimes. This is something that school-age children deal with on a daily basis, even from primary school, but I will focus principally on high school students. People from year 7 to year 12—so, aged 11 and 12 years to 18 years—are on the same campus, in different relationships, and sharing images. I have discussed with principals, education assistants, student services staff and school psychologists how they deal with this and what they do about it. I am conscious that there is a large education caucus and a number of educators in this chamber who have experience in this matter, and I would best describe it as digital citizenship. It is really important that we promote digital citizenship, which is a key part of the passage of this bill. As I said, a lot of the principals and the student services staff whom I have already spoken to are already running programs such as this as part of their pastoral care programs and in home room with discussions about the fluidity of our images and what can be shared and those types of aspects. Digital citizenship needs to be conveyed in a very appropriate way. The member for Morley said this very well: "We can help keep them safe from long-term harm." That really summarises digital citizenship. We can help to educate people on their digital identity and about the long-term aspect of their images that can be shared, not necessarily now but in the future, and that is the key.

I am getting a fair bit of grey hair, but I went through most of my childhood before Facebook and the internet arose, whereas young people now will be dealing with and sharing selfies and other images. I will not go into too much technology or many references to memes and so on, but images now will be permanently recorded for decades to come. I made many mistakes in my life but, luckily, Facebook did not exist when I made those mistakes. For young people now, facial recognition technology and other image technology that will be available in years to come will be significant. We need to educate people now about how and who we share digital information with. The principles of dating have changed. The member for Cottesloe said movies and coffee may be the usual way that we used to do our dating, but there are a lot of online interactions now and almost a staple part of that is the sharing of an image. When that escalates to an intimate image, it complicates matters for all parties concerned.

I mentioned that on a high school campus we now have people aged from 11 years to 18 years old. There are people before and after the age of consent of 16, for sexual practice, but also in the bill the age of consent for a person to give their consent for sharing an image is 16 years old. When I was in high school, year 10s did not go out with year 12s; it was always a bit of a class system. But in my experience as a teacher, a school is a school and

there can easily be a 16-year-old dating a 15-year-old and a 17-year-old with a 14-year-old in a casual friendly relationship that can certainly escalate as the relationship develops. We need to ensure that our young people are informed, aware and educated about those ages of consent and the consequences, especially when there are criminal aspects attached to this, because a 14-year-old or a 15-year-old cannot give their consent to forward their image to a person receiving it. Clause 4 is about the consent that a person gives. The consent from a 16-year-old or someone who has consent is for now. When an image is sent, that consent is for now. It is not for tomorrow or the day after. It is not consent, as concluded in this bill, to forward it to a third party. I fear that with the unfortunate ease with which images are shared this is certainly a complicating factor that will be dealt with by schools, parents and police with the passage of this bill.

As a career counsellor, I have provided assistance for young people's job, TAFE and university applications. Their Facebook page and social media profile, and other platforms as they develop in years to come, is what employers will access and banks will access regarding loans. Electronically stored images on a person's social media profile and attached to their name via facial recognition technology, whether it be pictures of partying or other inappropriate activities, but certainly shared online images, will have an impact in the long term on a person's job prospects. It is very important that it is an offence; it is very important.

An aspect of this bill outlines affecting working with children cards. Many applications, jobs and careers are affected when a person cannot access a working with children card. Again, I fear that if young people before and after the age of consent, and before and after becoming a legal adult, are not aware of things that they have forwarded or not forwarded, we really need to make sure that young people are aware of those consequences for all aspects of their career, job applications and education applications.

Education programs are key and the focus of that needs to be about privacy: "What is your privacy and what is important?" It needs to be about safety and cyberbullying. I have mentioned that the high schools that I have spoken to are already running programs and will incorporate what is proposed in this legislation. It is really important that at all levels from primary school through to years 7 and 12 have programs available to educate young people and ensure that they are aware of the consequences. I would like to commend a couple of organisations that are doing great work. SHQ—Sexual Health Quarters—is a great organisation that talks about sexual health and identity. There are local councils and not-for-profit organisations that run programs available to high schools and come into schools to educate parents, school and communities about that, which is really important.

I would like to wrap up by saying that I commend the government for introducing this bill. It is a very important piece of legislation. This bill will help protect my community. I look forward to helping promote responsible well-informed young people and ensuring that they are protected.

MR Z.R.F. KIRKUP (Dawesville) [5.56 pm]: Before I speak to what is a very important piece of legislation, it is important and prudent to raise the ridiculous commentary from the member for Southern River, who, as part of his contribution to the very important Criminal Law Amendment (Intimate Images) Bill 2018, while he exalted the many virtues protecting the victims who have this heinous harassment conducted against them, somehow sought to incorporate the 2017 Liberal Party launch as if that is in the same theme or genre of what we are dealing with.

Mr P.A. Katsambanis: Grubby.

Mr Z.R.F. KIRKUP: That is disgraceful and grubby, as the member for Hillarys rightly puts it. It was a disgraceful contribution from the member for Southern River. I would expect more from him, but I suspect on his 7.9 per cent margin we do not have much to fear given the result in Darling Range because soon enough he will be gone. In that time, it would be prudent at some point during this debate for the member for Southern River to get up and apologise for that contribution.

Mrs M.H. Roberts: You should apologise.

Mr Z.R.F. KIRKUP: I would expect far better of him, member for Midland.

Mrs M.H. Roberts: I would not expect any better of you, though.

Mr Z.R.F. KIRKUP: Thank you. I would expect far better from him, member for Midland.

Together with my colleagues who have spoken already, we obviously fully support this legislation. It is legislation that is good in spirit and, as the member for Scarborough noted in her contribution, is something that we would have endeavoured to introduce had we been in government. As the member for Cottesloe pointed out to me, I am one of the only millennial members of the Legislative Assembly, and that means that with the majority of my generation, I have been connected electronically for most of my life. In fact, I figured out that since I was in year 10 at Governor Stirling Senior High School, I had a phone with a camera and a colour screen. That was 2002 or thereabouts. Since that time, more than half my life has been connected, in a mobile sense, with a device with a screen and a camera. I suppose as part of that, that is the sort of contribution that I couch my experience in and

what we are seeing occur globally when we are dealing with this very important legislation. I fear, as the member for Cottesloe has pointed out, the practical implications this will have for our young people who basically from birth have an Instagram account created for them, not by choice. I have found or come across plenty of new parents who have created a social media account for their children that they will likely carry with them for the rest of their lives, if they so choose. The reality is that they are now carving out these types of online presence from an incredibly young age. Some of my contribution will revolve around what I fear when it comes to legislation dealing with a rapidly evolving space, and that is the electronic and digital worlds. That is a very important part of this legislation, but it is something that I am concerned about at every point in time as this Legislative Assembly, this Parliament, this jurisdiction and jurisdictions across the globe try to keep up the pace, because we are seeing time and again that legislative bodies are behind. We see these types of acts that we have spoken about being committed for years and even decades in some instances and Parliaments, respectively, globally, have not be able to keep up. As part of that, I will talk about the role of the social media platforms and the concerns that I have as part of the opposition.

Sitting suspended from 6.00 to 7.00 pm

Mr Z.R.F. KIRKUP: I would like to continue the contribution I was making before the dinner break. It would be remiss of me at the outset of the remainder of my contribution to not speak about the rise, role and responsibilities of social media platforms, which I think have been far too slow to respond to the practice of online harassment. Of course, that means not only text-based harassment, but also the harassment referred to in the legislation that we are dealing with here—image-based abuse, harassment and blackmail. For too long, platforms such as Facebook and Twitter have been slow to react to the phenomenon that can be described as image-based abuse—or revenge porn, as it is called. A recent episode of *Four Corners* was an exposé of Facebook that made very clear that Facebook's model is entirely based on the monetisation and commercialisation of viral images. Images that continue to be spread sometimes are not only violent images, but also sexually explicit. I encourage all members to look at that *Four Corners* episode because it is an exposé on the individuals, basically the gatekeepers, whose responsibility it is to flag content that is posted online. The program showed how they would decide at that point in time whether a post was particularly violent or, in the case in point, whether nude videos and the like should continue to be present on the platform. The program showed a video of a very young child being physically abused by his father. Even after the censors, as they are termed, allowed that to persist on Facebook, when it was raised with the executive of Facebook by, I think, BBC Four in the UK, it continued to be on the platform for some time even though it had been flagged a number of times. What we have here is a social media giant whose responsibility it is, as a corporate citizen, on a platform that enables the sharing of content between individuals —

The ACTING SPEAKER (Mr R.S. Love): Members, could you take the conversation outside or keep it low.

Mr Z.R.F. KIRKUP: I encourage all members to look at that *Four Corners* episode. It was very good and an interesting insight into Facebook. From what we saw, it was relatively disturbing to see that the commercialisation of that platform thrives on those explicit imagines. Again, that goes to what we are seeing here—that is, those platforms that have been enabled ensuring that people, victims, can have this image-based abuse used against them on platforms like Facebook, Twitter, Instagram or Snapchat and certainly, person to person through text messages, which I will get to in a moment.

The other platform worth mentioning is Google. Google for too long has been listing websites from searches that are predicated on getting twisted revenge or harassment-based sites listed in active searches. A 2014 article in *The Economist* found that on Google there were more than 4 000—again, I hesitate to use the term, because it is more colloquially used—revenge porn genre sites. No doubt that number has exploded by now in 2018. These giants of social media and the digital media, who interact with us on a daily basis—an interaction that is growing more with a younger audience—have a responsibility, I think, to shut down the practices that we are discussing here. I suspect that if they had been more active in doing so, if they had taken their corporate responsibility to heart and put in some technology, we would not need this legislation in many parts because these images and videos would not be able to be found on the internet.

The ACTING SPEAKER: Minister for Police, Attorney General, Minister for Asian Engagement, could you keep the noise down? I am having trouble hearing the member for Dawesville.

Mr Z.R.F. KIRKUP: I mention Google because it appears that its practice of allowing these types of videos and images to be hosted and available on the internet is still alive and well.

I draw members' attention to the New York legislature, which was one of the last states in the United States to not have legislation in relation to this type of image-based abuse, and to a *New York Post* article on 21 June this year entitled "Google kills revenge porn bill". Basically, the New York state legislature was dealing with a bill that was not dissimilar to the bill we are dealing with today, which would have made the non-consensual dissemination of sexually explicit materials a misdemeanour under its criminal code, punishable by up to a year in jail. Therefore, again, we are not necessarily inconsistent with that; it is slightly more lenient with its term. It would have also

enabled to victims to sue web hosts, which is a key difference to legislation we could be looking at here today, to remove those offending images. Although New York legislature's equivalent of the lower house passed the bill, the New York state legislature's Senate was at the eleventh hour being lobbied by lawyers, largely by Google and other tech giants, to have the language of the bill changed, which meant that effectively it could not be voted on by the state legislature of New York. As a result—thank you, member for Murray–Wellington—the bill could not be voted on and would not pass. A lawyer, whose name pops up in a number of articles and I think may have even informed some of the Attorney General's commentary, called Carrie Goldberg is quoted in the *New York Post* article as follows —

> "There could be no better showing of what unfettered power big tech has on our government. It's sickening. Any claims they make that big tech is aligned with victims of revenge porn are as hollow as Trump saying he's aligned with separated immigrant families facing deportation …
>
> "Big Tech, especially Google, created the revenge porn problem. And now, just as we were about to enable victims to demand removal of their most intimate material from the internet via this law, Google renews its abuse."

What we have is a continuation of social media platforms, these digital content providers, enabling these acts to continue to occur. That has been perpetuated for so long now that it is time that legislatures around the globe took a stand. It is very unfortunate that we see this type of irresponsibility—that is, these companies pressuring legislators in other jurisdictions—when trying to set up rules that will result in companies that host that material being sued. To me that makes a lot of sense. If I take any image or any slanderous, defamatory or liable information and perpetuate it, I could be actively pursued through the courts without any remediation. I think it is absolutely fair that a victim should be able to take action against a content provider, not necessarily a transmitter, like Facebook, whose responsibility it is to host these types of images, or Google whose responsibility it is to list these websites and the like. That would be an important addition.

Mr C.J. Tallentire: Wouldn't the best way to regulate that be that if the company—Facebook—does not respond to the complaint?

Mr Z.R.F. KIRKUP: The member for Thornlie asked whether we might be able to pursue the company if it did not respond to the initial complaint. That makes a lot of sense to me because the mechanism at least would be in place. If it fails to meet those mechanisms within a reasonable time, then, yes, that should absolutely be the next step. At the moment, there is no next step.

That *Four Corners* episode found that within a day, or a very short period, maybe within 48 hours, 25 000 images were posted in Ireland, which is where the BBC exposé was based, and had been flagged, but they could not get through it all. There was no way that the content moderators could stop every single one—take it down or mark it as sensitive. What happens is that because more and more content is provided online, if it is flagged, there is very little chance that any quick action can be taken by the people who host this content to take it down. I think it would be a great move from a victim's perspective to be able to pursue them through the courts, because I suspect that they would take a more active interest in making sure that material was —

Mrs R.M.J. Clarke: What if they're a US-based company, you couldn't hold them to account?

Mr Z.R.F. KIRKUP: The member for Murray–Wellington is right. But if it were a WA-based company that did that, perhaps we could pursue them here. We just need to make sure that all states are locked down and, indeed, I think the commonwealth should probably look at that.

I also note, probably because of the rise in the type of legislation we saw in New York state legislature, in November last year, Facebook announced that it would introduce an algorithm that would try to identify sexually explicit material so that at the point of uploading on Instagram, on Messenger, on WhatsApp—now that Facebook is in WhatsApp—or on Facebook, the image would basically be flagged and the onus would be reversed. People would not be able to automatically provide something online, because a gatekeeper would make sure that the image or video was reviewed before it proceeded to go online. As we all know, once content goes online, it can spread very, very quickly. From my perspective, it could spread very easily. I think all members are aware of such scenarios.

If members are interested in this issue, I encourage them to read *Conspiracy: Peter Thiel, Hulk Hogan, Gawker and the Anatomy of Intrigue* by Ryan Holiday. It is a very good read. Ryan Holiday is an author whom I follow a bit; he did some work on Stoic philosophy. In this case, he writes about Peter Thiel and the Hulk Hogan sex tape. The Hulk Hogan sex tape was taken down only after some years when Peter Thiel had enabled Hulk Hogan to sue Gawker Media to have the tape taken down. That is a very interesting case. That video can no longer be found because the website that enabled this video-based abuse, a sex tape that was produced in what Hulk Hogan, the WWE wrestler, thought was a private environment—not unlike what we are doing here—was leaked to

a value-add site, which was owned by Gawker, and it went viral. Only through the pursuit of Peter Thiel, giving millions and millions of dollars to Hulk Hogan to pursue it in, I think, the Californian court system, was that video eventually taken down. That led Gawker Media, which was perhaps an early version of BuzzFeed, to collapse; it no longer exists. It was a $140 million judgement against Gawker and the value-add site, and they collapsed. That was done entirely through this legal remedy that we are pursuing. It was a great thing because it indicated to those media websites that their practices in 2007 were wrong and should be stopped. In that case, that video can no longer be found, not even on torrent websites, as I understand it, because the severity of the court penalty saw a media giant collapse at that point and it meant that no-one wanted to touch it.

A person should not have to spend millions of dollars on legal teams to make sure a judgement can be made to have a video removed from the internet. I think that right should be open to everybody. If a person is compromised and they have image or video-based abuse of an "intimate image", as it has been called here—or "invasive image", as I think it is called in New South Wales—I think the onus should be on the person who hosts it and on the person who distributes it, especially if it is a large digital platform, to make sure that it can be pulled down in quick time. If they do not, a legal remedy could be taken against them. The book *Conspiracy* by Ryan Holiday that deals with quite a lot of the back story of that 2017 case is a fantastic book. It really outlines the impact this had on the actor's life. In court there were arguments about his sexual acts, whether that was in the public interest, and that the media company thought it was.

The member for Cottesloe a number of times raised the issue that unfortunately young people are now living digitally and they look at celebrity sex tapes—I could name a number of them off by heart; I think most have been widely reported—and seem to try to replicate some of that in some way, shape or form.

[Member's time extended.]

Mr Z.R.F. KIRKUP: It might be in a personal one-to-one manner or it might be on a larger sync. Talking about one-to-one, the member for Scarborough referred to text messaging. Most messaging now happens on Messenger, which is owned by Facebook, on WhatsApp or on some other variant, and they are actually very easy to spread digitally because they can be added to a group very quickly and the content goes. It can morph online very quickly as well. When we talk about sexting, which is the sharing of intimate images with consent because the sender has generated and sent the image to that person, it is actually a very encouraged practice now. The member for Cottesloe rightly pointed out that it is part of the dating or courting process, as the member accurately described it. There are multiple media sources now. As part of my research for this speech, I looked at *Cosmopolitan* magazine, which has an entire mini-site on its website dedicated to how people can best sext their partners. There are articles on this micro-site headlined—I did not read them, mind you—"What Does Sexting Say About Your Relationship?", "Sexting: Naughty Ideas to Try Today", "10 Things Guys Really Want You to Sext". This practice is actively encouraged on mainstream digital platforms that young people interact with on a daily basis. There is a very quick reference on the site not only about these images that they are seeing, but also how they can best do it—how they can do it in the most optimal manner. This is part of the process that we are seeing.

Ms C.M. Rowe: Would they not be complaining?

Mr Z.R.F. KIRKUP: No, sorry. I appreciate the interjection from the member for Belmont. Not from my perspective. I certainly was not trying to make that point. From my perspective, the ease by which it occurs also demonstrates the ease by which it is forwarded on. I suppose that is the point I am trying to get to. As someone who has grown up with a phone with a colour screen and a camera in my possession since I was in year 10 and who has gone through many dating and courtship processes, I am aware of the ease with which these things can happen. But what it does show as well, member for Belmont, is how quickly these things can be spread. When there is encouragement and normalisation, it means that people will actively exchange images on a more regular basis, which means that more content is being shared.

A Kinsey Institute study from 2016 found that one in five study participants had engaged in sexting. As that practice continues to spread and that number inevitably continues to grow, I suspect that, unfortunately, those images will get forwarded on. Part of the Kinsey Institute study, which surveyed 5 805 single adults in the United States, found that although 73.2 per cent of participants recorded discomfort with unauthorised sharing of text messages and images, 23 per cent had shared them anyway. Again, this shows that there is a high prevalence of this content being shared, which, again, in a consensual manner, is part of the normalisation of relationships now, it seems. But more than likely that content will be shared now. People have almost a one in four chance that that image or video will be shared even if other people do not want to see it. This seems to me to be a very unfortunate development in our society that leads to the abuse of people—the blackmailing of individuals—from a very, very young age, at times. Perhaps it is people who are in their formative years, right through to people, no matter how old they are, who could be in their forties or fifties, who engage in this. It impacts all manner of people of all ages, and it is why this legislation is so important.

The member for Morley quite rightly pointed out that it is a significant issue for parents. I am not a parent. I do not have children yet, but hopefully I will one day. It is obviously a very confronting issue for parents to have to deal with as well, because at some point their children will gain access to a phone and it is likely this normalised behaviour will occur. Unfortunately, it seems to me that there is a prevalence for these images to be shared on as well. It is important that this Parliament sends the message that that is not a behaviour that should be expected in Western Australia, but moreover it should not be expected anywhere we live—in real life or online. It is impossible to stop the spread of these images once they are online. Importantly, we should stop them at the source through these severe penalties. We should also heed the fact that jurisdictions in the United States—for example, in New York, which is a very populous state—still do not have this law in place. If they did, offenders would get only a year's imprisonment for a misdemeanour charge. Whereas, in the state of Western Australia, this Parliament and this government are taking it very seriously and making sure that sentences of many years are given to people who forward images that have been taken privately in a consensual manner.

I apologise for taking up more time than I anticipated but I would like to point out a slight concern. At the start of my contribution, I referred to the fact that I worry about legislatures, generally speaking, trying to keep up with the evolution of technology. It is a very big issue for us. Governments of all ilks—certainly this state government—have still not necessarily bedded down exactly how we can best deal with services such as Uber. That has been around for some time but it is a relatively short period when we consider the length of time that these text-based and image-based harassment cases have been going on—for decades in some instances.

This Parliament and Parliaments across the commonwealth have identified that they are struggling to keep up with technological evolution. I recently read that there are things called deep fake porn or morph porn, which involves the replacement of an image of someone—basically, superimposed—on a body that is not theirs engaging in an act that they did not do. It is so lifelike that competitions are held whereby people try to figure out which video, not just in a pornographic sense but in a general sense, is the real one and which is the fake one. People cannot determine the difference. We have also got to the point at which artificial intelligence is doing it for us. All we need to do is provide a head shot at a relatively high resolution and an algorithm will superimpose it over a figure in nearly any movie scene. Right now, Mr Acting Speaker, someone can put your head on one of the Jedi in Star Wars very quickly. This legislation keeps up with that in the sense that if any image of any type is superimposed or portrays an individual engaging in an act, even if they did not engage in that act, the offender can be punished under this legislation. I worry about where we will go next. This was not even a concept one or two years ago. Our legislation needs to be robust enough to allow governments and law enforcement in particular to keep up with the rise of that type of evolution.

Ms C.M. Rowe: There is a clause in there that allows for future changes to technology. I am sure the Attorney General will speak about that.

Mr Z.R.F. KIRKUP: I appreciate the member for Belmont's interjection; the legislation needs to keep up with those types of digital or electronic means. That is important but the reality is that it might create more grey areas. If we were talking about an artificial image, who is responsible for that and what does that look like? It relates to the ownership. That is where I am coming from.

The other issue that I raised during the briefing with the Attorney General's team yesterday is the nature by which something might be released. The member for Morley pointed out that Jennifer Lawrence had her iCloud account hacked and images were released. It had a horrible impact on that young actress and her development. The reality is that with iCloud, relatively new software will try to upload material online from most people's phones. I have a concern, which I raised with the Attorney General's team that briefed us, about shared folders and things like that—things that may have been stored in shared folders and people are notified if they subscribe to those folders. I will give a good example. A constituent wanted to share an idea that he had relating to sharks. He sent me a Dropbox link. It is a shared folder. He sent it to a number of people. I am notified every time that gentleman changes the nature of that folder. He could inadvertently, for argument's sake—I am not certain this would be the case—upload a private image to that Dropbox. That could happen if he got confused about where an image was located, it could have been dragged to the wrong folder or it could accidently be uploaded to the wrong area. That may then notify people who were linked to that shared folder. He could possibly be liable under this legislation and face criminal charges. Again, it is a matter of evolution. There is the test of what is a reasonable consideration of criminal activity. We need to be aware of the modern technological implications that this has.

I welcome the legislation. I think it is very good. It is very well spirited. It is important to send a message to those who seek to exploit vulnerabilities and private video sharing between people who exchange information in a consensual manner and then exploit that and break that person's intimate trust. It is important that we do it now in this place in Western Australia to stop it happening in WA. I would also like the legislation to hold corporations and companies liable if they host that information. It is an important remedy that should be available to the citizens of Western Australia if a Western Australian company did it. There might already be some capacity for that. It is

an important avenue that we should pursue where we can and make sure that this legislation is as robust as possible to keep up with those technological evolutions.

MS C.M. ROWE (Belmont) [7.25 pm]: I rise to make a very brief contribution to the debate on the Criminal Law Amendment (Intimate Images) Bill 2018. I would like to start by taking the opportunity to congratulate the Attorney General on the bill that is before us this evening. I am very happy to be making a contribution.

The issue of revenge porn in our community and the sharing of intimate images of a person without their consent is a huge problem. It has ruinous effects on victim's lives. Listening to other members' contributions to this bill, it is quite apparent that nobody is immune from falling victim to such abuse. As the member for Morley pointed out, we have seen Hollywood actresses and famous male sports stars in Australia fall victim to it as well. Most worryingly is when young people, particularly young girls, fall victim to what will hopefully be crimes if this legislation is passed and we can stamp out this behaviour.

It is really important to note the comments made by the Minister for Women's Interests. She had some great comments to make, saying that it is important that we do not victim-blame the people who share intimate images in a consenting fashion with parties they are in a relationship with. They are not doing anything that is in any way a criminal offence. We all might think it is not necessarily what we would want to be doing but it is happening out there and we certainly do not want to be victim blaming. We want to make sure that people are protected in those instances where images are shared without their consent.

This bill will make it a criminal offence to distribute intimate images of a person when it is not consensual. That includes when a person is engaged in a private act when they can safely assume or reasonably expect to be afforded privacy, such as showering, using the toilet, undressing or engaging in a sexual act. It also includes circumstances in which an image has been created or altered in such a way as to make it appear as though the person depicted is engaged in those acts that I just mentioned, even though they may not have been.

The distribution of such images has quite a devastating effect on victims. I did quite a bit of research on victims and how they felt about their experience. Some of them found images of themselves online and they were not even aware that this had happened to them. Somebody had hacked into their social media account and so forth. It is troubling to read the impact that it is having.

As has been mentioned quite a bit this evening, we know that a lot of people, especially young people, often engage in sexting, which is the consensual sharing of intimate images via SMS or some other platform. Obviously, this bill does not prohibit that activity because, as I mentioned before, it is consensual, but we want to stamp out the practice of such photos being forwarded to other parties without the person's consent. Under this legislation, thankfully, that will become illegal. This activity is incredibly harmful to the victim, especially given the fact that once an image is on the internet, it will more than likely remain there in perpetuity. That can have a detrimental effect on someone's capacity to have relationships in the future and when seeking out employment opportunities.

An article from news.com.au on 17 November 2016 titled "Revenge porn has more than doubled over the past two years and now affects more than one in every five Australians" highlights just how big a problem this is in our society. The article states that revenge porn affects more than one in five Australians and that people who send photos of themselves are in the highest risk category of falling victim to this dehumanising and degrading abuse. The article explains—I must admit that I was quite surprised by this—that both men and women are vulnerable targets of revenge porn and that those most at risk, sadly, are disabled people, Indigenous people and young people. One in three teenagers aged between 16 and 19 reported this type of abuse. That is exactly what that behaviour is—it is abuse. It is designed only to humiliate and degrade the victim, which is why the government is choosing to act and make this a criminal offence.

This bill sets out the consequences of engaging in the distribution of intimate images without consent. Courts will be given the authority to order a person charged with such offences to remove or destroy the content. The penalties will be jail terms between 18 months and three years, and fines of up to $18 000. I believe that is the highest fine out of all the Australian jurisdictions, and I think that is really fantastic. The bill is clearly designed to act as a major deterrent. It is in the hope that we can stop the prevalence of revenge porn and its catastrophic emotional impact on those upon whom it is inflicted. It is very much time that such a law was introduced to protect people against revenge porn.

In an article on ABC online news on 28 June, titled "Revenge porn crackdown announced by WA Government offers hope for victims", Noelle Martin, who is now 23, details how a photograph that was taken without her knowledge from her social media page when she was 17 was altered and superimposed. It was basically an image of her in a pornographic pose. She described discovering this image on the internet was akin to "someone stripping your dignity and your humanity". She then went on to say that she has still been unsuccessful in having this content removed from the internet. That was a number of years ago now. This would continue to cause enormous distress

to her as an individual and, no doubt, to her family. Currently, there is absolutely no way to police such activity because there is no law that prohibits it. This bill will make it illegal to circulate intimate images without consent. However, as I mentioned previously, it will not be an offence to share intimate images between consenting parties. When images are distributed without a person's consent, it robs that person of their dignity and it is horrendously violating and is no doubt incredibly degrading.

Given the psychological damage caused by revenge porn, this legislation is so important. So many people are affected by this and it can cause so much pain and distress, especially when in many instances the image cannot be removed from the internet. Quite simply, this behaviour ruins lives. We as a government are saying that we will not tolerate this; it is completely unacceptable. I am certain that this bill will go a really long way in providing a real deterrent for people who engage in this activity and as a result I am hopeful that we will see far fewer victims of this abuse. Distributing intimate images without consent is degrading.

As a mother of two young girls, this is something that is a big concern. They are still very young, but it is a real concern. I do not want my children to grow up in an environment in which we tolerate that kind of behaviour. I would like to commend the bill to the house.

MR K.M. O'DONNELL (Kalgoorlie) [7.33 pm]: Greetings, Mr Acting Speaker. I rise to contribute to the debate on the Criminal Law Amendment (Intimate Images) Bill 2018. The member for Belmont made a comment that I did not realise, and it is devastating; one in five people in Australia are impacted by revenge porn. We are talking about five million people. That in itself is devastating.

As a former police officer, a father and a sporting coach, I have dealt with youth for over 34 years. My observations and experience are that it has become a way of life for youth. It has become "the norm" as you would say. Two 16-year-old boys I knew were laughing and chuckling near me, so I asked them what they were laughing about. They were looking at a phone. They said, "We just got another photo from a girl." I said, "What!" They showed me a photo of a 16-year-old girl standing in a bathroom in front of a full mirror taking a photograph of herself. The flash covered her face but nothing else. The rest of her body was clearly shown. I took the phone straightaway and ascertained who the girl was so that that could be stopped. I then spoke to the boys and they said it is common practice not just for the girls to do it but for the boys to do it—it was acceptable. I tried to tell them, and I have tried to tell others, that going down that track is not acceptable first-up, but down the road they might want to have a career change and do other things such as have a family. There is nothing worse than all of a sudden the mother's photo is spread out and she has got young children. It can be very embarrassing.

The second reading speech states that it is a degrading and dehumanising practice that violates personal privacy and dignity, and it does. I am glad that part 4 of the bill amends the Working with Children (Criminal Record Checking) Act 2004. When such acts are committed against a child, the convicted person cannot be permitted to work with children unless exceptional circumstances apply. I have tried to think what exceptional circumstances would apply. No doubt there probably is, but personally I would rather not see that person being cleared with a working with children card if that person has been convicted of doing this. I like the idea of young offenders still being able to go before the juvenile justice teams for first offences. That is a good thing. For those who do not know what a juvenile justice team is, the juvenile attends an office with their parent or guardian. A police officer is also in attendance. If the victim is also a juvenile, their parent or guardian is in attendance. A social worker from child protection is in attendance and then they go through the process. The victim gets to tell the offender how their actions affected them. They plan how the offender can move forward without offending against any other lady in society. I think that is a very good thing. I am glad that they are doing it. I also like the rectification order that judges can make. That is good too because it will remove everything. I am not going to talk anymore; I will be brief. I commend the government for doing this. It is a very good bill.

MR J.R. QUIGLEY (Butler — Attorney General) [7.38 pm] — in reply: I would like to thank members on all sides for their contributions during the second reading debate on the Criminal Law Amendment (Intimate Images) Bill 2018. I would particularly like to thank the opposition for confirming its support for this important piece of legislation. It is apparent from all the contributions that everyone in this place is aware of the issues that surround image-based abuse and most know a constituent, friend or family member who has been directly affected. The rapid emergence of this issue speaks to the way technology is constantly changing and the way we live and inter-react. The bill before us this evening addresses an election commitment to criminalise the non-consensual distribution of intimate images. It responds to the growing community concerns about the prevalence of and the harm caused by image-based abuse. It sends a strong message to the community that this conduct will no longer be tolerated.

The lead speaker for the opposition, the member for Hillarys, observed that the brevity of the bill belies its complexity. This is true. It means that I will need to defer some of the issues that have been raised to consideration in detail so that they can be dealt with in the appropriate detail. However, I wish to take this opportunity to

comment on some of the issues that were raised by the member for Hillarys and others. I want to start at the end of the comments in my notes because I have a note for the member for Dawesville. At the conclusion of his speech, he expressed a concern about the automatic uploading of intimate images. This legislation fits within the total matrix of criminal law. To put the member's mind at ease, section 23A of the Criminal Code is entitled "Unwilled acts and omissions" and section 23A(2) provides that a person is not criminally responsible for an unwilled act. That probably takes care of the member's concern.

The member for Hillarys inquired how several of the definitions contained in the Criminal Law Amendment (Intimate Images) Bill 2018 were arrived at. I am sure that we will discuss the specifics during the consideration in detail stage, but it might be helpful at this stage to provide some context around the development of the bill. The definitions in question were crafted in view of other provisions of the Criminal Code. The definitions adopted the equivalent legislation in other jurisdictions, including South Australia, Victoria, New South Wales, the Australian Capital Territory and the Northern Territory. They also took into account the national statement of principles that was developed by the former Law, Crime and Community Safety Council, now the Council of Attorneys-General. Concepts drawn from these sources were then road-tested with the key stakeholders and practitioners including the Office of the Director of Public Prosecutions, subject matter experts within the Western Australia Police Force, Legal Aid WA, the judiciary and the Commissioner for Children and Young People. The result is a carefully crafted and, we believe, balanced bill. The member for Hillarys also characterised the bill as a starting point. After all, in an emerging field such as this, how can we be sure to capture all relevant scenarios while, at the same time, avoiding inadvertent overreach?

The risk of overreach was also a dominant theme in the member for Cottesloe's contribution. It is needless to say that legislating in an emerging area carries risks and it would be unwise to assert that this legislation will not need to be adjusted again at some future point. However, I can assure members that every care has been taken to minimise the risks that have been identified, especially those that were raised by the member for Cottesloe. For example, he raised the concern that the bill would criminalise a mother who sends her husband a picture of their nude child in the bath. Although this would fall within the definition of an intimate image, the defences within the bill have been framed to ensure that normal, reasonable conduct is not captured by the new offence. It will depend whether the transmission was reasonable in the circumstances. The member also raised the spectre of people being criminalised for accidental distribution or the sketching of lewd caricatures. The practical hurdles to conviction in these scenarios are as numerous as they are formidable and I will happily enumerate them for the member during the consideration in detail stage rather than try to go through all the layers at the moment. The member for Cottesloe also suggested that conviction would lead to inclusion on sex offender registers. I can assure members that this is not the case. As I stated in my second reading speech, a conviction under this legislation will not result in registration under the Community Protection (Offender Reporting) Act.

Although I agree with the member for Cottesloe that we need to be careful not to unduly criminalise young people, which was one of my prime concerns, the answer is not to exempt them from the law. Saying a person was just young and naive could be a defence for a child throwing rocks off a bridge at car windscreens on the freeway. It is criminalised. There are many other acts that we can say are the result of young, naive behaviour, but are also subject to criminal law. I also take the member's point about the use of so-called recreational drugs, which has become normalised, but we still apply sanctions to that behaviour. We have to be sure that criminal law responds to this sort of conduct in a way that is age appropriate. For example, I would not think, and I have not heard it said here, that if a 14-year-old sexts an intimate image of themselves to a partner who then on-sends it without consent, the partner is anywhere near as culpable, morally or otherwise, as an adult who engages in the same conduct. A function of the Young Offenders Act is that cautions can be issued. If a complaint is made about someone's image being distributed in this way, it will depend how far it has gone. That will be within police discretion, as police have a discretion at the moment in all offences as to what level to charge at. In some cases, it might be appropriate to issue a formal caution notice, which may have the salutary effect upon the child and their parents.

The member for Hillarys also raised whether suppression orders could be made in connection with proceedings relating to the new offence or whether the prosecution of this offence would see the victim re-victimised by publication. No-one wants to see that happen, and this circumstance is covered by section 171 of the Criminal Procedure Act 2004. Section 171(4)(b) provides that the court may —

> make an order that prohibits the publication outside the courtroom of the whole of the proceedings, or a part or particular of them specified by the court;

The prosecutor, on behalf of the victim, can ask for the name of the victim or the image to be suppressed from publication outside the courtroom. Section 171(4)(c) provides that the court may —

> make an order that prohibits or restricts the publication outside the courtroom of any matter that is likely to lead members of the public to identify a victim of an offence.

This occurs regularly for victims of sexual assault. These powers of the court can be exercised at the initiative of the court or on application of a party to the case and will be available during criminal proceedings relating to the new distribution offence.

On the question of how such orders would interact with the Family Court, which was also raised by the member for Hillarys, I can advise the Legislative Assembly that family law proceedings are suppressed as a matter of course. I refer members to section 243 of the Family Court Act of Western Australia and also section 121 of the equivalent commonwealth legislation, the Family Law Act 1975. Those proceedings are suppressed, so it would not happen unless a specific order of the court was made to publish them. Otherwise, there cannot be any publication of proceedings. We saw a graphic example of the way the Family Court operates in that area with the recent mass murder down in Margaret River. I think the father of the deceased children wished to have a psychologist's report published on the quality of his parenting. It was part of proceedings in the Family Court of Western Australia. *The West Australian* launched an application in the Family Court to allow the publication of that report, which the father had seen because he was a party to the proceedings. That case was heard by Chief Judge Thackeray of the Family Court, who upheld the principle in section 243 of the Family Court Act that no publication is allowed.

Mr P.A. Katsambanis: I am comfortable with the issue of the Family Court on its own. The issue that I raised, which I will try to clarify quickly, is that Family Court proceedings are on foot. Those proceedings are suppressed. However, evidence provided within those proceedings is then used in an action for criminal proceedings under this legislation that we are introducing. I am concerned about that interface.

Mr J.R. QUIGLEY: Sure. We would then fall back on section 171(4)(b) of the Criminal Procedure Act, which provides that the court has the power to order suppression of publication outside the courtroom, on the application of any party to the proceedings; and section 171(4)(c), which provides that the court has the power to prevent the identification of the victim.

The member for Scarborough asked whether an education campaign will be conducted to support the bill. I am pleased to advise that my department—that is, the department for which I temporarily bear responsibility, the Department of Justice —

Mr P.A. Katsambanis: What are you telling us that we do not know?

Mr J.R. QUIGLEY: I am telling members that which everybody knows. When I spoke to the Chief Justice the other day, I said, "I'm temporarily the Attorney General". He asked me what I meant by that, and I said, "It's not a career. It's a privilege. It's an office that we pass through." In the span of our lives, even if we are in an office for six or eight years, we pass through it briefly. For as long as I am the Attorney General responsible for that department, I am able to advise that the Department of Education and Legal Aid Western Australia are working with the Department of Justice to develop an education campaign targeting students and young people. I understand this will be handled within the existing resources of Legal Aid, Education and Justice. The Department of Justice is also consulting with the Ministerial Youth Advisory Council to ensure that the campaign messages are informed by young people themselves. I do not think young people would listen to something if it was not expressed in their own idiom, or it certainly would not have as much traction.

I thank all members for their contributions to the second reading debate. This bill delivers on an election promise that we made. The one little hook in all this is that the federal government has been promising to bring in similar legislation. Its legislation will cover transmission of intimate material over a telephone network service, but not over wi-fi, which can happen in schools, shopping centres and other areas in which wi-fi is available. Its legislation constitutionally will not cover that. This bill has also been drawn with the federal legislation in mind. Under section 109 of the federal Constitution, if any inconsistencies arise between our legislation and the federal legislation, the federal law will take precedence on that particular subject matter or circumstance. We cannot think of any possible inconsistencies at the moment. However, the law has not passed through federal Parliament. The alternative was to stay our hand and wait for movement in Canberra. However, with a federal election on the horizon and not knowing what priority that legislation would get, we thought it would be imprudent to delay this legislation. It is clear that the Western Australian public wants this law. These offences are prevalent in our community. Therefore, we believed it was best to get on with it and bring our law up to date with the law in other states and territories and see what comes out of the national capital, if anything. We know that may or may not happen and that we may need to do a little adjustment. However, as I said earlier in my second reading response, our laws have been developed bearing in mind the laws passed in the jurisdictions of South Australia, Victoria, New South Wales, the Australian Capital Territory and the Northern Territory, and the general principles that came out of the Council of Attorneys-General. The best course is to do what the government has elected to do and proceed now. If any subsequent amendments or adjustments need to be made, I am sure all members will understand the need for that.

Once again, I thank all members for their contributions.

Question put and passed.

Bill read a second time.

Leave denied to proceed forthwith to third reading.

Consideration in Detail

Clause 1: Short title —

Mr P.A. KATSAMBANIS: I could probably fit this question in anywhere. However, following on from the Attorney General's summing up, I am concerned about any possible application of section 109 of the federal Constitution. I recognise that the Attorney General did say that according to his best advice, he cannot foresee any conflict at the moment. However, he also pointed out that any legislation that the commonwealth may pass is not certain at this stage. Has the Attorney General received specific advice about any issues that may arise from section 109 of the federal Constitution; and, if so, who was that advice received from, and would the Attorney General be prepared in good faith to provide that advice?

Mr J.R. QUIGLEY: That question does not really fit within any issues around clause 1. However, having said that, I will say that the Department of Justice has received early drafts of the commonwealth bill, and it appears that this bill does not conflict with those early drafts. However, who knows what the federal Parliament will do? As far as the department is concerned, the bill as currently drawn does not raise any constitutional issues. I hasten to repeat what I said recently in my second reading reply—namely, that this bill reflects the legislation in the jurisdictions of South Australia, the Northern Territory, the Australian Capital Territory, New South Wales et al.

Mr P.A. KATSAMBANIS: I accept the Attorney General's explanation. We still do not have the final version of the commonwealth bill —

Mr J.R. Quigley: If it passes one.

Mr P.A. KATSAMBANIS: If it passes one; and we will see what happens in the interim.

Clause put and passed.

Clause 2: Commencement —

Mr P.A. KATSAMBANIS: This pretty standard clause about when the act will come into operation reads —

(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.

It is the standard question from me: Why can all of the bill not come into operation after it has received royal assent or on a specific date? Is there any current intention that some parts or provisions of the bill may commence on different days?

Mr J.R. QUIGLEY: No, there is no current intention that other parts of the bill—other than that set out in clause 2—will start on separate days. The member for Hillarys has already remarked to the chamber that clause 2 is pretty standard. If the member recalls, it was the same with the Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017, which we said we would pass and then proclaim—as we did—as soon as everyone was set up for it. Once this bill completes its passage through Parliament, the police will be able to inform their e-crime section that it is coming and the courts will be able to update their systems, and then we will proclaim it. But there will be no substantial lag between assent and proclamation. It is not intended that there will be; we want to get this thing rolling as quickly as we can. But as soon as it has passed, the courts and police will know what is coming and they can update their systems, and in a matter of weeks we will proclaim the legislation.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Chapter XXVA inserted —

Mr P.A. KATSAMBANIS: This is one of the substantive clauses of the bill, and I will work through the issues as they appear in the bill. I do not intend to drag this out in any way, but I think we need to clarify some issues so that not only are members in this chamber on the same page, but also it might inform members in the other chamber. It will certainly inform the public and judiciary, who will be interpreting and utilising this bill.

On line 10 of page 3 of the bill, consent is given the meaning in proposed section 221BB, and that is very good. That is what consent will mean in this new provision of the Criminal Code. But immediately after the definition of "consent", we have "distributes". The definition is —

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

That is quite different from consent, which is defined in the proposed section. Distribution includes the meaning given in proposed section 221BC, and implies and actually means that necessarily the definition contained in proposed section 221BC is not the whole definition of "distributes". What else could be included in that distribution that is not contained in the new sections being introduced to the Criminal Code?

Mr J.R. QUIGLEY: Proposed section 221BC, of course, is very descriptive and prescriptive of what distributes means. "Distributes" includes the meaning given in proposed section 221BC, as the member has rightly pointed out. The member asked what else might be included. I heard this wag on TV the other night on *Grand Designs Australia*. He was speaking to the interviewer in front of his wife and said, "I've got ideas that I haven't even thought of yet"! And I suppose this takes care of that sort of eventuality—that there might be in the future, with the development of technology, some means of distribution that we do not yet know about, but that the courts would regard as distribution. So rather than any little nook in the development of technology arising and us having to come running back into this chamber to amend the act, it includes those things. If some new method of distribution arises out of the advancement of technology—in other words, an idea we have not yet thought of—it will be included.

Mr P.A. KATSAMBANIS: We will see how that works in practice. I do not have any question around the definition of "engaged in a private act"; if other members do, they can speak up. If not, I will move to the definition of "intimate image". I will not read in the definition at this stage, but I will refer to it. It means a still or moving image, so it covers the possibility of a photograph, video or any other type of technology. The first concept in the bill that I would like some clarification around from the Attorney General is —

> … in circumstances in which the person would reasonably expect to be afforded privacy —

We can all foresee a number of cases when that would be relatively clear-cut, such as in the comfort of people's own homes. I think there is plenty of established practice for people being in their backyard, surrounded by a fence. But can the Attorney General expand more broadly on what should be a reasonable expectation of being afforded privacy?

Mr J.R. QUIGLEY: Sure. 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 also the attendant circumstances. For example, an image of a person without clothing may not be an intimate image—for example, when a person is streaking at a sporting event. We would not regard that as an intimate image if it is of someone running across Optus Stadium without their gear on.

Mr P.A. Katsambanis: It is a public spot; that's pretty clear, yes.

Mr J.R. QUIGLEY: Yes. That definition includes —

> 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; …

So if we have a film of Victoria's Secret underwear catwalk models, that would not be an intimate image. The very purpose of them being in the Victoria's Secret show is to walk down the catwalk with as many people as possible watching them do so. We would have to look at the actual circumstances in which the image was taken to decide whether or not it is intimate. As the member quite rightly pointed out, we would say that an image taken of someone nude in their backyard is intimate. But if someone dropped their gear at a large gathering in the same yard with 50 people present, we would say, "There's nothing much intimate about that because they've done it in front of a crowd." The purpose of having the circumstances in the bill is to determine whether it was an intimate occasion or a public or semi-public occasion.

Mr P.A. KATSAMBANIS: I can understand the circumstances of someone streaking and clearly we can understand the circumstances of people in their bathroom, home or backyard. Without asking the Attorney General to express a legal opinion, would he consider that this aspect would cover somebody who may be in a public place late at night—a river, stream or beach—who chooses to skinny-dip on the basis that they think no-one is around and, in their expectation, no-one will see them but then someone takes their image, or would we rely on a reasonable-man test that if a person disrobes in public, they should not have the expectation that they will not be seen and therefore will not be photographed?

Mr J.R. QUIGLEY: We get down to the phrase "would reasonably expect". The member and I know that the reasonable person sits on the back seat of the Clapham omnibus —

Mr P.A. Katsambanis: Correct.

Mr J.R. QUIGLEY: But I do not know whether he would regard the back seat of the Clapham omnibus as a circumstance in which he could drop his gear and it be an intimate situation. I do not want to utter words at the ministerial table that are prescriptive of the judiciary because the circumstances, as the member would appreciate, are endless. If I can just do a variation of the proposition the member put to me: if a person went to the northern section of Swanbourne Beach and took off their clothes, they could hardly regard it as a circumstance in which they could reasonably expect to be afforded privacy because it is Perth's nudist beach, whereas in a change room they would expect to be afforded privacy. At the end of the day, it is really going to be a question of fact, not a question of law, for the court to decide having regard to all the attendant circumstances. The police use the phrase "time, place, circumstance" and I think that will be apposite here. The member cited a circumstance in which someone does it in the middle of the night with all care taken and whether they would expect to be photographed. I say probably not, and if someone took a photograph and transmitted it, there could be a case against them. But, as I said, I do not want to be prescriptive at the ministerial table. It is going to be for the court to decide what is reasonable in the circumstances. I had the privilege of attending a debate in the House of Lords during which they said that the most maligned person in England is that passenger on the Clapham omnibus because he gets loaded up with everything!

Mr P.A. KATSAMBANIS: I often wonder whether that reasonable person on the Clapham omnibus ever reached his destination or whether he is still stuck on the bus. Having taken a bus to Clapham Junction, I think it is, I looked around to see whether I could find that reasonable person.

Mr J.R. Quigley: Member, I don't think that a reasonable person would take their clothes off in the back seat.

Mr P.A. KATSAMBANIS: We would not expect that, and we would expect other criminal offences to be triggered if that happened.

Moving on with the definition of "intimate image", I do this with some form of reticence. I do not want to be considered to be pedantic, but I think we need clarification around this. The first issue is in proposed paragraph (a)(i) of the definition of "intimate image", which refers to —

> the person's genital area or anal area, whether bare or covered by underwear; …

This might sound silly, but the first question that arises is: what is underwear? What is the test of reasonableness of what is underwear and what is outerwear? Is lingerie underwear? Are garments that some people wear as underwear but other people choose to wear as their public persona while walking around in public or at home considered underwear? A similar question—the Attorney General could incorporate his answer—is: how do we deal with transparent or translucent clothing that is not underwear but may still end up being revealing, as is referred to in proposed subparagraph (i) and in proposed subparagraph (ii), which refers to the breasts of a person who either is female or identifies as female? How would this provision deal with the circumstance in which a person, still in relatively intimate and almost explicit circumstances, is not wearing underwear and their genital area, anal area or breasts are covered but the covering is of a see-through nature and may expose those body parts in an image that is seen by other people?

Mr J.R. QUIGLEY: I refer to proposed paragraph (a) of the definition of "intimate image" in proposed section 221BA. The first line refers to "a still or moving image, in any form" of that person's genital or anal area. That really covers the situation the member raised in which a person wears translucent clothing and their genital or anal area is photographed. The definition then goes on to say "whether bare or covered by underwear". It is going to be an offence if a person takes a photograph of the area bare; and, if the clothing is translucent, one will see a bare image through it, but if it is covered by underwear, it will not be bare. The amending legislation does not carry a separate definition of "underwear", but the courts will apply commonsense. If someone took a picture of my posterior while I was wearing a suit, there would be nothing that could possibly fall within the definition of an "intimate image" and it would be the same if I were wearing a pair of jeans. But what do we mean by undergarments? We mean underpants, knickers, G-strings—all those garments that human beings wear on their body first before they put on their clothes. I think that the courts should not have too much difficulty in deciding whether the person is covered by underwear, a suit or a pair of Levi's jeans. If I were in a portion of this building such as the gentlemen's toilets and I did not have my suit on but had my underpants on, although a person could not see any part of my skin, that would still be covered by the definition because I would not be expecting to be photographed in my undergarments, unless I was a model. I know it would be beyond the imagination of a lot of people in this chamber, but if I were a model, modelling, for example, Bonds underwear, that would be covered because I would not reasonably expect it to be a private or intimate occasion.

Mr S.K. L'Estrange: The Minister for Water in a mankini!

Mr J.R. QUIGLEY: That is not in the clause, and I do not want to contemplate that image! So that we do not take too long tonight, I think that is plain enough.

Mr P.A. KATSAMBANIS: I take the Attorney General's explanation. We will not get into a debate on this today. I am not necessarily sure about his indication that, under either proposed subparagraph (i) or (ii) of the definition of "intimate image", if one could see the body parts through transparent clothing that was not deemed to be underwear, it would be covered, but I take his explanation and I think the explanation he has put on the record would definitely help guide any judicial officer who was interpreting this proposed section. I want to go to proposed subparagraph (ii), which deals with the exposure of the breasts of a person who is either a female person or a transgender or intersex person identifying as female. At the end it says, "whether bare or covered by underwear". I am informed a little bit on this by some of the high-profile cases of public figures whose intimate photos have come into the public realm. I think it is pretty clear what "bare" means in relation to breasts, and I think it is pretty clear what "covered by underwear" means. Photographs have been circulated in which the breasts would have been otherwise bare except for the fact that they were covered by a strategically positioned arm or by flimsy pieces of clothing that may not have been underwear. They could still be classed in the realm of being relatively provocative or explicit. Would those types of scenarios be covered by this definition?

Mr J.R. QUIGLEY: We have to go back to time, place and circumstance all over again on this, and use our commonsense here. What is sought to be criminalised is the non-consensual transmission of photographs of people's naked breasts. It does not matter whether they are covered by underwear—that is, a brassiere, which is underwear—as opposed to, for example, a bathing costume, which is not underwear, when a person would be seen in a normal bathing costume. It is really images of naked breasts that are the issue. I do realise that it is fashion for people to wear very flimsy tops, where not a lot is left to the imagination, especially some of these outfits worn on red carpet events. That then takes us back to: was it an intimate image? The person was out on the red carpet, walking with a footballer to the Brownlow Medal awards. She wants to be seen; she is on display. The same applies to models and many women in the city in the summer who wear nice flouncy blouses and may not choose to wear a brassiere underneath. But that is not an intimate occasion; it is out and about. This is protecting people whose breasts are photographed in circumstances in which they never had any reasonable expectation of the photograph being transmitted to anyone. It does not matter that that person was in their undergarments at the time, because that could be equally embarrassing.

Mr P.A. KATSAMBANIS: I take the Attorney General's explanation. I understand that we are dealing with exceptions rather than what is most likely to be dealt with under this proposed legislation. Taking the model scenario, we have often seen photographs in which a model is dressed in perhaps flimsy clothing, which I think is the word the Attorney General used, but still with the expectation—in the model's mind, anyway—that they were not going to reveal anything beyond what is traditionally covered by that flimsy clothing, and all of a sudden there is a wardrobe malfunction in public; say, for instance, at a modelling show with models who do not model underwear but just model clothes. There was also the scenario of Janet Jackson at the Super Bowl some years ago in which there was a wardrobe malfunction, and photographs were taken. Obviously, it is a public event and a public place, but it is really then a question of the level of privacy. Obviously, Ms Jackson and any of the models there expected to be photographed—that is what they were there for; they knew what they were getting into—but they had no expectation that there would be a wardrobe malfunction and that their breasts or rear ends or other parts would be photographed. It is also the case sometimes when, inadvertently, celebrities are stalked by paparazzi and rather revealing photos are taken of them when they are getting out of motor vehicles. They clearly had no expectation of showing those parts of their body, but a persistent, stalker-type paparazzi has managed to acquire those photographs. How do we deal with those admittedly relatively rare and esoteric cases? As we know, they might be rare, but they do happen; they are not totally and utterly uncommon.

Mr J.R. QUIGLEY: Certainly. Of course, paparazzi do like to get photographs of a lady alighting from a vehicle, and try to snap them when they can get a little bit of their knickers or whatever—their undergarments around their genital area. That is what paparazzi do with those great big metre-long lenses. In those circumstances, a person could be charged. It would be up to a court to decide whether a woman alighting from a vehicle could reasonably expect privacy in relation to her genital area. I would say that any woman alighting from a vehicle in public would have a reasonable expectation of privacy in relation to her genital area, and not have the expectation that someone with a three-foot-long zoom lens, two blocks away, would try to snap her undergarments. We would say that those circumstances should go before the courts, and let the courts determine whether it was reasonable in all the circumstances.

As to the wardrobe malfunction, if someone is taking photographs at an event like that and then someone's skirt falls off, either by design or otherwise, and the person is standing there naked from the waist down—perhaps no underwear—taking a photo in those circumstances is, of course, not an offence. However, to then go and sell that image or transmit it without the model's consent—I do not know what Janet Jackson's situation was at the Super Bowl, but that is live —

Mr P.A. Katsambanis: The member for Murray–Wellington is conscious of it! She is the one who prompted the name!

Mr J.R. QUIGLEY: If someone then further transmitted that image, they would be running a big risk because we want those people before the courts. We say that those people are entitled to their privacy, and let the court decide.

Mr P.A. KATSAMBANIS: Paragraph (b) on page 4, under the definition of "intimate image", states that it includes an "image, in any form, that has been created or altered to appear to show any of the things". In many cases, these sorts of images are never taken or created with the consent of the victim or the person depicted in the images. It covers photoshopping and stuff like that, but it also appears to cover things such as—the Attorney General is of the vintage to remember—those old Larry Pickering calendars that exposed public figures to mild humiliation. Back in the day he would depict public figures, both male and female, in cartoon form. Would that form of cartoon be covered? I preface this by saying that we have seen more nefarious cartoons than that in Australia. Many years ago a newsreader was depicted in a cartoon in what may have been a truck-stop magazine. I do not recall the exact circumstances, but I recall a female newsreader's caricature appearing in a magazine, which was drawn so as to indicate she was revealing her body in an explicit manner. I think that would be covered under the existing law. There are probably more nefarious things, but I am more interested in the Larry Pickering–type approach, and also, heaven forbid, if Alston were to draw some of us in states of undress in his cartoons, would that be picked up by paragraph (b) of the definition of "intimate image"?

Mr J.R. QUIGLEY: Alston would not be prosecuted if he were to draw me in a state of undress with Tarzan's physique! But, seriously, a question about caricatures was raised during the second reading stage of the bill. The member has to bear in mind, firstly, the definition of "intimate image". The bill states that "intimate image" —

> (a) means a still or moving image … that shows, in circumstances in which the person would reasonably expect to be afforded privacy —
>
> (i) the person's genital area or anal area …

That definition would catch someone if an image was altered by photoshopping and putting someone else in that photo. We must turn to the offences. In dealing with the caricature issue raised by the member for Hillarys and, I think, the member for Cottesloe, we must go to the offences under proposed section 221BD, "Distribution of an intimate image". Proposed section 221BD3(d) states —

> A reasonable person would consider the distribution of the image to be acceptable, having regard to each of the following …

Because we are talking about cartoons in the media, the circumstances are —

> (i) the nature and content of the image;
>
> (ii) the circumstances in which the image was distributed;
>
> (iii) the age, mental capacity, vulnerability or other relevant circumstances of the depicted person;
>
> (iv) the degree to which the accused's actions affect the privacy of the depicted person;
>
> (v) the relationship between the accuse and the depicted person;
>
> (vi) any other relevant matters.

A lot of these offences would be applicable in the cartoon situation. Once again the court would have to decide the test on the basis of reasonableness having regard to the matters set out in proposed new section 221BD.

Under proposed section 221BA, the definition of "intimate image" states in paragraph (b) that it includes an image, in any form, member for Cottesloe, "that has been created or altered to appear to show any of the things mentioned in paragraph (a)". Of course, they are genitalia, the anal area or the breasts. An image would have to appear to be showing one of those things and not showing some mock-up or some sketch. It has to show a person's genitalia, breast or anal area.

Mr P.A. KATSAMBANIS: As I said in my second reading contribution, I always err on the side of caution when there are these grey areas to make sure that the victim has appropriate protection. But it seems that in these grey area sorts of matters there could be a prima facie case and then it would be up to the accused person to plead these definitions.

Mr J.R. Quigley: Or the police whilst investigating would have regard to that.

Mr P.A. KATSAMBANIS: I was about to say that, or in better circumstances, the police would take that into account, and certainly the DPP would take that into account when considering whether to prosecute. I am comfortable with the Attorney General's explanation because this is a relatively new area. We cannot cover off on

every eventuality. We are considering some of those things tonight and I think on balance there are defences, as the Attorney General pointed out. It is probably the right way to deal with it. I do not have any more issues to raise on this.

Mr J.R. QUIGLEY: I will make one comment. The test always is whether the reasonable person would consider the distribution of the image to be acceptable in the circumstances. One of the most powerful intimate images ever published was that of Kim Phúc. On 8 June 1972 she was photographed running down the street in Vietnam. All her clothes had been burnt by napalm, and her skin was blistering. That photo changed the debate about the Vietnam War. Someone could say that even though she was totally naked, in the circumstances the publication of that photograph was reasonable. The most powerful air force in the world had set this eight-year-old girl on fire. These matters always have to be considered in the context of time, place and circumstance when applying the test of reasonableness.

Mr P.A. KATSAMBANIS: Unless other members want to discuss the definition of "law enforcement agency", I want to now move to proposed section 221BB and the term "consent". I am relatively comfortable with this provision. It goes through various subsections and raises a few questions that will, I think, be litigated in time. We could go down all sorts of culs-de-sac tonight that may not necessarily be helpful. In a more general context in relation to consent, the threshold question that I think needs to be clarified here is the issue of how a victim communicates the withdrawal of consent to the other party. I know a lot of it will be evidentiary and depend on each individual fact or circumstance but when an accused person says, "I didn't receive the withdrawal", how would this definition or the rest of the provisions of this bill assist the victim in proving up that they communicated it? I raise this in the context of verbal communication in the main. If there is a text message or an email or a letter, there would be evidence there. But in a he-said, she-said scenario, where would there be protection for the individual in those circumstances?

Mr J.R. QUIGLEY: Proposed section 221BB(2) states —

> ... consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit or any fraudulent means.

That really repeats the definition of "consent" in section 319 of the Criminal Code dealing with sexual offences.

If a person whose body parts have been photographed consents to its distribution to another person, that is it. They cannot then ex post facto say, "I withdraw my offence" and therefore the offence is created ex post facto. That cannot happen. But giving consent to limited publication is covered by proposed subsection (3), which states —

> A person who consents to the distribution of an intimate image of themselves on a particular occasion is not, only because of that fact, to be regarded as having consented to the distribution of the image or any other image on another occasion.

Having given consent, one cannot withdraw the consent to make that consented transmission suddenly a criminal offence. But giving consent on a limited basis does not infer or carry with it an imputation that the person is consenting to a further distribution or wider distribution. Proposed subsection (4) states —

> A person who consents to the distribution of an intimate image of themselves ... is not, only because of that fact, to be regarded as having consented to the distribution ... or any other image ...

If the person distributes their own intimate image in a limited way, that cannot then be said to be consent to wider distribution. I make that clear. It is not like a sex act where during the sexual act consent is withdrawn, because the person can immediately desist from engagement in that act. Once a person has consented to the distribution of their image, if they withdraw consent, there is nothing they can do to withdraw the distribution, like they can desist from a sexual act. I do not know whether that helps the member.

Mr P.A. KATSAMBANIS: It probably helps in communicating to the public that they should just be careful what they consent to. My question is around when someone does offer consent and whether it is done voluntarily, or whether the elements in proposed section 221BB(2) cannot be made out that consent was obtained by force, threat, intimidation, deceit or any fraudulent means. They offer consent at a point in time. Someone provides a photo to a friend or a partner or whoever and the partner asks, "Can I distribute it to my mates? Can I post it on the internet?" Consent is given: "Just go for your life." Then there are the second thoughts and the regrets.

Mr J.R. Quigley: There's no unscrambling the eggs.

Mr P.A. KATSAMBANIS: Unfortunately, yes. I agree with the Attorney General that if the victim thought at some point, "This isn't right. I was silly. I was naive. I now withdraw consent", that we cannot prosecute the distributor, if you like, for events that happened prior to the withdrawal of consent.

Then we get into this he-said, she-said and "Stop distributing it." The issue here is a victim who has previously consented or is deemed to have consented at some point in time and makes it very clear that they no longer consent. What happens to the distributor, if you like, is probably clearer. The distributor cannot keep distributing it. That is pretty clear in proposed subsection (3), whereby if consent is given on a particular basis, it cannot be regarded as consent for broader distribution. I am paraphrasing. It is out in the public realm. The victim has very limited ability to contact the third parties who received it, and may not even know who all of them are, and particularly in this circumstance may have no way of communicating withdrawal of consent to those other third parties. Would they still be able to distribute it?

In asking this question, I note that the rectification order that is available later on in clause 4—in proposed section 221BE—is triggered by a charge. Again, when the first distributor cannot be charged, is the victim just left to the fact that they made one silly mistake and the image is going to be out there and live on the internet and be continually transmitted forever?

Mr J.R. QUIGLEY: The first thing I would like to say in response to the member's contribution is that there cannot be deemed consent; there has to be actual consent. There is no deeming provision. They have to give actual consent. Let us look at what happens. The person whose intimate image is captured gives consent to its distribution. Subsequently, once it is out there in the public realm on the internet, it just keeps going and going and the person feels harassed by this and now wishes to withdraw consent. This will not involve the people in an offence because consent has been given but they can contact the commonwealth's eSafety Commissioner, Ms Julie Inman Grant. In circumstances like this, the eSafety Commissioner will contact the provider with a request for a safety takedown. If it is an intimate image, that is likely to be met with a favourable response by the Office of the eSafety Commissioner, a commonwealth agency. I cannot take it beyond that. Once the consent is given, it is out there. It is not an offence then but the eSafety Commissioner, Ms Julie Inman Grant, can prevail upon the provider to take it down. If it involves an intimate relationship—we have talked about sexual abuse via the transmission of images—the person might be going to the Magistrates Court to get a restraining order.

It might be a misconduct restraining order as opposed to a violence restraining order, if there is no evidence of violence, and in the course of those proceedings they can seek from the court a take-down order as described in the legislation, or a restraint from further distribution. They can restrain the person from any further distribution in a family violence restraining order. That would be the way home in circumstances in which it is an intimate relationship.

Mr P.A. KATSAMBANIS: I think that is relatively helpful. Again, it sends a strong message that once it is out there, controlling its distribution is extraordinarily difficult. Even if elements of coercion or whatever can be proven, once it is there, it is there; it is extraordinarily difficult in the modern age to remove it. It was well described by the member for Dawesville, mind you, who has a lot more practical knowledge of young people's use of the internet. I am comfortable with the definition of "distributes". I think that is a relatively good definition. Sometimes it depends on the evidence; the factual circumstances of each particular case.

I go to proposed section 221BD, "Distribution of intimate image", at clause 4 of the bill. There is a definition there for "media activity purposes". I note that it states —

> (a) material having the character of news, current affairs or a documentary; or
>
> (b) material consisting of commentary or opinion on, or analysis of, news, current affairs, or a documentary.

My question is: how broad is this in practice? What used to be referred to as women's magazines, magazines such as *New Idea*, *The Australian Women's Weekly* and *Woman's Day*—I am not necessarily sure they all still exist, or the more truck-stop equivalents; I think the Attorney General understands what I mean by the truck-stop equivalents of those—may choose to run an image and claim that it was for media activity purposes. Would those magazines be covered by news, current affairs or a documentary, or do they fall into that crack of general public interest but do not have any of those elements of news or current affairs; it is really just celebrity gossip rather than news, current affairs or a documentary?

Mr J.R. QUIGLEY: Before answering the member's question, I would like to clarify an answer that I gave in my previous commentary, and that was that they could get a take-down order in the course of violence restraining proceedings. They cannot get a take-down order; they can get an order against further distribution. Where I misspoke was I meant that the take-down order is available, we would call it a rectification order, once a person is charged—not convicted. As soon as a person is charged, under section 221BE the court may order rectification and issue the take-down order. I just wanted to clarify that.

In relation to the media defences, this government did not want to fetter in any way genuine media reporting—not titillation, which is not genuine media reporting. The material has to have the character of news, current affairs or

a documentary. In my youth, I recall a magazine—I do not think it was *Woman's Day*, it was a magazine called *Pix*—that depicted on page 3 women in underwear; they did not have bare breasts. It was in the nature of titillation rather than having any news element to it at all. I think that a court applying commonsense could soon discern whether the publication had the character of news. I mentioned earlier the case of Kim Phuc who was set alight by a napalm bomb on 8 June 1972. That was a compelling news story that changed a whole attitude to a war. I think the courts applying commonsense could soon determine whether it was news, current affairs or a documentary; for example, if there was a documentary on some other countries and it was the custom in some other countries for women to be bare breasted. If there were a documentary running on this, of course there is a media defence available because of that. If it were a show on let us see who has the biggest boobs or something like that, and they were going around photographing bare-breasted people in different countries for that purpose, it is hardly in the nature of a documentary.

My experience in the last 20 to 25 years has been that the news media, especially in Western Australia, which is my main exposure to it, has been responsible by pixilating intimate images. One does not pick up *The West Australian* and see offensive photographs that are not pixilated both as to identity and to relevant body parts. The government believes that that speaks for itself. We certainly do not want to bring in any legislation that could be a fetter on genuine news distribution or the analysis of news et cetera. We do not want to be a society that fetters a free and open press. The aim of the defence is to ensure that these new criminal offences do not have a chilling effect on the freedom of speech or the debate of subjects in our democracy.

Mr P.A. KATSAMBANIS: I accept that explanation. I think a lot of this is going to be up to the interpretation of specific facts and circumstances. I, like the Attorney General, have confidence that our judiciary, be it in the District Court or the Magistrates Court, will be able to determine this. Over time, I think those determinations will guide police and prosecutors as well. I am comfortable with that.

Obviously proposed section 221BD(2) creates the offence. I am not at this stage going to ask why the penalty was set at three years and not some other amount.

Mr J.R. Quigley: Most summary offences are. We had that discussion before. Most summary offences had that as a maximum; not all.

Mr P.A. KATSAMBANIS: Sure. Firstly, is it the intention that the majority of these matters will be dealt with summarily and, secondly, without wanting to ask the Attorney General how long a piece of string is, what is the expected volume of cases over an annual or three-yearly basis that will be brought before the courts now that we are creating this new criminal offence?

Mr J.R. QUIGLEY: I am sorry, I missed the first part of the question.

Mr P.A. KATSAMBANIS: One, is the intention that most of these matters will be tried summarily; and, two, what is the estimated volume of cases? I do not want to ask the Attorney General how long is a piece of string, but there must be some evidence from the reporting to police of these matters, and perhaps from the reporting back by police that they have difficulty prosecuting under the existing legislation.

Mr J.R. QUIGLEY: It is how long is a piece of string—we simply do not know. A lot of things come into play as to the type of complaints. For example, a lot of the complaints that I have heard about involve people who are quite young. The member for Cottesloe referred to how it has become passé among young people to engage in sexting. The police can take different actions in their investigation of these matters. They might choose just to issue a caution. They might refer the young person to a panel under the Young Offenders Act. We cannot put a specific figure on that. However, it is important to note that subsection (2) of proposed section 221BD provides —

> A person commits a crime if —
>
> (a) the person distributes an intimate image of another person (the ***depicted person***); and
>
> (b) the depicted person does not consent to the distribution.

By nominating that the person has committed a crime, the matter may be dealt with on indictment—therefore, it is an each-way offence—at the election of the prosecutor. If it is a crime, it needs to be at the election of the Director of Public Prosecutions—which would apply in the most serious cases—that the person be taken before a court. Section 5 of the Criminal Code provides that if an indictable offence has a summary conviction penalty, the court is to try the charge summarily unless the prosecutor or the accused person applies to have the matter heard on indictment. The court may decide the charge is to be tried on indictment of its own motion if, among other things, the circumstances of the offending were so serious that the punishment would be inadequate in the lower court; or the charge forms part of a course of conduct in which the offences were committed, so it is part of a more pervasive and serious course of conduct; or there is a co-accused who is to be tried on indictment, in which

circumstance both cases would be sent up on indictment; or that the interests of justice require that the matter be heard on indictment.

For example, in a media case there might be a debate about whether the material broadcast had the character of news, current affairs or a documentary. The media organisation might complain that the criminal offence was being used to fetter or have a chilling effect on public debate of a matter of public interest. In that case, the defendant might apply to the court and say the matter is of such importance to our democracy that it should be heard before a jury and let the community decide. We cannot at this stage predict all those variables. We live in hope that this will do what the member hopes it will do. We live in hope when we are in this chamber, do we not, member? We hope this will send a message to the community that it is not on to distribute intimate images of a person without that person's consent.

Mr P.A. KATSAMBANIS: I thank the Attorney General. I agree that this is about the hope that we will send a message to the community. I made it clear in my contribution to the second reading debate that a lot of this will rely on that message getting through.

I move now to the defences that are contained in proposed section 221BD(3), which provides —

> It is a defence to a charge under subsection (2) to prove that —
>
> (a) the distribution of the image was for a genuine scientific, educational or medical purpose; or …

I note that "artistic purposes" has been excluded. I hope that was done specifically upon consideration. In the past, we have often seen situations in which explicit images are displayed, either with or without consent, and often of very young persons who cannot possibly consent under this legislation or generally. The claim has been made that those images are being displayed for artistic reasons, and we should not interfere with art. I want to clarify 100 per cent that these sorts of claims will not be considered as a defence in these circumstances.

Mr J.R. QUIGLEY: I would not expect that if it was a photograph of a nude person taken without consent and put on public display, it would fit within the defences provided for in this proposed section. It goes on to provide —

> (d) a reasonable person would consider the distribution of the image to be acceptable, having regard to each of the following (to the extent relevant) —
>
> (i) the nature and content of the image; …

I notice that an artist is travelling the world and taking mass photographs of nude people. I think that artist did that recently on top of a Myer's store in Melbourne. If such a photograph were put on display, would it be regarded as an intimate occasion? It probably would not be. Would we consider the distribution of such a photograph acceptable having regard to the nature and content of the image, which shows, in the distance, a mass of nude people holding yellow umbrellas, or whatever they were holding? We would not think it was a great invasion of privacy. It goes on to say —

> (ii) the circumstances in which the image was distributed; …

I think the question the member asked about artistic distribution may fit within paragraph (d), but only in limited circumstances. I think the member can see the purpose of paragraph (a), namely, that we do not want to put a fetter on scientific, educational or medical advancement.

Mr P.A. KATSAMBANIS: I do see that. It is excellent that that has been clarified, because there have been issues around the public display of photographs of naked very young children, in the name of art. That is offensive to many people in our society, including me. It is clear that in those circumstances, these defences would not apply. In the circumstances that the Attorney General described, yes, I accept that if an artist puts out a call for people to come to a public place in Melbourne, Perth, San Francisco or wherever, and display all their bodily parts because he is going to take a photo and display it in galleries, it is pretty much an open and shut case that that image will be distributed, and that should not be fettered.

Proposed section 221BD(3) provides also —

> (c) the person who distributed the image —
>
> (i) distributed the image for media activity purposes; and
>
> (ii) did not intend the distribution to cause harm to the depicted person; and
>
> (iii) reasonably believed the distribution to be in the public interest;
>
> or

These things are inclusive—they all need to be met. We have dealt with the definition of "public interest" in all sorts of cases, including defamation and others, mainly in other jurisdictions but also in the Western Australian jurisdiction. I think that is relatively straightforward. However, it introduces an element of intention, namely, that

there was no intention to cause harm to the depicted person by the distribution of that material. Again, the interpretation of paragraph (c) will be based on evidence, and in each case, it will be different.

But that raises the question of the matter that members raised in debate—including the member for Cottesloe, who put it very, very well—that there could be a circumstance in which a person has a photograph on their phone or their computer that has been given to them in good faith that they will not distribute it. It has been taken, and the person depicted knows the other person has it, and then that other person clumsily, by pressing a button by mistake or uploading the picture by mistake, ends up distributing that photo to a third party, clearly without consent for distribution. Those errors, mistakes and clumsy fingers do not seem to be covered in the defence section. I am not necessarily sure that paragraph (d) offers comfort in those circumstances, so I seek some sort of clarification from the Attorney General. If somebody did distribute this sort of image, but clearly did it by mistake—they had no intention of doing it and it was simply a moment of someone being not so good with the technology or just a genuine error, rather than a lapse in judgement—how would that be covered in the defences?

Mr J.R. QUIGLEY: The member has skilfully posed a question that could take about three or four weeks of law lectures to unravel, because, of course, it covers those important areas of the Criminal Code between sections 23A, 23B and 24. They deal with unwilled acts or omissions. Section 23A(2) reads —

> A person is not criminally responsible for an act or omission which occurs independently of the exercise of the person's will.

That covers the scenario that the member for Cottesloe raised; that is, they have a setting on their computer so that when the image comes in, it is automatically distributed.

Mr P.A. Katsambanis: I think the member for Dawesville raised that.

Mr J.R. QUIGLEY: The member for Hillarys is quite right. If it is uploaded automatically, that happens independently of the person's will and therefore no criminal liability attaches.

Mr P.A. Katsambanis: Or by hacking, for that matter.

Mr J.R. QUIGLEY: Yes. Subsection (2) of Section 24, "Accident", reads —

> A person is not criminally responsible for an event which occurs by accident.

That is, it was not foreseeable that the distribution would occur by reason of the person's act. But when we get down to pressing the wrong button on a computer, which is what the member for Hillarys alluded to, I think that would be covered by section 24 of the Criminal Code, "Mistake of fact", which reads —

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

That does not cover negligence, but it covers a mistake of fact. He thought he was doing this, but by reason of the way the computer works, in fact he was doing that. He or she could then plead a mistake of fact. They thought that that button did this, but it did that. But it would not cover negligence, when the person knew what the button did but casually and negligently pressed it, and that image was sent out to the world. However, if there was a genuine mistake of fact, that section would cover it. We have to look at those early sections of the Criminal Code to answer the member's question.

Mr P.A. KATSAMBANIS: Thank you. That again goes to show that this is part of our Criminal Code. The Criminal Law Amendment (Intimate Images) Bill 2018 will become part of our Criminal Code and criminal law in Western Australia, and those provisions will apply. The Attorney General read them out. In reading them, it is quite clear that they are clumsy and may be subject to significant legal debate in some cases. But those protections exist, and it is a good clarification. I do not have any more questions around proposed section 221BD, but I think the member for Cottesloe has. I will allow him to ask about proposed section 221BD, and then I will move to the next proposed section in clause 4.

Dr D.J. HONEY: My question is about intent. This bill does not include a defence of intent. I understand that for serious criminal matters, intent often forms part of a defence; it has to be proved that someone intended to cause harm. All the examples I have heard of the egregious cases that have occurred have shown clear intent to cause harm, but I do not see that lack of intent to harm is a defence. I just wondered whether the Attorney General could explain whether that was quite conscious or whether intent is covered. Just to be clear, proposed section 221BD(3)(c) refers to intent for media activity, but it seems to ignore intent for everyone else in the community.

Mr J.R. QUIGLEY: Of course. I am happy to answer that. No, an intention to cause harm is not an element of the offence. I will first deal with proposed section 221BD(3)(c), to which the member referred. That is conjunctive.

We are talking about a person who distributes the image for media activity—that is defined earlier; we have been through that—and then there is the conjunctive "and". It is not just enough that it is for media activity —

> and
>
> (ii) did not intend the distribution to cause harm to the depicted person; …

So it was just intending to further the public debate —

> and
>
> (iii) reasonably believed the distribution to be in the public interest;

Intention there is not an element of the offence as such; it is a defence that they did not intend to cause harm, that it was part of their media activity, and it was believed to be in the public interest. But to prove the offence, one does not have to prove that there was an intention to cause harm or otherwise. What we are dealing with here is non-consensual distribution. That, by itself, is unacceptable, irrespective of any harm that may or may not occur. Harm or intention to cause harm does not have to be proved; it just has to be proved that it was an intimate body image that was distributed without consent. I do not know whether I need to take that any further.

Dr D.J. Honey: I think that is clear. I have another question, though.

Mr J.R. QUIGLEY: Yes.

Dr D.J. HONEY: Does the legislation in other jurisdictions cover intent or does all the legislation in other jurisdictions exclude intent?

Mr J.R. QUIGLEY: Intention is an interesting subject at criminal law. For an offence, there has to be actus reus, an action, and mens rea, the mental element connected to the action. Beyond that, a specific intention to achieve a particular outcome does not have to be proved. There has to be an action of distribution and there has to be the mental element in the sense that it is a willed act, but the prosecution does not have to prove any specific intention to cause harm or do anything else.

Mr P.A. KATSAMBANIS: I move on to proposed new section 221BE, which is about orders for rectification. I seek a little bit of clarity.

Mr J.R. Quigley: Member, before you go on, can you grant me an indulgence for a moment so that I can give a supplementary answer to the member for Cottesloe?

Mr P.A. KATSAMBANIS: I will grant the Attorney an indulgence!

Mr J.R. QUIGLEY: I said that the legislation was drawn in line with national principles. It has just been drawn to my attention that principle 14 of the "National Statement of Principles Relating to the Criminalisation of Non-consensual Sharing of Intimate Images" states —

> … sharing intimate images should not require proof of an *intention* to cause harm or distress or another outcome.

Leaving the element of intention out was in compliance with the national principles. I am sorry, member, but I wanted to give that supplementary answer to your colleague.

Mr P.A. KATSAMBANIS: It raises an interesting issue. Clearly, an intent to cause distress or harm is different from an intent to send.

Mr J.R. Quigley: That's the mens rea.

Mr P.A. KATSAMBANIS: Yes, that is the mens rea part and, as the Attorney General pointed out, it has been codified. Large parts of the old common law, actus reus and mens rea, have been codified in the Criminal Code. I think there is a fair understanding of that.

Moving on to the rectification orders. I support rectification orders and think that they are great. How far can they go? I ask that question—I do not want it to sound glib—but clearly the prosecution can get a rectification order against the person charged. There is no doubt about that, which is great. But can that charge against the offender trigger the ability of a rectification order, or what in civil proceedings sometimes we might call cease and desist orders, on third parties who may have received the image, which may well have triggered the charge, but where there is no way of charging them because there is no evidence that they have on-distributed it, if you like, or further distributed it? A victim would want the level of comfort that the recipients of the distributed image will not continue to distribute it even after the original distributor was charged and eventually convicted.

Mr J.R. QUIGLEY: Of course, it would be reckless of a subsequent person, having seeing someone charged with making the distribution, to then flout the law and compound the offence by committing one himself.

Mr P.A. Katsambanis: Except that they may not necessarily know.

Mr J.R. QUIGLEY: That is true.

Mr P.A. Katsambanis: We are talking about the internet here.

Mr J.R. QUIGLEY: If they do not know and they have no knowledge of these events, it would be very hard for the court to make an order against them. The short answer to the question, of course, is found in proposed section 221BE(2), which provides —

> If a person is charged with an intimate image offence, the court may order the person to take reasonable actions 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.

We understand the difficulties of rectification notices. I ask this question rhetorically because we asked it of ourselves. Is it therefore better to leave rectification orders out or put them in? That is a rhetorical question and I do not expect the member to answer it. We answered in the affirmative to give the courts the best chance of ordering an offender to require someone to return the image to them, destroy it, take it down or whatever. We recognise that there are limits to the jurisdiction of Western Australian courts. I note that some companies, such as Facebook, have refused to take down the most offensive publications—not intimate images—such as those posted by Holocaust deniers, who offend people of the Jewish race. They refuse to take them down. What can an Australian court do when this is honed somewhere else? I get back to that rhetorical question: is it better to put our best rectification order in or leave it out because of the practical limits of the jurisdiction? We opted to put it in and it might be that the person using their best efforts can recover some of these photographs or cause someone else who has posted them to take them down. This is our genuine best effort at rectification.

Mr P.A. KATSAMBANIS: In that context, I agree. I think I made that point in my second reading contribution and the Attorney has made the point that we err on the side of giving victims more rather than fewer powers. In proposed subsection (2), to which the Attorney General referred, there is a series of actions that can be ordered by the court—remove, retract, recover, delete, destroy or forfeit any intimate image. Is the Attorney General comfortable that that covers a situation, perhaps by the use of the word "retract" or other words in this subsection, of a court being able to order the person charged to communicate to each and every person to whom they personally distributed the image that they ought not distribute it any further and that they had no consent to distribute it?

Mr J.R. QUIGLEY: If one goes to the language in proposed section 221BE(2), the court has the power to order the defendant to take reasonable steps. We cannot say that the offender has to contact everyone one who has received the image, because they might not know.

Mr P.A. Katsambanis: You would know everyone you sent it to.

Mr J.R. QUIGLEY: That is right. The offender would know everyone they sent it to and it might be that they are asked to remove, retract recover or delete and further ask that person to request of those that he or she has on-forwarded it to do likewise.

Mr P.A. KATSAMBANIS: I am comfortable with that. I do not have any other questions on this or any other clause. Thank you, Attorney, for your indulgence in the consideration in detail stage.

Mr J.R. Quigley: Not at all, member, not at all.

Clause put and passed.

Clauses 5 to 14 put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

MR J.R. QUIGLEY (Butler — Attorney General) [9.29 pm]: I move —

> That the bill be now read a third time.

MR P.A. KATSAMBANIS (Hillarys) [9.29 pm]: With the indulgence of the house, I thank the Attorney General for introducing the Criminal Law Amendment (Intimate Images) Bill 2018. It has bipartisan support. We wish it well; I do not want to delay its passage any further. I thank all the members who contributed. The majority of contributions from all members have been very useful and have highlighted not just the importance of this issue but also its complexity in an ever-changing environment. Community attitudes are changing and technology is always rapidly advancing, and our law is trying to catch up. There have been far too many victims in the space of image-based abuse, and, hopefully, this legislation will provide them with some comfort in the future and will ensure that the perpetrators of image-based abuse are properly charged and convicted for the great harm and distress they have caused their victims.

I thank the Attorney General for his indulgence in consideration in detail as well. I think that process has teased out some information that will be very useful for practitioners, police and the courts interpreting this legislation in the future. I think it has been implied by the Attorney General, and I take it as a given, that if issues arise in the practical application of this legislation—which is groundbreaking in many ways and covers some uncharted waters—the government and the Attorney General will very quickly bring amendments to this place to make sure that the totality of the protection provided to victims is maintained as much as possible.

MR J.R. QUIGLEY (Butler — Attorney General) [9.31 pm] — in reply: I want to thank all the members of the chamber for their contributions during this debate on the Criminal Law Amendment (Intimate Images) Bill 2018. I think it has been very helpful to have the depth of discussion we have had in the chamber this afternoon and this evening. Some very good points were raised by members during consideration in detail, particularly by the spokesperson for the shadow Attorney General—that is, the member for Hillarys. I also thank the member for Cottesloe —

Mr P.A. Katsambanis: I'm not the shadow Attorney General!

Mr J.R. QUIGLEY: I said the spokesperson for the shadow Attorney General. The member should be the shadow Attorney General, because he knows more law! That is clear. But in the interim, until what should happen happens, he is the spokesperson for the shadow Attorney General.

Mr P.A. Katsambanis: I'm not necessarily sure that comment would actually advance my cause anyway!

Mrs M.H. Roberts: It's not intended to!

Mr J.R. QUIGLEY: There might be a little indulgence at the moment, but there certainly was not during consideration in detail; the government was here to answer the member's probing questions, which we hope we have done to the satisfaction of the chamber; I know we have. As we have said, this is a groundbreaking area of the law; we are dealing with new technology, and that is why we had to include in the definition of "distributes" under proposed section 221BA the word "includes", because we do not know how technology is going to advance. That is why the member for Hillarys has rightly acknowledged that if any other unforeseen circumstances crop up, the government will attend to them in a timely manner because this is a very, very important area of the criminal law that impacts, on a daily basis, thousands of people in our community.

The Deputy Leader of the Opposition raised the point that there should be an education program. The government has already turned its mind to that in the manner I described during consideration in detail, with the Department of Education, the Department of Justice and Legal Aid, to get the proper guidelines and information out there for the public. Once this bill passes through this Parliament, educators and parents will be able to definitively say to their children: this conduct is not only dangerous and not only harmful, it is against the law, and it will have consequences. I thank all members for their contributions.

Question put and passed.

Bill read a third time and transmitted to the Council.

House adjourned at 9.34 pm