CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

Committee

Resumed from 6 November. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 4: Chapter XXVA inserted —

Progress was reported after the clause had been partly considered.

Hon SUE ELLERY: I need to make a correction regarding something that I said during the debate when this bill was last before the chamber. During debate on the bill on Tuesday, 6 November 2018, Hon Michael Mischin inquired whether an incapable person could give consent under the definition in proposed section 221BB. As I said at the time, the advisers at the table sought advice on this question from the Director of Public Prosecutions during the dinner break. The response I provided immediately after the dinner break to the effect that an incapable person would be deemed to be incapable of giving free and voluntary consent was intended to be a summary of that advice. I wish to make a correction to my response to more clearly state the legal position. An incapable person is not deemed to be incapable of giving free and voluntary consent, but, rather, depending on the evidence related to that particular person's capacity, there may be a strong argument that they are not able to give free and voluntary consent. To be clear, the DPP's advice was that there are many circumstances in which a person may be rendered incapable of giving free and voluntary consent, including mental impairment, cognitive deficiency or severe intoxication. Depending on the evidence in a particular case, the DPP may be able to prove that an incapable person or other person who is permanently or temporarily impaired did not freely and voluntarily consent, thus proving an absence of consent. Due to the fact that each case is unique, there is limited case law on this point but it is well established that incapacity can negate consent. I note there was a recent case reported in the media on 13 November 2018 involving a girl being raped by two men in Kings Park who were intoxicated and that the jury found her not to have freely and voluntarily consented. The two men were duly convicted of sexual penetration without consent and are awaiting sentencing.

Hon MICHAEL MISCHIN: I thank the Leader of the House for that additional information and clarification. The DPP has put its mind to the question of consent by those who would ordinarily be deemed incapable or, rather, considered incapable in respect of giving consent in other cases. Under the Criminal Code there are a number of offences involving sexual offences committed against people who are incapable. There is no specific provision proposed in the bill before us to address that issue, but it is probably something that we do not need to worry about at this stage because the government will do what it will do. But if an unforeseen problem arises, I trust that the government will address it. Certainly, review provisions will be inserted into the bill as proposed later in our supplementary notice paper. It is something that can be addressed within a reasonable period of time.

I have a couple of other queries about the question of consent. I want to posit an example that is germane to the amendments that I propose to move. The thesis in the legislation is that the non-consensual distribution of an intimate image is criminal. We have already canvassed the possibility of parents distributing baby photos of their naked infant without the consent of that infant because the infant is capable of giving consent at a young age. But let us consider the example of someone who at the age of 15 might be asked by their mum, "I've got some baby photos of you and I've already sent them in the past to others and shared them with relatives. Do you mind if I send these photos?", to which the 15-year-old responds, "Yes, I don't have a problem with that. They're baby photos and grandma might like to see them." In that case, has the parent committed an offence if they distribute those photos?

Hon SUE ELLERY: I am going to make the same point that I have made previously. Although the member might keep raising a series of particular examples, case studies or scenarios and asking for a definitive position, the answer will depend on the circumstances. I can tell the member—I think I have said this before in any event—that two elements would be applied to the kind of scenario he is talking about. The first one is the prosecutorial discretion. Safeguards and procedures are in place to ensure that innocent conduct will not be brought before the courts. The decision to lay charges and prosecute is governed by the DPP's prosecution policy and guidelines. The guidelines provide that a prosecution should proceed only if it is in the public interest. That is to be assessed against a range of factors, which include whether there are reasonable prospects of conviction, whether any lines of defence are available to the accused, the degree of culpability of the accused, and the likely length and expense of a trial if disproportionate to the seriousness of the alleged offending. Then there are particular provisions, if a charge were laid, in respect to acceptable conduct. I take the member to proposed section 221BD(3)(d), which states —

> 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;
>
> (ii) the circumstances in which the image was distributed;
>
> (iii) the age, mental capacity, vulnerability or other relevant circumstances of the depicted person;

The list goes on.

Hon MICHAEL MISCHIN: Prosecutorial discretion only kicks in at a later stage. Our government heard a lot of criticism from the then opposition regarding the use of prosecutorial discretion as a safeguard—most notably, as I recall, in the mandatory minimum jail sentences for assaults on public officers committed in the course of their duty. That is after it is quite plain that an offence has been committed, but there is a question of whether the bodily harm is sufficient to warrant a prosecution. We heard that that was not an adequate safeguard. I will assist the minister here. Yes, the parent does commit an offence. If a mother says to her 15-year-old, "I have some of the old baby photos and I would like to send them to grandma. Do you consent to that?", and the 15-year-old says, "Yes, I don't mind" —

Hon Sue Ellery: A 15-year-old can't give consent.

Hon MICHAEL MISCHIN: That is right, minister; a 15-year-old cannot give consent, so the mother is committing an offence. There is a possible defence for the mother, but she has committed an offence. It is criminalised. It is unlikely that the police would charge in those circumstances and, if they did, the mother might be able to avail herself of that defence in due course and in the fullness of time it may be that the DPP would decline to indict. Nonetheless, she has committed an offence; she is a criminal, unless she can establish that defence. It is not a question of saying that she is not criminally responsible because of the circumstances—that conduct has been criminalised as a matter of policy by this bill. The reasons for that have been disclosed to me in respect of the amendments that I have posited on the supplementary notice paper. It may be worthwhile for me to cover those reasons now, without moving my amendment at this stage.

Hon SUE ELLERY: Perhaps I could seek some assistance from the Chair. I am happy to debate the amendment, but I would like to do that when we are actually debating the amendment.

The DEPUTY CHAIR: Could you talk to that point, Hon Michael Mischin?

Hon MICHAEL MISCHIN: I would like to debate the amendment when we get to the amendment, too, but what I am driving at here is directly related to the answer the minister has just given and whether an offence has been committed as the law currently stands. I have received advice from the Attorney General's office, which sets out the philosophy of the government. It confirms that my view of it is correct. I received this document only last week—I am sorry; I do not have the covering email. It is headed "Criminal Law Amendment (Intimate Images) Bill 2018—Government Response to the Amendment Proposed by the Hon Michael Mischin MLC". I will read it out. I am happy to table a copy. I do not have a clean copy before me at the moment, but I shall do that. It sets out the philosophy on which this bill has been built to date, and purports to answer why my amendment is not accepted by the government. I will get to that in due course. I do not know whether other members have received a copy, so I shall read it out. It says —

> On Wednesday, 7 November 2018, the Honourable Michael Mischin MLC placed a proposed amendment to the Criminal Law Amendment (Intimate Images) Bill 2018 ('**the Bill**') on the Supplementary Notice Paper.
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> The proposed amendment converts the existing 'acceptable conduct' provision in subsection 221BD(3)(d) of the Bill from a defence, which the accused would need to prove on the balance of probabilities, into an exculpatory circumstance, which, if raised by the accused, would need to be disproved by the prosecution beyond reasonable doubt.
>
> The proposed amendment follows concerns raised during debate on the Bill on 6 November 2018 regarding the potential criminalisation of conduct that is in line with community standards.

That is precisely the point Hon Simon O'Brien raised and that both Hon Nick Goiran and I spoke to. It continues —

> An example provided was that of a parent who displays a naked baby photo at their son or daughter's 21st birthday party.

I digress for a moment to point out that this can happen at an earlier stage. It can happen in a most innocent fashion—a parent asking their juvenile child whether they mind if an intimate photo of them be distributed to relatives as a trip down memory lane. That is with the consent of that child. But the child is under 16, so they—never mind an incapable person—cannot, by law, if this bill is passed, give consent to that. The advice continues —

> The concern expressed was that the Bill would effectively make the parent guilty until proven innocent, placing an unfair onus on them to prove their innocence before the courts.
>
> After giving serious consideration to these concerns, and to the remedy proposed by the Honourable Michael Mischin MLC, the Government has concluded that it will not be supporting the amendment for the following reasons:
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> 1. The amendment would undermine the policy intent of the Bill;

The policy intent of the bill, as will be revealed, is to criminalise the distribution of intimate images without consent, which is exactly what this hypothetical parent is proposing to do. It continues —

> 2. The amendment is unnecessary in view of existing and proposed safeguards.

We do not yet know what the proposed safeguards are. One of them is foreshadowed in this advice, but we do not have it yet. It continues —

> The Government's position was reached following Departmental consultation with the Director of Public Prosecutions (DPP), the Western Australia Police Force and the A/Commissioner for Victims of Crime. A further explanation of the Government's position is provided below.

Under the heading "Policy implications", the advice goes on —

> The Bill aims to:
>
> - Send a clear message that image-based abuse is unacceptable;

I do not know about the example I have given being abuse as opposed to common, accepted behaviour in the community. It continues —

> - Enable victims to secure criminal justice through the courts.

Those aims are so vague. They could be applied to any piece of legislation, with respect, rather than focused on what is going on here. But it is a "clear message" anyway. It continues —

> The current drafting supports this intent by creating a presumption that the non-consensual distribution of an intimate image is a criminal act.

That is exactly the point that Hon Simon O'Brien, Hon Nick Goiran and I were trying to make. It is a criminal act; that parent is a criminal by presumption. It continues —

> If the accused believes that their conduct was acceptable *despite* the lack of consent, the onus is on him or her to prove it.

That is precisely the point that I am concerned about—a criminal parent potentially having to prove their innocence. That is something that we have heard an awful lot about from members on the other side of the chamber during the course of debating many bills in the past, but there has been a deafening silence in this case. It goes on —

> The amendment effectively reverses the position.

That is an acknowledgement of the point I am making —

> The principle that the non-consensual distribution of an intimate image is a criminal act would no longer be the starting point, but something that the prosecution would need to establish in case after case.

That is not going to be hard. A parent has sent a baby photo of a naked infant to someone else. The infant, now 15, cannot consent by law; end of story—criminal. There may be other examples, I should add, that we just have not thought of yet, but that is the most obvious. We will stick with that because it is so clear-cut. It continues —

> The DPP has confirmed that in practice —

In practice, not in law —

> this change would make it much harder —

That is where I propose an alternative for the prosecution to prove the elements of the offence —

> for the prosecution to prove the offence in the cases that are likely to come before the courts.

That is arguable, too. I do not know why it would. Perhaps the minister, notwithstanding the reluctance of the government to descend into cases and examples, can give us an example in which it would be that much harder if the prosecution and the police have done their job and actually built a case based on evidence. It continues —

> The change would also equivocate the Bill's message about the unacceptability of image-based abuse.

I find that hard to believe. We are making it a criminal offence to do this unless a person falls within certain exculpatory circumstances, just like an unlawful assault under the Criminal Code and just like every other piece of behaviour under the Criminal Code in which the prosecution has to prove the unlawfulness of the conduct. I should add, if I just intersperse here, with the guidelines, "National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images", which was tabled, I think, by the minister on one of the last occasions we were before the house. Those principles mention what I propose as being an

acceptable possibility. We have seen that reflected in the New South Wales legislation. It is not a problem legally; it does not seem to have caused a problem in New South Wales. One of the factors under "Consent and harm" in paragraph 12 says —

> Consideration should be given to the merits and risks of offence structures to address the lack of consent to distribution by the person depicted in the intimate image as each jurisdiction deems appropriate.

Paragraph 12.1 reads —

> The issue of consent may be addressed in a variety of ways, whether by inclusion as an element of the offence, as an available defence, or considered when determining whether conduct is contrary to community standards of acceptable behaviour.

That is broad enough to encompass the sorts of possibilities that I have canvassed and that the New South Wales legislation has reflected. I go on with the advice from the DPP that it will make it much harder and equivocate the bill's message. It states —

> The A/Commissioner for Victims of Crime has further elaborated on what this shift could mean for victims of image-based abuse:

I think I am going to have to seek another call.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Just before you do, I ask you to take a seat for a minute before I give you the call again. Hon Michael Mischin, I have listened very carefully to the construct of the debate. For consistency, I traditionally feel that a debate prior to the moving of an amendment should reflect whether or not the amendment will proceed and some of the issues around it. I have given you a fair bit of largesse in that regard, and I intend to give you a little more to make the case as to whether we should proceed. But I would be thinking of an argument that suggested perhaps some compromise that would not require the moving of the motion as part of the debate, because if we are simply going to debate the content of the motion, I ask you to then move the amendment. I will give you a little largesse in the meantime, but limited. I call Hon Michael Mischin.

Hon MICHAEL MISCHIN: Thank you. I understand the point you are making, Mr Deputy Chair, but I am reinforcing the current philosophy of the act in the point that I am trying to make. I understand the minister was saying that it will be dealt with on a case-by-case basis. She has referred to prosecutorial guidelines, the likelihood of charges being laid, what might happen in court, what an accused might plead and all the rest of it. The point that I am making is that the legislation is currently crafted to criminalise across the board with no nuance in it. There is another, and better, approach. I want to confirm the way that this legislation has been crafted, so it is quite clear that the point that I am making is based on the manner in which this legislation has been drafted. The advice continues with the points made by the Commissioner for Victims of Crime, which read —

- First, because existing prosecution guidelines require a reasonable prospect of conviction, any additional hurdle to conviction will reduce the likelihood of a complaint leading to prosecution. This could create a perception that the criminal justice system remains unresponsive to victims of image-based abuse.

I do not see that. That is more argument than based on any rational approach to the principles of criminal law. It continues —

- Second, any additional hurdle to conviction could be expected to reduce the proportion of accused persons who enter a guilty plea. This means that more victims will experience the delays and anxieties associated with trial.
- Third, if the accused asserts that their conduct was acceptable, the prosecution—and by extension the victim—would effectively need to justify the complaint.

That is the whole point of prosecution and proof beyond reasonable doubt —

> This could signal to victims that *their* attitudes and actions, not those of the accused, are being scrutinised by the court.

No; with respect, that does not follow at all —

- Fourth, the amendment would incentivise —

There is a word! —

> arguments that reflect outdated and demeaning assumptions about acceptable conduct; arguments such as 'boys will be boys', 'it was just a bit of fun' or 'it was just a picture'. While such arguments could be raised in connection with the existing acceptable conduct defence, —

I stress the word "defence" —

> the proposed amendment would substantially lower the bar for their success.

I do not accept any of that necessarily. That is as far as I will go with this at the moment, but I make the point that there is also a legislative principle. I would like that to be borne in mind and I alert the minister at this stage so that she can turn her mind to it. It is on page 3 of the "Fundamental Legislative Principles (FLPS): Department of the Legislative Council" pamphlet. We have heard this cited in the Standing Committee on Legislation as a matter of routine every time it delivers a report on legislation and has regard for these principles, and most recently, I think, in the Residential Tenancies Legislation Amendment (Family Violence) Bill 2018 that we debated last week. It reads —

> **Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?**
>
> At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence beyond reasonable doubt; the accused is not required to prove anything. Provisions in some legislation reverse this onus of proof and require the person charged with an offence either to prove or disprove some matter to establish their innocence (legal burden) or to point to some evidence that suggests a reasonable possibility that the matter exists or does not exist (evidential burden).

That is what I am proposing is the appropriate approach to this and one that has been adopted by New South Wales, upon which this legislation seems to be modelled —

> Generally, reversal of the onus of proof of an element of an offence (especially in criminal matters) is objectionable on the basis it trespasses on personal rights and liberties. However, justification is sometimes found in situations where the matter to be proved by the defendant is peculiarly within the defendant's knowledge and would be extremely difficult, or very expensive, for the prosecution to prove.

That is their state of mind, in other words. None of this, proposed in the bill, requires the proof of a state of mind. Consent is something that can be established. Honest and reasonable mistaken belief in consent is something the accused can raise as an evidential burden and be disproved. Otherwise, things such as acceptable community conduct are objective matters that can be established, not subjective. The prosecution ought to be well aware of whether it is acceptable conduct that a parent be allowed to distribute an image, even of someone who cannot legally consent, or a reasonable belief that it is acceptable—for example, a 15-year-old telling his mum that he does not mind if she sends a copy to his grandma of a photo of him in the bath when he was two years old. The government would say that it sends the wrong message to say that it is not criminal and would require mum to turn over in her mind whether she is going to be charged and whether she has a good defence, even though the son cannot consent because he is under 15, and whether prosecutorial guidelines are to be followed and which ones.

I think that is wrong. I foreshadow my amendment. At this point I am simply trying to confirm that the manner in which the government has approached this exercise has been by taking a blanket, heavy-handed approach rather than a nuanced one, all for convenience, rather than having regard to basic legislative principles—ones that this government, when in opposition, steadfastly promoted in just about every circumstance. Unless the minister has anything to say about the fundamentals and how this bill is currently structured, I will move amendment 2/4 on supplementary notice paper 76, issue 3. I move —

> Page 6, line 12, to page 7, line 23 — To delete the lines and substitute —
>
> (3) A person is not criminally responsible under subsection (2) if a reasonable person would consider the distribution of the image to be acceptable, having regard to each of the following (to the extent relevant) —
>
> (a) the nature and content of the image;
>
> (b) the circumstances in which the image was distributed;
>
> (c) the age, mental capacity, vulnerability or other relevant circumstances of the depicted person;
>
> (d) the degree to which the accused's actions affect the privacy of the depicted person;
>
> (e) the relationship between the accused and the depicted person;
>
> (f) any other relevant matters.
>
> (4) 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

(b) the distribution of the image was reasonably necessary for the purpose of legal proceedings; or

(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.

(5) Nothing in subsection (2) makes it an offence —

(a) for a member or officer of a law enforcement agency or their agents to distribute an intimate image when acting in the course of their official duties; or

(b) for a person to distribute an intimate image in accordance with, or in the performance of the person's functions under, a written law or a law of the Commonwealth or another State or Territory; or

(c) for a person to distribute an intimate image for the purposes of the administration of justice.

Hon SUE ELLERY: The government will not be supporting the amendment. The honourable member is quite right that there have been debates in this house on many occasions about whether the proposed legislation's reversal of the onus of proof is appropriately balanced in all of the circumstances in the policy, the bill and in the safeguards that might be built into the legislation. We have had those debates, and on many occasions. The reversal of the onus of proof is not new or unusual and neither is debate about it in this chamber. The question always to be determined is whether the policy of the bill—the policy of this bill has already been set by the second reading—and the safeguards built into the respective legislation are balanced. I just make that point.

The first point to note in response to the honourable member is that the bill does not establish a presumption of criminality or in any way interfere with the presumption of innocence. The prosecution must still establish and prove all of the elements of the offence in the usual way, beyond reasonable doubt. The elements to be proven here in respect of this piece of legislation are, in the first case, distribution, and in the second case, a lack of consent.

Although it is true that the bill places the legal onus on the accused to establish the defences—that is what is referred to as "reversing the onus of proof"—it is not unusual under the Criminal Code to include the acceptable conduct defence in proposed section 221BD(3)(d), and we say that is reasonable and appropriate in the circumstances. There are numerous offences under the Criminal Code that provide defences that must be proven by the accused on the balance of probabilities, particularly in circumstances in which the facts giving rise to the defence are peculiarly within the knowledge of the accused. The position adopted in the bill before us does not require the accused to prove an essential element of the offence, but rather asks them to justify why it was acceptable to distribute the image, despite the fact that the victim did not consent.

The difference between us is that the honourable member is arguing that this reversal of the onus of proof is not justified. That is essentially the argument he has put; that is, he does not accept, in these circumstances, that it is appropriate to reverse the onus of proof. The government has a different view. Our view is that the existing safeguards and procedures are adequate. I will provide a more detailed response, and some of it will involve me repeating some of what has been heard from the honourable member, because he just read into the house a response he was provided with when he asked the advisers about this very issue. Some of this members will have just heard, because the document he was referring to is the document, prepared by the advisers and shared with him, that explains why the government took the particular view it did.

The government has considered the concerns raised during the debate and the remedy proposed by the honourable member in his amendment on the notice paper. We will not be supporting it. Our view is that the amendment would undermine the policy intent of the bill and that the amendment is unnecessary if there are existing and proposed safeguards. We reached this position following consultation by the Department of Justice with the Director of Public Prosecutions, WA Police Force and the Acting Commissioner for Victims of Crime. With respect to the policy implications, the amendment would undermine the key principle that image-based abuse is unacceptable. The bill requires the prosecution to prove beyond reasonable doubt that the accused person distributed an intimate image without consent. If the accused believes that their conduct was reasonably acceptable despite the lack of consent, proposed section 221BD(3)(d) places the onus on them to prove this on the balance of probabilities; that is, it provides a defence. The opposition's proposed amendment would effectively reverse this. The principle that distributing an intimate image without consent is prima facie unacceptable conduct will no longer be the starting point, but something that the prosecution would need to establish in case after case.

The DPP has confirmed that, in practice, the opposition's amendment would make it much harder for the prosecution to prove the new offence in the cases likely to come before the courts. That is an important caveat,

because we have already talked a little bit about what the government's expectations are for cases likely to come before the courts. Instead of the accused having to prove why the distribution was reasonably acceptable, the prosecution would have to prove that the distribution was not acceptable. This would effectively signal to victims that it is their attitudes and their actions, not those of the accused, that are to be scrutinised by the court. It would also incentivise arguments that reflect outdated and demeaning assumptions about acceptable conduct—this is one of the bits that the honourable member was just referring to—arguments such as "boys will be boys", "it was just a bit of fun" or "it was just a picture". Although such arguments could be raised in connection with the existing acceptable conduct defence, the proposed amendment would substantially lower the bar for their success.

In addition to these policy reasons, the government considers that the existing safeguards and procedures are adequate to ensure that innocent conduct, such as that in some of the examples we have heard already, will not be brought before the courts. The decision to lay charges and prosecute is governed by the DPP's "Statement of Prosecution Policy and Guidelines 2018". As I have said already, those guidelines apply to both WA Police Force and the office of the DPP. Among other things, those guidelines provide that a prosecution should only proceed if it is in the public interest. This is to be assessed with regard to a range of factors that are directly relevant to the concerns raised about the bill and particular examples or scenarios that have been provided. Those factors include whether there are reasonable prospects of conviction, any lines of defence available to the accused, the degree of culpability of the accused, and the likely length and expense of a trial if disproportionate to the seriousness of the alleged offending. In addition to the guidelines, the Director of Public Prosecutions has agreed to develop a specific charging note for the intimate image offence. The charging note will provide further information to the Western Australia Police Force and prosecutors about the exercise of the discretion to prosecute having regard to the public interest and the application of the factors set out in the legislation.

At a procedural level, the decision to lay charges will also be subject to internal checks within the Western Australia Police Force. The recommendations of the investigating officer will be reviewed and either endorsed or rejected by a senior officer. In the event of uncertainty, the matter can be referred to the Office of the Director of Public Prosecutions for advice. Once a matter has been referred for prosecution, it will be open to the relevant prosecutorial service—either the Western Australia Police Force of the Office of the Director of Public Prosecutions—to discontinue the matter if there does not appear to be a sound basis for proceeding. In the government's view, these various safeguards will make it very unlikely that the type of conduct raised during the debate will make its way to the courts. For those reasons, the government will not support the amendment.

Hon ALISON XAMON: I rise to indicate that I have some sympathy for the amendment that has been put forward by Hon Michael Mischin. I am still not quite persuaded either way about the best way to move forward. On the one hand, I am very concerned that the proposed amendment could water down the policy effect of this legislation, which is to change community attitudes and behaviours around the circulation of intimate images and to set a very clear and unequivocal line in the sand that tells people that the circulation of such images without consent is unacceptable and is in breach of what we consider to be appropriate societal standards. On the other hand, I remain genuinely concerned that innocent people may get caught up in this. There has been a fair bit of discussion around the legitimate concern, I think, of parents, grandparents and family members who lovingly circulate quite innocent images of their loved children that do not breach the standards of child pornography, which we already understand. We are talking about very innocent pictures in which there may be some degree of quite innocent nudity that no sound person would find offensive. I recognise that it is unlikely that those situations will come to the court's attention.

I want to get a bit more information in a moment about the nature of the charging notes that have been referred to. We have tried to get information from the briefings, but we have not been able to get more detail about them. I return to a concern I raised in my second reading contribution—that is, the sort of defences that will be made available to people who circulate intimate images only as a means to stop harassing and intimidating behaviour. I am not convinced that the current defences in the act are sufficient to protect people who forward intimate images—they can often be quite crass images—simply because they have had enough and are sick of receiving them and being harassed and intimidated, and do so as a form of public shaming. I am concerned that the amendment before us is potentially too broad. In its current wording, I think it would make prosecution quite difficult as we try to change community attitudes and community behaviours and send a very clear message from the courts that circulation of private images without consent is unacceptable conduct. I ask the minister for more information about the nature of the charging notes that keep getting referred to. I am aware that it has been agreed that prosecutorial guidelines will be forthcoming. That is good because we should always have prosecutorial guidelines, but first I would like to have a bit more information about the nature of the charging note. I wonder whether the minister has any comments on my concerns about the circulation of images for the purposes of trying to stop intimidation and harassment?

Hon SUE ELLERY: Firstly, I understand that Hon Alison Xamon's office was advised that the Director of Public Prosecutions will not be in a position to start drafting the charge notes until the legislation has been determined by the house. I am not in a position to give the member any more information than that.

The honourable member raised image-based harassment when the matter was last debated. I provided a response then, but I will do it again. The person is likely to have committed the offence of using a carriage service to menace, harass or cause offence under the commonwealth Criminal Code. This is information that I provided when we last debated this. The maximum penalty for that offence is three years' imprisonment. Depending on the circumstances, the person may also have committed an offence under state law such as a stalking, using electronic communication to expose a child under 16 to indecent matter, or making a threat to do something unlawful. The recipient of the image could obtain a misconduct restraining order, the breach of which would be a criminal offence. There are options for responding to image-based harassment that do not involve shaming the person depicted by public distribution. It does not necessarily follow that a person would be prosecuted or convicted if they had tried to respond to harassment by shaming. Firstly, the shamed person may be disinclined to report the matter to the police; secondly, the police may decline to prosecute on the public interest grounds; thirdly, if a prosecution is commenced, the defendant could seek to argue that the image in question is not an intimate image for the purpose of the offence due to the absence of a reasonable expectation of privacy; and, finally, the defendant could argue that the defence provided in proposed section 221BD(3)(d) that a reasonable person would consider the distribution to be acceptable applies. It is entirely plausible that the court would be sympathetic to such an arguments, but it will ultimately be a matter for the court to determine, if the matter were to make it to court at all.

When we last debated this bill on 6 November, I gave the member an undertaking that I would ask the Minister for Police to raise two matters with the Commissioner of Police—that is, whether there would be specific prosecution guidelines and whether police would be encouraged to take image-based harassment more seriously. I have already advised the chamber about prosecution guidelines. I have raised the matter of image-based harassment with the Minister for Police and drawn it to her attention. I have asked her to raise it with the police commissioner. I have not yet heard back, but I imagine that the minister will do that.

Hon SIMON O'BRIEN: I read the *Hansard* of Tuesday, 6 November to recapture the discussion that was being held when I raised this matter in the Committee of the Whole House at an earlier stage. In a moment, I want to zero in on the particular matter that is in my mind, because it applies to not only this potential piece of legislation but others, so it is an important principle. I listened closely to the remarks of Hon Alison Xamon just now when she was indicating an openness to further explore and decide upon the merits of the amendment before us. I think it is a tremendously important amendment. I want to explain why. In doing so, I want to pick up on some remarks that emanated from the committee chair just now when we were reminded that the policy of the Criminal Law Amendment (Intimate Images) Bill 2018 had been determined with the second reading vote and, indeed, it has. What we need to clarify is the policy of the bill. As I understand it, the house is virtually in unanimous agreement about the policy of this bill not only in its broad terms, but even in its specific terms. However, I need to remind members that the policy of the bill does not mean an endorsement of every detail written in black and white. In particular, the committee stage of a bill is about examining those matters of detail and determining whether they best give effect to the policy of the bill and about matters of efficient procedure. Those are the sorts of things we are concerning ourselves with now. Most particularly, we can apply that to the amendment currently before the Chair. I urge the government not to be too defensive about this and say, "No, hang on, we're not changing anything; we've decided what we will do and it's not up to us to change that." We are not seeking to interfere, as supporters of this amendment, with the policy of the bill. We are trying, though, to make sure, firstly, that the bill works better in achieving its aims—that the detail of the bill does not give rise in due course to public concern about whether the law is properly constructed and whether it will work in practical terms without trespassing quite improperly on the rights of ordinary, decent Western Australians. These are weighty matters and that is why I really want to impress upon members the comments I am about to make.

I have had a good look at the bill in light of some of the concerns that, anecdotally, Hon Michael Mischin has raised about the bill being brought before the house. I have been reassured, simply through reading the bill and the associated material, about the scope to which it applies. For example, people are concerned whether they could be taken before a court if they distribute an image of some people innocently gathered on the beach. It might be just a group and they are perhaps wearing bathers, holding a soft drink or something, posing with a surfboard, but if there is someone in the background on the beach with their top off, will that be captured by this law? That would be a pretty poor thing. Of course, they will not be captured by this law because they were in a public place. This is about images of people engaged in a private act and, further, in circumstances in which the person would reasonably expect to be afforded privacy. Anyone who is concerned about that, for example, can be reassured, as, indeed, I was. I want to deal with malicious acts. I want to put a stop to people's privacy and dignity being attacked, in particular, in a way that can have terrible consequences. We have already heard from a member this morning in unrelated matters about the impact that excessive incursion into one's private life and people making claims or counterclaims or inquiries can cause great distress. Daily we hear about the problems of cyberbullying and how that impacts on people of all ages, for example. Of course we want to put a stop to that. We want to send a clear

message as a Parliament. That is why we, as a Parliament, are happy to endorse the policy of this bill and we are not scared of it.

We come then to the detail, in particular, the mechanics. The amendment before us now is couched in terms that I think are already in the bill but they have been rearranged slightly. For those outside who are perhaps following this debate, proposed section 221BD entitled "Distribution of an intimate image" sets out at proposed subsection (2) a crime. It states —

> 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.
>
> Penalty for this subsection: imprisonment for 3 years.
>
> Summary conviction penalty for this subsection:
>
> imprisonment for 18 months and a fine of $18 000.

This is serious stuff, but succeeding subsection (3) provides defences to any charge under subsection (2). The defences are laid out in proposed subsection (3)(a), (b), (c) and (d). Finally, proposed subsection (4) lists three circumstances in which it sets out quite clearly the circumstances in which it is explicitly not an offence against subsection (2). That relates to law enforcement officers in the course of their official duties performing a function under another written law or otherwise being involved with the administration of justice. The amendment standing in Hon Michael Mischin's name seeks to vary all that and to say that a person would not be criminally responsible under proposed subsection (2) in a range of ways, having regard to half a dozen considerations that, in the mind of a reasonable person, would be acceptable circumstances. I am paraphrasing a little there, but that is the gist of it. It goes on to preserve the other elements—that is, the other defences, as they are currently characterised, and the explicit exemptions from an offence, which are also in there. The net result is to give effect to the matter I raised on 6 November 2018 when I objected to the construction of this provision.

The DEPUTY CHAIR: Members, the question is that the amendment be agreed to.

Hon SIMON O'BRIEN: Thank you for the courtesy. We have since then heard comment about the reversal of the onus of proof. I think I can fairly say that the minister acknowledged that this is something that comes up in this place not infrequently and that sometimes it can even be observed as a matter of degree. In the past, I have said that I am not fundamentally philosophically opposed to having in a bill a provision that reverses the onus of proof. Those members who have heard me give an example of why that is the case a hundred times before should brace themselves, because they are about to hear it for the 101st time! The example I give is an offence under either state or commonwealth law that prescribes that it is an offence for someone to avoid paying any duty or tax that is payable. How on earth does a prosecutor prove that an individual citizen has not paid a tax that is payable? Do they bring in every tax record in the whole department for the last five years and make the court go through it all and then say, "See, the defendant's name is not mentioned here"? Of course they do not. But there is a defence against that charge that is easily brought about; that is, the person under investigation can simply say, "Yes, I did pay this tax or duty and here is my receipt." That is easily done. It would not even get to court. That is an example of the reversal of the onus of proof that is right, proper, sensible and reasonable.

My objection to the way the proposed section is currently drafted is that it is not right, proper and reasonable for a person charged with distributing an intimate image to have to rely on a defence that they would have to prove in court—no, no, no! The onus that would cast on people would be dramatic. I know what has already been said about guidelines, procedures and contemplating the public interest—all those sorts of value judgements. Nonetheless, I predict that an unfortunate circumstance will arise in which someone who should not be charged under this provision will be charged, and it will be publicised that they have been charged with an offence under what will be known as the Criminal Law Amendment (Intimate Images) Act. Contemplate, in the eyes of reasonable people and community standards, the situation of someone who wakes up to find that they have been charged under that act and it is plastered all over the papers. What impact will that have on them? The authors of this bill are saying, "It's all right; they have a defence when they get to court." That would be no comfort to a person who has already been publicly held up as an offender under this legislation. It would then get worse, because it takes a long time for a court to resolve these matters, if they ever are. In the meantime, they would have incurred all sorts of disruption to their life—possibly lost a job, and certainly not obtained a job or a promotion—and massive expense with lawyers. They would get none of that back when the court finds, "Yes, you do have a defence. Case dismissed." None of that harm would be undone and the damage would be incredible. If a handful of cases arise in those circumstances, we will have failed. At the point of considering Hon Michael Mischin's amendment, we need to recognise that and do something about it. That is one reason I am supporting this amendment, and I propose that the rest of the house does so as well.

I want to mention something all members know about—that is, the nature of humanity. Let us apply human nature to a bill, for example. A policy decision is made and people say, "Here's our policy decision. Let's go about putting it into legislation." So, off they go and they do their consultation, drafting and everything like that, and then they go up through the hierarchy of departments and to ministers' offices showing how their legislation is needed and it is the way to go. Notes are then made up for ministers to accompany their cabinet submission to convince cabinet that, yes, this is the way to go. Ultimately the ministers get out in the media and say, "We're going to introduce a bill, because this is the way to go." The bill is brought into this place and the minister delivers a second reading speech that says, "This is the way to go." That is what they do. Very rarely, during any of those processes—until right now—does someone stand up and ask, "Hang on, what's the downside to this? What are the alternatives, and the potential risks and pitfalls?" On 6 November, the minister was mulling over the ideas that I and others were raising—I know that she was taking it on board and that she got it. We have a representative minister, of course, which is a difficult position to be in. In due course, the government went away and sought advice. We have just had the benefit of that advice officially. Who did the government seek advice from? We were given a list of the parties—the police, various judicial personalities and so on—but they are the same people who own the current wording and mechanics in the bill. Of course they are going to turn around and say, "No, you don't want to amend this. This the right way to go." That is human nature.

Everything about the approach taken with this legislation screams at me that it is not the right way to go. It is not the right way to go if a charge could be laid against someone who is eminently innocent and who will suffer the outrageous treatment to which I have just alluded, and that somehow that will be made right by saying that they have a defence if it gets to court. No. We need to make sure that the first test is that a case has to be made against a person before they have to respond, and that proof of the elements of an offence has to be established by the prosecution and not disproven by those who are innocent. It is as fundamental as that. None of my remarks and nothing in the honourable member's proposed amendment are against the policy of the bill. It is about ensuring fairness and justice in the future for all our citizens, while at the same time not undermining in any way the policy of this bill. That is why I put to members that they should embrace this amendment; and, if not, I hope they have some good explanations as to why not.

Hon MICHAEL MISCHIN: I thank Hon Simon O'Brien and Hon Alison Xamon for their contributions. I am encouraged that Hon Alison Xamon is not beyond persuasion on this matter, provided that some of her concerns are addressed. I hope that that is the case. It does not surprise me that the government has rejected the proposition set out in the amendment on the supplementary notice paper. We have learned at length, from experience over the last two years, that the Attorney General does not like being persuaded that there are alternative ways to approach a problem. We have had some surprisingly good successes after a great deal of time, such as on the National Redress Scheme, and a few other concessions along the way.

According to the government, the bill aims to send a clear message that image-based abuse is unacceptable. It is not the transmission of images and not even the transmission of images without consent if no harm is done that is unacceptable; it is image-based abuse. What I have proposed in my amendment does not detract from that policy. The government says that the legislation will enable victims to secure criminal justice through the courts—namely, someone will be punished for that. Again, I do not propose to change that. I urge members to look at the manner in which the amendment has been constructed. It is entirely in accordance with long-accepted principles of criminal law and consistent with the manner in which most, other than exceptional, offences are dealt with. By way of analogy, I will use an offence like assault. If I were to ask whether it is right to send a message that assaulting someone is unacceptable, people would say that it is right. An assault is the application of force by one person to the person of another without that other person's consent. People would say, "Of course it is terrible that someone could apply force to the person of another if it is not consented to."

Hon Simon O'Brien: It should be a criminal offence.

Hon MICHAEL MISCHIN: It should be a criminal offence, and we need to send out a strong message that assault is wrong. Of course, assaults can arise in a variety of ways.

Sitting suspended from 1.00 to 2.00 pm

The DEPUTY CHAIR (Hon Matthew Swinbourn): Members, we are continuing to deal with the Criminal Law Amendment (Intimate Images) Bill 2018 and with the amendment moved by Hon Michael Mischin. The question is that the words to be substituted be substituted.

Hon MICHAEL MISCHIN: Thank you. I think that in fact we are dealing with the deletion of the words first, but I am happy to jump a step if that helps!

The DEPUTY CHAIR: Yes; so the question is that the words to be deleted be deleted.

Hon MICHAEL MISCHIN: Before the luncheon adjournment, I was about to address the merits of the amendment I have moved. I had reinforced that the first of the two alleged policy aims of this bill is to send a clear

message that image-based abuse is unacceptable. I should add that it is not image distribution, nor even image distribution without consent; it is image-based abuse. The amendment I have moved does not detract from that in the slightest. The second policy aim of the bill is to enable victims to secure criminal justice through the courts—"justice" being the operative word. Again, the amendment I have moved is consistent with the general principles of criminal responsibility and does not detract from that aim. The amendment will align what is proposed in the legislation with accepted general standards of criminal responsibility.

I had been about to discuss this by using the analogy of assault. Assault is the application by one person of force to the person of another without that person's consent. Of course we would all agree as a matter of principle that that is a bad thing. Is it outlawed as such? No, it is not. That is because in addition to proving the assault, it has to be an unlawful assault—that is, an assault not authorised, justified or excused by law. That is not a defence to the charge, unlike what the government proposes in this legislation. In fact, it is quite the contrary—it is an element of the offence that the prosecution must prove beyond reasonable doubt. There may be an evidential burden on the accused; nevertheless, the prosecution bears the responsibility of proving its case. By way of example, if I was to strike Hon Alison Xamon, that would be an assault. If that strike was by way of a casual pat on the back, that would also be an assault, but whether it is unlawful is another question. The prosecution would need to be satisfied there was a prima facie case and a reasonable prospect of conviction and it was not so trivial as to not warrant the attention of the criminal courts—precisely the criminal prosecution discretionary guidelines that need to be addressed in this. But that does not mean that I have to have a defence that I have to prove on the balance of probabilities.

My proposed amendment would align this legislation with the generally accepted principles available in all other legislation dealing with criminal responsibility. We have already established that innocuous cases may arise—who knows how many other cases there may be. At present, proposed section 221BD(2) says that a person commits a crime if the person distributes an intimate image of the other person without their consent. Proposed subsection (3) prescribes a raft of defences that, to succeed, have to be established by an accused on the balance of probabilities. So if the activity is criminalised, there is a defence available. We are told not to worry if mum sends a photo of the infant in the bath because it is not likely to be prosecuted, and there are some great prosecution guidelines that would most likely mean that that would never get to a court, but it is criminal. I propose to realign it in the following manner: to retain proposed subsection (2) in its current form, but, consistent with other exculpatory factors within the Criminal Code and elsewhere, say in a proposed new subsection (3) —

> A person is not criminally responsible under subsection (2) if a reasonable person —

Hon Alison Xamon was worried about standards in the community and the like; reasonable person standards are hopefully what we are trying to incorporate. That is the touchstone. My amendment continues —

> would consider the distribution of the image to be acceptable, having regard to each of the following (to the extent relevant) —

I have listed in proposed paragraphs (a) to (f) only what is currently set out in proposed subsection (3)(d), but it is framed in terms of a defence to prove that a reasonable person would consider the distribution to be acceptable, and so on and so forth. They are precisely the same factors, but I have put it at the start of the criminalisation process.

During my previous incarnation as a prosecutor, I gained a considerable amount of experience in having to prove cases like this, but I fail to see how that makes it unacceptably burdensome to the prosecution to prove a charge. We would still be applying the reasonable person test. But instead of saying, "What you have done is criminal. You prove that a reasonable person would find it acceptable", the prosecution would have to say, "Is this reasonable? Would a reasonable person consider this to be unacceptable conduct?" That is where the community standard comes into play. That is consistent with all other legislation dealing with obscenity, improper conduct and the like. I fail to see why, in this case, other than making the job of the prosecution a little bit more difficult, inasmuch as they have to make a case and turn their mind to the reasonableness of the conduct, it has become such an impediment to proving a charge in appropriate circumstances. Otherwise, the matters set out in proposed section 221BD(3)(a) to (c) are reflected in my current amendment; they just become proposed subsection (4). Proposed subsection (5) is the current proposed subsection (4). The only material change is the quite proper one, I would suggest, of translating what is currently proposed as a defence, with the burden of proof on an accused currently contained in proposed subsection (3)(d), into a new proposed subsection (3), being a threshold of criminal responsibility that has regard to the same factors.

It is plainly not a problem for other jurisdictions. New South Wales seems to have done it comfortably. I have heard nothing from the minister or from the government saying that it has proved to be an impediment to the prosecution of these cases. I have heard nothing from the government saying that what I propose is technically wrong, poorly framed or somehow does not achieve the policy that I have established for it. The only complaint from the government is that it does not like it because the Director of Public Prosecutions thinks that it makes her job a little more difficult, the police think it is much easier to prosecute under what has been framed in the way it is, and the Commissioner for Victims of Crime has raised a number of arguments of a speculative nature about

what people might think about the message that is being sent. Otherwise, as far as I am aware, there has been no consultation on this bill, or the manner in which the offences have been framed, with the Law Society of Western Australia, the Legal Aid Commission, the Criminal Lawyers Association or any other such organisations, only with those who would find that their job is made a little bit easier by throwing the burden of proof onto an accused and saying, "Trust us; we're going to prepare some guidelines and things down the track that will make it even better." There are existing safeguards, we are told, and there will be more at some time.

The DEPUTY CHAIR: Hon Michael Mischin.

Hon MICHAEL MISCHIN: I urge members to have regard to the basic legislative principles, unless there is some defect of a technical nature that the government has now decided needs to be brought to the attention of the committee. The drafting seems to be sound and, unless some problem can be identified with the manner in which these provisions have been framed in New South Wales that has not been disclosed to date, I urge members to support the amendment. It will not detract from the operation of the legislation. It will reflect some of the problems that we have discussed and, if it proves to be a problem, we are proposing, and the government is proposing, a review on the third anniversary of the passing of this legislation. If it turns out that the laws need to be toughened up at that stage, let us do it. At least we are being consistent with the philosophies that have been expounded in this house for at least the last eight or nine years and the general principles of criminal responsibility that this house has accepted need to be adhered to.

Hon SUE ELLERY: Prior to the lunchbreak, Hon Alison Xamon had been canvassing some of the issues around the concern about a person who forwards an intimate image that they receive unsolicited, and whether they would be captured by and convicted of the new offence. The proposition is that the victim of this kind of harassment—that is indeed what it is—may show the images to supportive family or friends or, in some cases, even seek to shame the harasser by circulating the image online. In fact, that is a thing that many women, including myself, may well do as a way of saying that they are not going to tolerate that behaviour and that they are going to shine a light, so to speak, on that kind of behaviour by sending a message that it is completely unacceptable. I just wanted to make some comments about that.

The prosecutorial discretion to charge will be relevant in this kind of scenario. I reiterate that the victim of the harassment may, depending on the circumstances, be able to rely on the acceptable conduct defence that is contained in proposed section 221BD(3)(d). In particular, the court must have regard to a number of factors that would be particularly relevant in this scenario, including, amongst other things, the circumstances in which the image was distributed, and this provides for consideration of the broader context of the conduct—namely, the campaign of harassment by the person who sent the offending image; the relationship between the accused person and the depicted person, and this provides for consideration of the reality that the person depicted in the image has been harassing or potentially even stalking the accused; and any other relevant matter. In this case, it is clearly relevant that the person who sent the image by way of harassment is likely to have committed an offence under section 474.14 of the commonwealth Criminal Code to which I have already referred—that is, using a carriage service to menace, harass or cause offence—or stalking under section 338E of the Criminal Code. All these factors are highly relevant to the kind of scenario that Hon Alison Xamon has raised. Of course, it is equally important to emphasise that the person who is receiving those unsolicited and offensive images is able to report the matter to the police. In addition, Hon Aaron Stonehouse raised a question with me just as we broke for lunch. I want to reiterate that in addition to the guidelines that I have already described, the Director of Public Prosecutions will develop a specific charging note for the new intimate image offence. The charging note will provide further information to the Western Australia Police Force and prosecutors as to the exercise of the discretion to prosecute having regard to the public interest and the application of the factors set out in the legislation. Other than that, I have already articulated the reasons that the government will not be supporting the amendment.

Hon MICHAEL MISCHIN: I want to emphasise one thing from what the minister has said. In light of what Hon Alison Xamon is plainly concerned about, she should be in no doubt that what the minister is saying is that what Hon Alison Xamon's constituent is concerned about is an offence. If the member's constituent has received an unsolicited intimate image and she then wants to shame that person by distributing it to others and showing them what so-and-so has sent her, or if she wants to get advice from a friend and shows them what so-and-so has sent her, that is an offence. If she can more likely than not prove, on the balance of probabilities, that a reasonable person would consider that distribution to be acceptable, she may have a defence, but she has committed an offence. I am proposing that before the police charge, and in considering whether an offence has been committed, they should consider whether a reasonable person would consider the distribution of the image to be acceptable having regard to all those factors. If the police come to the view that it is not reasonable to send a copy of this intimate image, unsolicited and without consent, to her friend to get advice on it—no, that is not what a reasonable person would do; it would not be acceptable to a reasonable person having regard to the nature, content and circumstances et cetera—a charge can be laid, and then we get to prosecution guidelines and the charging notes.

However, there is no question that at the moment that constituent has committed an offence. There may be a good defence, but she has committed an offence. I urge Hon Alison Xamon to bear that in mind.

As to Hon Aaron Stonehouse's concerns about charging notes, they are fine; they are guidelines. However, none of them has yet been prepared, yet we are asked on the strength of that to throw a defence. As I have indicated, it is only those things currently in proposed subsection (3)(d) that are being put as the threshold for whether there would be criminal responsibility. That would involve a prosecutor and a police officer turning their minds to what a reasonable person would think in the circumstances, rather than saying, "Hey, an offence has been committed. If they think they have been reasonable, let them prove it." I urge members, in the absence of any technical objections and in the knowledge that this has been done in New South Wales and there have been no complaints raised there about it being impossible to prosecute, that this is consistent with the policy of the bill and it is also consistent with general principles of criminal responsibility. In respect of the fact that the government opposes it, the government has opposed just about every sensible amendment that we have put forward that has ultimately, after a great deal of stress, anguish and waste of time, finally been accepted.

Hon ALISON XAMON: I rise to comment and respond to Hon Michael Mischin's contribution just then. Of course, Hon Michael Mischin is correct on a number of fronts. He is correct in rightly identifying that the particular class of person that I have raised concerns about could potentially be prosecuted under the current wording of this legislation. Also, I say that he is correct in terms of our concerns that to date it has been very difficult for members in opposition parties to ascertain what are genuine deal-breakers and what are simply a reluctance to engage in amendments to legislation just for the sake of it.

Having said that, I have thought quite long and hard about this particular amendment proposed by Hon Michael Mischin. As I have said, I recognise that there is significant merit in why it has been put forward. The reason I will not be supporting the amendment that has been proposed is that I am concerned that as it is currently drafted, it almost provides too much defence, to the point that I am concerned that it will undermine part of the policy intent of this legislation—that is, to try to address cultural reform around the distribution of intimate images and the subsequent damage that that causes to people's lives. The review clause that we will be debating shortly will, hopefully, become a quite critical part of assessing whether the legislation as it may or may not pass goes too far or whether it ends up having a tangible effect in addressing inappropriate and, in fact, sometimes downright dangerous conduct by people who circulate these images. However, ultimately it is a balancing act, and that is the issue that we have to try to grapple with within this place.

I want to stress again that I do not believe that the arguments that Hon Michael Mischin has put forward are wrong. The issue is around the tension between how we ensure that those people of whom I think this house has a shared understanding are never captured by the provisions of this legislation, and having robust legislation that positively contributes to societal reform.

Division

Amendment put and a division taken, the Deputy Chair (Hon Matthew Swinbourn) casting his vote with the noes, with the following result —

Ayes (14)

Hon Jacqui Boydell	Hon Colin Holt	Hon Robin Scott	Hon Colin Tincknell
Hon Jim Chown	Hon Rick Mazza	Hon Tjorn Sibma	Hon Ken Baston *(Teller)*
Hon Peter Collier	Hon Michael Mischin	Hon Charles Smith	
Hon Donna Faragher	Hon Simon O'Brien	Hon Dr Steve Thomas	

Noes (15)

Hon Robin Chapple	Hon Diane Evers	Hon Samantha Rowe	Hon Darren West
Hon Tim Clifford	Hon Alannah MacTiernan	Hon Aaron Stonehouse	Hon Alison Xamon
Hon Alanna Clohesy	Hon Kyle McGinn	Hon Matthew Swinbourn	Hon Laurie Graham *(Teller)*
Hon Sue Ellery	Hon Martin Pritchard	Hon Dr Sally Talbot	

Pairs

Hon Martin Aldridge	Hon Stephen Dawson
Hon Colin de Grussa	Hon Adele Farina
Hon Nick Goiran	Hon Pierre Yang

Amendment thus negatived.

The DEPUTY CHAIR: We are dealing with the amendments on supplementary notice paper 76, issue 3. I understand that the amendment on the supplementary notice paper in the name of Hon Alison Xamon is not going to be pursued. Is that correct?

Hon ALISON XAMON: I confirm that I will be withdrawing my amendment on the notice paper. I prefer the government's amendment.

The DEPUTY CHAIR: There is nothing to withdraw, because the member is not pursuing it. We will now deal with the next amendment on the notice paper, which is in the name of the Leader of the House representing the Attorney General.

Hon MICHAEL MISCHIN: Before we get to the next amendment, I have a question on proposed section 221BE(6). As a logical sequence, that comes before what is proposed to be inserted on page 8, after line 29. Proposed section 221BE(6) provides —

> A person who, without reasonable excuse, fails to comply with an order made under subsection (2) commits an offence.

The penalty prescribed for that appears to be a summary conviction penalty. Proposed section 221BE(2) 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.

Let us say that the court specifies within seven days, and that seven-day period expires. What seems to be contemplated is that a charge is then able to be laid under proposed section 221BE(6), which requires the prosecution to disprove beyond reasonable doubt, if the evidential burden is raised, that there is no reasonable excuse. It is not a defence. We have had an argument about how important it is that these things be defences, but the prosecution must prove beyond reasonable doubt that there was no reasonable excuse. However, we do not have a continuing offence penalty prescribed. The failure to comply may be a one-off breach, but it may continue for quite some time. Why has the government not specified a continuing offence for this failure?

Hon SUE ELLERY: I am advised that this clause is constructed and crafted that way because the most similar offence contained in the Criminal Code, the offence of disobeying a lawful order of the court created by section 178, is also not a continuing offence. By virtue of the operation of section 71 of the Interpretation Act, the obligations created by the order will not lapse upon conviction. Rather, the offender will commit a separate offence for every day that they remain noncompliant, with a daily penalty of $50.

Hon MICHAEL MISCHIN: The minister is saying that if I am given until, say, 1 January to comply and I fail to comply by 1 January, I am charged with having failed to comply by 1 January. Is a charge lodged against me for every day after that or will it be a charge after I am convicted for that failure, or what? Is the minister seriously suggesting that a charge will be laid for every day that I have exceeded the time limit?

Hon SUE ELLERY: Theoretically, the proposition put by the member is correct; that is, after conviction the offender would be committing a separate offence for every day, and they could be charged with a separate charge every day. In a practical sense, I am advised that is probably unlikely to happen. The matter would still be pursued but whether or not a separate charge would be laid every day is a matter for the prosecution to determine.

Hon MICHAEL MISCHIN: We have made it easy to prosecute and we have made it pretty toothless when it comes to enforcing the requirement for complying with a court order to remedy the harm. What the minister is saying is that if I fail to comply by 1 January, I am charged. The police can get on the case immediately and slap a charge against me saying that I had not complied by 31 December and I committed an offence on 1 January. When it finally wends its way through the Magistrates Court six to 12 months later, I am convicted. If the image is still there, I may or may not be charged with a further offence after that. Is that the substance of it, minister?

Hon SUE ELLERY: No, and again I do not agree with the pejorative language used by the honourable member. The substantive penalty for failing to comply with an order is 12 months' imprisonment and a fine of $12 000.

Hon MICHAEL MISCHIN: Those being maxima—correct?

Hon Sue Ellery: Correct.

Hon MICHAEL MISCHIN: So it is not going to be necessarily 12 months' imprisonment and a fine of $12 000; it is something less than that—correct?

Hon Sue Ellery: Correct, member.

Hon MICHAEL MISCHIN: Why is it not that in proposed section 221BE(6), given that we have been told how hard it is to prosecute these cases if the threshold question is "reasonableness" and so forth, this is not an offence framed in terms of "A person who fails to comply with an order made under subsection (2) commits an offence"? It is a defence if there is a reasonable excuse for it. Why has the government not been consistent in the manner it has framed the legislation if it is so critical, as the minister said during the previous debate, that these things be made defences because of the difficulty of proving them?

Hon SUE ELLERY: The honourable member is trying to compare apples with oranges. The first relates to the policy around the nature of the offences and the kind of message that we want to send about that. This is about penalties and, as I said when I answered Hon Michael Mischin's question on this originally, the most similar offence already in the Criminal Code—the offence of disobeying a lawful order of the court—is created by section 178 and is also not a continuing offence.

Hon MICHAEL MISCHIN: The minister missed the point. I am not talking about whether it is a continuing offence. The government has decided that is has to be done in a different fashion—that is fine. Why has the government not reversed—to put it in lay terms—the onus of proof in the enforcement provision by making it a defence of reasonable excuse just as it has made it a defence to a charge of distribution without consent? Why has the government not done that when it is so hard to prosecute the others, but, here, the prosecution has to prove beyond reasonable doubt that there has not been a reasonable excuse? Why is the government not consistent?

Hon SUE ELLERY: Indeed, this is about consistency. This is after the person has been convicted. The conviction has already been established. The consistency here is with the similar provision that already exists in the Criminal Code about disobeying a lawful order of the court. I move —

Page 8, after line 29 — To insert —

221BF. Review of amendments made by *Criminal Law Amendment (Intimate Images) Act 2018*

(1) The Minister must review the operation and effectiveness of the amendments made to this Code, the *Restraining Orders Act 1997* and the *Working with Children (Criminal Record Checking) Act 2004* by the *Criminal Law Amendment (Intimate Images) Act 2018*, and prepare a report based on the review, as soon as practicable after the 3rd anniversary of the day on which the *Criminal Law Amendment (Intimate Images) Act 2018* section 4 comes into operation.

(2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 3rd anniversary.

This is in response to matters raised during an earlier debate. The proposal is to amend the bill to require a statutory review after three years. The review will assess the operation and effectiveness of the bill, including the operation of the acceptable conduct defence and any other issues that may arise in the practical implementation of the offences.

Hon MICHAEL MISCHIN: I indicate the opposition's support for the proposed amendment. At least there will be some check on the manner in which this legislation will operate.

Hon ALISON XAMON: I indicate that the Greens also support this proposed amendment. I think it is actually better than my original amendment, although it is largely in the same terms. Considering the issues that arose during the course of the second reading debate, an earlier review would be beneficial.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 5 to 14 put and passed.

Title put and passed.

Report

Bill reported, with an amendment, and, by leave, the report adopted.

As to Third Reading — Standing Orders Suspension — Motion

On motion without notice by **Hon Sue Ellery (Leader of the House)**, resolved with an absolute majority —

That so much of standing orders be suspended so as to enable the bill to be read a third time forthwith.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and returned to the Assembly with an amendment.