CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

Committee

Resumed from 1 November. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon SUE ELLERY: I am responding to an issue that Hon Alison Xamon raised when we last considered this matter. Her question was essentially whether the bill would criminalise a person who received unsolicited intimate images and then distributed those images with a view to shaming the person depicted into refraining from sending further images. A person who sends an unsolicited intimate image of themselves has likely committed the offence of using a carriage service to menace, harass or cause offence, pursuant to section 474.17 of the commonwealth Criminal Code. The maximum penalty for that offence is three years' imprisonment. Depending on the circumstances —

The CHAIR: Order! Sorry to interrupt, minister. Members are indicating, and I agree, that there is too much peripheral noise around the chamber, so members are having difficulty hearing. Minister, would you please resume your remarks.

Hon SUE ELLERY: Depending on the circumstances, the person may also commit an offence, such as stalking, under state law by using electronic communication to expose a child under 16 to indecent matter or making a threat to do something unlawful. However, the honourable member would appreciate that it would depend on the particular circumstances. The recipient of the image could also obtain a misconduct restraining order, the breach of which would be a criminal offence.

I have outlined those possible variations of laws to make the point that there are options for responding to image-based harassment that do not involve shaming the person depicted via public distribution. Image-based harassment is a serious matter and it should be reported to the police or, if relevant, appropriate school authorities. The alternative response proposed by the honourable member—essentially, that of public shaming—would likely amount to the non-consensual distribution of an intimate image for the purpose of the new offence created under the bill. It does not necessarily follow that the person would be prosecuted or convicted. First, the shamed person may be disinclined to report the matter to police, given that the episode could raise questions about their own criminal liability. Second, the police may decline to prosecute on public interest grounds. Third, 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. Finally, the defendant could argue that the defence provided in proposed section 221BD(3)(d)—that a reasonable person would consider distribution to be acceptable—applies. It is entirely plausible that the court would be sympathetic to such an argument, but ultimately that is a matter for the court to determine in view of the very specific circumstances of the case. In offering advice, for what it is worth, the appropriate response to image-based harassment is to report the conduct to the relevant authorities.

Hon ALISON XAMON: I thank the minister for that comprehensive response to the question. I raise some concerns around the nature of the response. I suppose my particular concern is that what has just been described is setting a very high bar in being able to demonstrate intent by the person who has sent the unsolicited and unwelcome image to a recipient. It sounds as though there needs to have been some degree of malice or threat, which of course would evoke a range of defences to someone who otherwise might feel inclined to seek solace amongst their friends or even just amongst people who might view the matter in the same way. I am concerned that that means that even though the policy of this bill, I would argue, is very sound, it will still potentially have unintended consequences for some people. I am particularly concerned when people are receiving unwelcome, unsolicited intimate images that have not been sent in order to threaten but perhaps are persistent, clumsy attempts to court. I would like to put on the record that I think that people who send these images are deeply misguided. I am yet to find a woman who finds these particular images enticing or attractive. Nevertheless, I am aware that some men in particular may be of the mistaken view that somehow a potential partner will be excited about receiving them. I suspect that is not the case. However, that does not fall within the scope of threat. One of the things that women in particular may choose to do is to circulate that said unwelcome image amongst their friends as a way of saying, "Can you believe what this is guy is doing? What is wrong with him? No wonder he does not have a girlfriend and never will." Nevertheless, that person could find themselves the unwelcome recipient of falling foul of this law.

I suppose the question that I have relates to the degree of discretion available to the police in particular should a rebuffed man, in the buff, take umbrage at the circulation of his intimate image, particularly if he has been the subject of subsequent, probably well-earned, mockery. What discretion will the police be able to display in order

to ensure that a person on the receiving end of the image is not going to find themselves, unfairly in my opinion, subject to the provisions of this legislation?

Hon SUE ELLERY: I understand the point that the honourable member is making. I suspect that if I were in receipt of such an image, I would probably be one of those women who would seek to publicly shame the person by saying, "Look what I received on my social media site" or whatever. I suspect that I would be one of those people who might fall foul. However, the point I made in the response I just gave is that there are various elements of discretion. The police do have discretion as to whether to prosecute on public interest grounds. Again, the courts, depending on the particular circumstances as well, have a discretion as to how they will treat it. It is not possible to give the member a finite answer about what would happen in circumstance X versus circumstance Y, but I understand the point that the member is making.

Hon ALISON XAMON: I thank the minister. During this debate I am hoping to get on the record confirmation from the government that this bill does not intend to capture those people who receive the unwelcome images and who subsequently resort, often in exasperation, to measures of further circulation for the express purpose of trying to dissuade the person who has sent the unwelcome image, but also, for that matter, people in general, from sending unwelcome intimate images.

Hon SUE ELLERY: The driver of the policy was not the particular social behaviour that the member is describing. It would be inaccurate to say that there are no circumstances, because it would depend entirely on the circumstances in which the person who has received unsolicited intimate images and then as a form of "shaming" recirculates that. It is not what the policy was designed for; it is not its intent. I cannot give the member a guarantee that in every single circumstance there might not be a reason that that person too fell foul of the law. It will depend entirely on the circumstances. As I outlined, there are several points at which discretion can be exercised, by both the police and the courts.

Hon ALISON XAMON: I thank the minister for that further explanation. I have some further questions about the nature of the education programs that are intended to be associated with the rollout of this legislation, and I will get to that in a moment. Is there an intention or, indeed, is it something that will be considered by government that the unintended consequences of people forwarding unwelcome intimate images for the purposes of shaming will be made more broadly known?

Hon SUE ELLERY: The essential idea behind the legislation is not to distribute intimate images without consent. The essential message is not to do it—just do not do it.

Hon Nick Goiran: Maybe don't do it even with consent.

Hon Sue Ellery: Yes.

Hon ALISON XAMON: I have some other questions. Regarding the information program that has been referred to, can the minister confirm that it is the government's intention to ensure that the same information will be provided to non-government schools and government schools to ensure that all young people and children are going to be made aware of the implications of both taking as well as forwarding intimate images?

Hon SUE ELLERY: Yes, it is the intention that the educational information and material be made available to all students, whichever sector they are in. Catholic Education Western Australia and the Association of Independent Schools of Western Australia, representing independent non-government schools, sit on a joint working party with the Department of Education, which has responsibility for public schools. They are part of the working group that is putting together the material. I am advised that there have been meetings with them about the establishment of a working party.

Hon ALISON XAMON: What is the proposed time frame for the likely rollout of this education program? Will it be available for the new school year?

Hon SUE ELLERY: I am advised that yes, it is intended that it will be available in the new school year, in 2019.

Hon ALISON XAMON: Of course, minister, not all young people are in school, yet this legislation has implications well beyond young people who are currently in school. Is there going to be a broader education program so that other young people will be made aware of the changes to the laws and the risks inherent in forwarding intimate images?

Hon SUE ELLERY: I can advise that the Department of Justice has also had discussions with the Ministerial Youth Advisory Council about options for reaching young people who are not involved in formal schooling.

Hon NICK GOIRAN: What was the outcome of that discussion with the Ministerial Youth Advisory Council? Is it going to do something? If it is going to do something, when is it going to do it? Has it been provided with funding to undertake that education program for young people in Western Australia?

Hon SUE ELLERY: I am advised that the meeting was about asking the advisory council for advice on options for reaching those young people. Formal advice has not been received from the Ministerial Youth Advisory Council. However, I am advised that the consultation and those discussions will be ongoing.

Hon NICK GOIRAN: When is the formal advice from the advisory council expected to be provided?

Hon SUE ELLERY: I am advised that there is not a finite date because those conversations will be ongoing. On the passage of the bill, the consultation process with the advisory council will move forward to assist with how the material is prepared—in particular, how it will be made available or accessible to young people who do not attend school.

Hon NICK GOIRAN: Looking ahead to clause 2, which inevitably deals with commencement, I note that the government's intention is that the operative provisions will come into effect on a date to be fixed by proclamation. Would the advice from the advisory council be received prior to proclamation?

Hon SUE ELLERY: The plan is, on the passage of the bill, to continue the conversations and discussion with the Ministerial Youth Advisory Council, and others—the example I have been given is the Commissioner for Children and Young People—about the best ways to distribute the material, particularly to young people who are beyond school age, and that those consultations and the degree of engagement and information that is provided will assist the Department of Justice to determine the appropriate proclamation date. The expectation is that the process will take about three months, but if it were to take, for example, three months and one week, that would be okay; if it were to take eight weeks instead of 12 weeks, that would be okay too. The process that is planned is to consult with those bodies on how best to get information to young people who are outside the school system.

Hon NICK GOIRAN: If I understand correctly, the government's plan is to make sure that it has undertaken consultation with relevant stakeholders, experts and the like prior to proclaiming the operative provisions —

Hon Sue Ellery: Honourable member, if you will take an interjection, it is so that when the law comes into effect, that education plan is running.

Hon NICK GOIRAN: That was going to be my next question. It is one thing for them to have the advice but will the education program have been rolled out prior to proclamation?

Hon SUE ELLERY: The plan is to have all the education material and the process by which it is to be rolled out to the respective people in different groups—some of whom attend school and some of whom do not—ready to go so that when the law comes into effect, the education plan is also in effect so that the message is getting out at the same time that the law is changed.

Hon NICK GOIRAN: I guess I want to be confident that the education takes place before the law changes rather than at the time that it changes, because it is one thing for the materials to be in the hands of a teacher, chaplain or school principal and for those documents to sit on their desk and not be provided to the target audience, but then when the law changes, the target audience is captured by the new offences that they know nothing about. Although ignorance is no excuse before the law, I am hearing from the government that there is a keen desire and enthusiasm for young people to be educated about this change in the law. I would like an assurance that the education program is going to take place at some point prior to the law coming into effect.

Hon SUE ELLERY: As I advised in the second reading reply, the information will get out through a series of media events encompassing print and TV, social media, the use of existing networks, and information being uploaded to respective government websites. The reason that is considered to be important is that Google is, in fact, I am advised, the first source of information that people use to look for what their options are if they are being subjected to this kind of exposure. Therefore, it is important that social media and government websites have that material. The member is right to ask questions about making sure that the education or information plan is appropriate. It is certainly not intended to be a hardcopy document, booklet, leaflet or whatever sits on the desk of a school chaplain, teacher or anyone else. I make the side comment that, in my experience, chaplains are the most proactive people in any school environment. I do not think they would be the ones who would be sitting on information and not distributing it. However, the plan is to get the message out using a variety of sources that we reasonably expect young people would access in any event.

Hon NICK GOIRAN: Minister, I agree with and am encouraged by everything you have said, but I am keen to know about the timing. All the things the government says it is going to do are excellent; there is consultation with the Ministerial Youth Advisory Council, the Association of Independent Schools of Western Australia and other bodies to make sure that the options about how to reach young people are clear in the government's mind. All those things are excellent. There is then going to be an education program that consists of print and TV media, social media and the like. All those things are excellent and have my support. My question is: When? Are these things going to be done pre-proclamation or post-proclamation? Clearly, the minister will tell me that some of this will happen post-proclamation, and that is quite right, but will any of it be done pre-proclamation? For example, is it the government's intention that some of the print and TV media and social media will be done prior to proclamation?

Hon SUE ELLERY: I made the point a few minutes ago: I cannot give the member a precise time line for when that will happen. It is the government's intention, once the bill is passed, that a definitive plan will be established to set out the best time line to take advantage of this. For example, they might need to take into account social media market usage over Christmas. I do not know. Particular elements might need to be taken into account, and, of course, the next school year kicks off in the first week of February. A plan will be worked out following the passage of the bill. I cannot give the honourable member a precise date or time line. However, I can tell him that the plan will encompass a variety of methods to get the message out, particularly to those young people who are not gathered in one place in a school setting but who are out and about studying, in the workplace or otherwise occupied. The plan is multimodal, if I can call it such. It will be determined once the passage of the bill occurs.

Hon NICK GOIRAN: I will ask this question then: has the government made a decision that some education will take place prior to proclamation?

Hon SUE ELLERY: I cannot be precise about when, honourable member. I anticipate from the way that it has been described to me that some will happen before proclamation and some will happen after proclamation. It will depend on the things that I indicated in the last answer I gave the member about how best to capture the particular group we are aiming at over the summer period, once the bill is passed. I anticipate there may be some before proclamation and there may be some after proclamation.

Hon Nick Goiran: But no decision has been made?

Hon SUE ELLERY: No decision has been made on the timing of that; however, I can assure the member that a plan is proposed to be developed post the passage of the bill.

Hon PETER COLLIER: The minister mentioned a working group has been established—AISWA and the Catholic Education Office of Western Australia are working with Department of Education. Is the Western Australian Council of State School Organisations part of that working group?

Hon SUE ELLERY: I am advised that there have been meetings with Catholic ed and AISWA about the establishment of a working group. I cannot tell the member whether WACSSO is included in that. I do not know from the advice at the table. However, wearing my other hat, I can probably find out, and I will encourage the Department of Justice to make sure that the respective stakeholder groups are incorporated into that working party. It might also include principals' organisations as well.

Hon PETER COLLIER: I think WACSSO needs to have some consultation or to be involved at some level, particularly considering the cohort involved. It should also include parents and friends organisations in the non-government sector. That is just a bit of advice and a suggestion.

Hon MICHAEL MISCHIN: I am sorry that I had to be absent from the chamber on urgent parliamentary business for a short time. The minister might have already touched on this: is this education process aimed at juveniles at school or is it more general; and, if so, what is being planned for those who do not attend schools and who are not able to receive the benefit of that direct involvement?

Hon SUE ELLERY: I have spent about 15 minutes talking about that. It is aimed at young people generally. The easier cohort to get to is those who attend schools, so processes have been established to prepare and distribute that material. For those young people who are no longer at school, a variety of other measures have been proposed—we just talked about those. Broadly, it is around the use of social media and involves seeking advice from the Ministerial Youth Advisory Council and others, such as the Commissioner for Children and Young People, on how to best get the message out, but it will include websites, social media, print et cetera.

Hon MICHAEL MISCHIN: I take it that those avenues of education would be applicable to not only juveniles but also adults, warning people that new laws are in place and discouraging adults from engaging in this sort of behaviour. Has any estimate been made of what resources will be required and how much money will be involved to mount this education exercise? By involving schools, how much of a draw will it be on the education budget? Do we need to engage, for example, any kind of specialists to assist in propagating the message?

Hon SUE ELLERY: I am confident that schools, be they public or private, already have extensive methods that do not require additional resources to get out the message—for example, the way schools manage the curriculum. There are already programs in place around cyber safety and e-safety—things that schools already deliver as part of the curriculum. It is possible that the messages that will need to flow about this legislation will be incorporated in those. In terms of my other hat as Minister for Education, no additional resources will be required. I am confident that the messages can get out through the existing systems.

Hon MICHAEL MISCHIN: I agree with the proposition the minister advanced during the second reading reply, that there needs to be a standard of behaviour that children as well as adults must abide by, and that we cannot make exceptions to the rule. But there are processes under the criminal justice system by which juveniles are dealt

with differently, with sensitivity to their age and maturity. Take a situation in which a girl rashly takes intimate selfies of herself and propagates them to her then boyfriend, who irresponsibly sends them on to his friends. This is not an unlikely situation, and not particularly malicious, but certainly stupid and insensitive. How would a juvenile like that be dealt with in the process? How is it seen that that sort of a situation would be addressed with a view to imposing and giving force to the law while at the same time bearing in mind the consequences? Can the minister also address the consequences? Are there any risks of a juvenile being put on the sex offender register under the Community Protection (Offender Reporting) Act?

Hon SUE ELLERY: I will start with the second point that the member made about whether people charged with these offences would be captured by the offender reporting regime. The answer is no. I will answer the first part of the member's question in a moment, but I will first make the point that a key part of the purpose of the public education campaign, and the education campaign targeted at young people, is to try to, if you like, cut that off at the pass, before it happens, so that young people understand the consequences quite early. It is the very nature of developing brains in adolescents and such that that might not always be successful, but that is the purpose of it, as opposed to a 45-year-old bloke who should know better.

Hon Michael Mischin: Unfortunately, a lot of adults do not know any better.

Hon SUE ELLERY: That is true. In respect of young people and the situation that the member just described, I make the point that the juvenile justice team process, with its strong focus on restorative justice and family engagement, is already well adapted to deal with offending of this kind. It is anticipated that the misuse of internet images by young people in a high proportion of cases is likely to be driven by a lack of insight and maturity rather than a deliberate, considered decision to cause offence to, embarrass or harass somebody. It will depend on the circumstances, and I can appreciate members wanting, if you like, to test the boundaries by way of a series of examples, and I am happy to explore those where I am able to, but it will depend on the circumstances.

Hon ALISON XAMON: This line of questioning gets to one of the core concerns about the bill and that is that although we absolutely do not want to minimise the seriousness of the implications of the act of sending on other people's private images, we need to make sure that we do not inadvertently end up creating potentially lifelong consequences for young people who are acting foolishly and stupidly but not maliciously. It is about wanting to ensure that the police will use diversion for young people for the new offences when appropriate. Is it also the intention that the police will record the reasons why they might decide to prosecute when diversion is not the preferred option?

Hon SUE ELLERY: The proposition that the police will record their reasons is a recommendation that the police have accepted and are in the process of implementing. I understand the concerns of members about young people, but the idea is not to exempt them from the law but to ensure that the justice system responds appropriately to their age. That includes, as I have just mentioned, the use of the juvenile justice team. I note that the honourable member made her own inquiries that have confirmed that the police are using diversionary options in cases of the misuse of intimate images where it is appropriate.

Hon MICHAEL MISCHIN: Moving on from that for a moment, the minister mentioned in her second reading response, as I recall, that no recording-type offence is included in the legislation because strictures on that already exist under the current law. I think she mentioned the Surveillance Devices Act 1998, and made reference also to the Criminal Code. Can she inform us what the limitations are? I understand that under the Surveillance Devices Act it is the misuse of a surveillance device, but more generally, in respect of recording, what provisions of the Criminal Code or other legislation are available to meet that problem?

Hon SUE ELLERY: There are two categories. The indecent recording of children is covered by the Criminal Code in sections 320, 321, 322, 329 and 330. The honourable member made the point about section 6 of the Surveillance Devices Act in respect of the recording of a private activity.

Hon MICHAEL MISCHIN: Having said that, was the merit of having a more overarching recording-type offence included in this particular bill considered, and was it rejected on the basis that the field was already satisfactorily covered, or was it because of difficulties in framing it in an appropriately limited way that would not create undesirable consequences as an adjunct? If a specific part of the Criminal Code is going to deal with the propagation and distribution of intimate images, some integration of a suitable recording offence may be preferable and give the police the opportunity to cover the field satisfactorily, rather than having to target individual offences scattered amongst two pieces of legislation.

Hon SUE ELLERY: I referred in my second reading reply to the fact that it was considered. It was rejected on the basis of the State Solicitor's advice that the issues of recording were already covered in other legislation, two examples of which I just gave.

Hon MICHAEL MISCHIN: Am I to understand that if any consolidation of those offences were to take place, they would be in no different terms than what is currently available? No improvement could be made on those that would deal with this particular matter at an earlier stage than the distribution?

Hon SUE ELLERY: We are delving into the realm of the hypothetical. I do not know that it is possible to say that there is no way that those particular provisions of the Criminal Code and section 6 of the Surveillance Devices Act 1998 could be improved. That was not examined. The proposition considered was whether this legislation should include that offence of recording and the determination was made that no, it is satisfactorily covered elsewhere.

Hon MICHAEL MISCHIN: That surprises me a little. Since the issue has been addressed quite specifically with a new part to the Criminal Code in order to address a particular mischief, I would have thought that the opportunity would be taken to review the current laws against recording to see whether they could be improved and amendments passed to refine those to meet the same mischief at an earlier stage. But the minister is telling me that no thought has been given to how they could be improved and brought up to date so that there is seamless coverage of the criminal law for this particular evil?

Hon Sue Ellery: I have answered the question.

Hon Michael Mischin: You have not, actually.

Hon ALISON XAMON: I come back to the issue of diversion for young people. Can the minister confirm that the diversion methods that will be used or are intended to be used have been shown to be effective in reducing reoffending?

Hon SUE ELLERY: I am not sure I really understand the question I am being asked. In response to the earlier question, I advised that police accepted the recommendation about recording their reasons for making decisions. Regarding diversionary programs, those are the diversionary programs and the methodology behind them that is now used by juvenile justice teams. I am not aware of any particular evaluation conducted recently. If the member is, she could advise me. The juvenile justice team is well experienced in its business of attempting to divert young people who, for a range of reasons, may make an ill-considered decision and end up on the wrong side of the law as a consequence. But I do not have any information available to me now about an evaluation of the diversionary programs that they use.

Hon ALISON XAMON: I quickly go back to the issue of unwelcome intimate images that people receive and subsequently republish out of frustration or desperation. Is there any intention to ensure that police are given any level of training around the best way to support, particularly, women who have received these images? I note that in her comprehensive response to my earlier question the minister recommended that perhaps women may want to consider going to the police. The concern I have is that often when women go to the police, unless such an image is associated with an explicit threat, the police will ignore it or tell women to get over it. That is often why people take it in their own hands to respond, if you like, in a civil way by engaging in legitimate actions of public shaming. As that option is now potentially quite problematic for somebody, is there any intention to encourage police to take the receipt of these images much more seriously?

Hon SUE ELLERY: I appreciate the point that the honourable member is making. I do not have anyone from the police here, so I cannot tell the member about specific training. I can tell the member that the work being done by the police academy has significantly improved over the time that I have been in public office. I am not able to give the member any detailed information; however, I can give the member the commitment that I will personally ask the Minister for Police to raise the issue with the Commissioner of Police.

Clause put and passed.

Clause 2: Commencement —

Hon NICK GOIRAN: There is no question from me, just a short comment. This is one of the instances in which I support the operative provisions of the bill coming into operation on proclamation. I support that because of the information that was revealed earlier this afternoon: that the government is yet to make a decision on whether it will roll out the education program to children and young people prior to proclamation. If there were a date that this would come into operation, for example the day after the bill receives royal assent, I could envisage significant problems in Western Australia with children and young people being oblivious of the change in the law, whereas at least this particular clause gives the government sufficient flexibility to ensure that the laws are not proclaimed until Western Australian children and young people are properly educated about the change in the law. It is important for members to note that the proclamation date—if this clause passes in its current form—will come into operation only at a time the government of Western Australia chooses. It will be entirely for the McGowan government to choose when this law will come into operation. Consequently, it will be entirely up to the government to decide whether one or more than one child in Western Australia has any idea that this law has changed. I hope that the McGowan government makes the commonsense decision to ensure that it properly rolls out its education program for children and young people prior to running off and proclaiming this law, because if

it fails to do that, there will be significant problems in this state. If government members are in any doubt about that whatsoever, I would encourage them to pick up the phone and talk to the Commissioner for Children and Young People, because I cannot imagine for a moment that the Commissioner for Children and Young People would ever countenance a change in the law of this magnitude occurring prior to children and young people in Western Australia having any idea about it. I would encourage the government to give very strong consideration to the education program that it is planning. I am somewhat dismayed to hear that it is only in the planning stage and that there is no plan, as such, that can be tabled or anything of that sort. A consultation process is taking place that seems to me to be appropriate; a good number and range of stakeholders seem to be involved. At the end of the day, consultation is not a decision. Earlier this afternoon, we heard that the government has not yet made a decision on whether it will roll out the education program prior to proclamation. I hope that it does. For those reasons, on this occasion I support the operative provisions coming into effect by way of proclamation.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Chapter XXVA inserted —

Hon MICHAEL MISCHIN: I have a question about proposed section 221BA and the definition of "engaged in a private act", which is said to mean three things. It arises through the offence-creating provision in proposed section 221BD(2), which states that the distribution of an intimate image of another person without that person's consent is a crime. Proposed section 221BA defines an intimate image of a person; I will come to that in a moment. One of the options under "intimate image" in proposed paragraph (a)(iii) refers to "the person engaged in a private act". This is said to mean three things —

(a) in a state of undress; or

(b) using the toilet, showering or bathing; or

(c) engaged in a sexual act;

I understand that the New South Wales legislation has a qualification to that definition. It refers to —

> … a sexual act of a kind not ordinarily done in public …

Would kissing be considered a sexual act?

Hon SUE ELLERY: This will really depend on the circumstances. If a couple is kissing in public, they would not have a reasonable expectation of privacy and the definition of intimate image would not be engaged. They are making a choice to do what they are doing in public. If they are kissing in private, it would be for the court to determine whether the conduct amounts to a sexual act. It will depend on the circumstances; however, if they are kissing in public, one assumes that they know that they are in public.

Hon MICHAEL MISCHIN: That might be right. I suppose it all depends on the nature of the kissing, too. Whether the couple expected to be photographed kissing and to have the image distributed is another matter. If I understand the legislation correctly, it is not a limitation on any other sexual act; or is the commission in public of a sexual act, besides kissing—that is, a real true-blue definite sexual act, common-or-garden sexual act—something that cannot be distributed, notwithstanding that it can be seen by the public?

Hon SUE ELLERY: I need to take the honourable member to the definition of an intimate image. Proposed section 221BA states —

> ***intimate image***, of a person —
>
> (a) means a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy —

I appreciate that the honourable member wants to test the boundaries of what will be covered, so to speak, but the definitions are deliberately written to express what a reasonable expectation would be. Frankly, common-or-garden sexual activity or not, the definition of an intimate image will depend on the particular circumstances of the case. I am not sure that I can take this much further for the honourable member, other than to say that the legislation has been drafted to capture what a reasonable person might expect the definitions would mean. Common-or-garden sexual activity or otherwise, if people are knowingly conducting a sexual act in public, one would not expect that they would expect to be afforded privacy.

Hon ALISON XAMON: Would the following scenario be captured by the provisions of this act? If, under the cover of darkness, a drunken teenage couple decide to engage in sexual congress at Cottesloe Beach, for example, and they are inadvertently photographed by their mates and the photograph is subsequently sent around, would that be in breach of these provisions or would it be fair game? Although they may have thought that they were able to undertake the activity in private, it was a public place and they may nevertheless have no recourse.

Hon SUE ELLERY: Perhaps the honourable member has answered her own question—they are doing what they are doing in a public place. Nevertheless, as I pointed out earlier in respect of young people, which is the example the member gave, there are several points at which discretion can be exercised by either the police or the courts. The bill has been crafted to allow those discretionary trigger points to be used, but it will depend entirely on the particular circumstances of the case.

Hon MICHAEL MISCHIN: I think Hon Alison Xamon has struck on the same issue that I have with the bill—it is the wording that has been used. I was referring to the circumstances in which a person would reasonably expect to be afforded privacy. To wit, a person having sex in the dark on the beach could say, "Leave me alone. I expect to do this privately. Get lost; it's in a public place, but it's dark, so take off." That is different to the New South Wales formula, which refers to when a reasonable person would reasonably expect to be afforded privacy. Under the NSW legislation, one could say, "Hang on, you've decided to do this in a public place—in the back of your car at the drive-in, on the beach at night or wherever it happens to be—and you can't reasonably expect to have privacy like you would have in your own home."

The New South Wales formula seems to take the circumstances into account a little more, rather than the subjective view of the person who is being photographed. It may be that not much turns on this in the end, and it may just be a question of emphasis, but I am curious about why the NSW formulation was not adopted rather than this one, which seems to open up arguments, particularly in light of the broader concept of a sexual act.

For example, let us take tongue kissing and all the rest of it. If it is done in the dark and is considered to be a sexual act, is it something about which a person could say, "I would reasonably expect to be afforded privacy, so go away and don't photograph me; and, if you photograph me, you can't send it out on social media"? I am just trying to get an idea of the metes and bounds, because this sort of stuff will come up, particularly in cases in which people are engaged in social activity—parties, camping trips, all sorts of possibilities. I think we need to understand the metes and bounds so that people are not unreasonably caught by this legislation. Unfortunately, it is of the nature of things sometimes that the flaws in legislation are shown up by the extreme cases, with an overenthusiastic prosecutor or a particularly insistent complainant pushing for action that causes difficulties down the track.

Hon SUE ELLERY: If we start with the New South Wales example, a deliberate decision was made that qualifying the reference to engaging in a sexual act with a privacy requirement would, in fact, be duplicative. That is because the overarching definition of "intimate image" already requires that the relevant conduct be depicted in circumstances in which the person would reasonably expect to be afforded privacy. The question of whether a secluded beach at night constitutes a place where a person might reasonably expect to be afforded privacy is going to hinge on whether the circumstances—this may not be satisfactory to the honourable member—are such that the person could reasonably expect to be afforded privacy. Commonsense would say that in most cases, a person who chooses to undertake that activity in a public place—be it dark or otherwise—cannot reasonably expect to be afforded privacy; the nature of the place is that it is public. However, one could construct a scenario that could conceivably give rise to the opposite conclusion, and that is why I am not in a position to be able to say, "Here are 37 000 possible scenarios, here is the decision that the police will take in each of those 37 000 scenarios about whether to proceed to lay charges, and here is what the court will be required to do in each of those 37 000 scenarios." It is not possible to do that. The bill has been deliberately constructed to do several things: to send the message that the conduct is unacceptable and that there are consequences as a result, and to allow the particular circumstances to be taken into account. One such circumstance is, for example, the age of the people involved: are we talking about 14-year-olds or are we talking about 46-year-olds? There is a difference. Although I understand well the question the honourable member is asking and I understand why he is asking it, the bill has been deliberately structured in this fashion to rely on those words in circumstances in which the person would reasonably expect to be afforded privacy.

Hon ALISON XAMON: I thank the minister. Although I certainly accept that it is impossible to outline every single scenario to which this bill may or may not apply, it will of course be important for people who might look at this legislation in the future to get some idea of the policy parameters intended. One of my concerns about the potential lack of protection, particularly for young people who may find themselves being photographed in unfortunate situations within the public realm, is that it is very often young people who engage in these activities in public spheres precisely because they do not have their own places in which to engage in these activities. It would be very concerning if they were to be subject to being photographed by a third party and found that they had no recourse to be able to stop the distribution of the images and to ensure that people who could potentially circulate those images maliciously can be brought to account.

I would like to further unpick the idea of what is reasonably deemed to be a public place. We have already talked about the complexities and what can be expected around the cover of darkness. My further question is about the old chestnut of the back of the car. If someone is in the back seat of their own vehicle, under the cover of darkness—

potentially in the car park of Cottesloe Beach—would that be considered to be a public place, or would it be a scenario that could invite the provisions of this legislation?

Hon SUE ELLERY: I would like to be in a position to give the honourable member a definitive answer that the police will treat that particular circumstance in such a way, and that the courts will treat it in such another way. It is going to depend on the circumstances. A public car park at Cottesloe Beach—or anywhere else—is a public place. There might be a difference between a kombivan with curtains and a ute, I am advised. There may well be a difference, but I am not able to give the honourable member a precise response in that respect. I do not want to be seen to be hindering her questioning; I am happy to answer questions about this, but I am not sure that I can give her a definitive answer. The description she gave was of a vehicle in a public car park; that is a public place. Whether I can be any more precise than that is going to depend on the particular circumstances and whether, for example, inside a kombi with curtains one might reasonably expect to be afforded privacy.

Hon MICHAEL MISCHIN: How times have changed. I can recall, within living memory, when I was sitting in the chair that the minister is sitting in, and answers like, "Well, it depends on the circumstances" were utterly unacceptable to those sitting on these benches in those days. There was an insistence that I give assurances about what the police might think and do under any given circumstances, and how the courts would treat cases and the like. Now the minister is telling me that she cannot even say whether it would fall within the scope of the legislation if, for example, people engaged in and filmed a sexual act at night-time on a beach, and it was not even a third party filming it but the couple filming it themselves for posterity and memories for their scrapbook, and then later, when the relationship turned sour, one of them decided to go and send it on. The minister cannot tell me whether that situation would subject the relevant party to an offence, because it is a moving image or perhaps a still of a sexual act, or whether that is a circumstance in which a person could reasonably expect to be afforded privacy. That is precisely one of the circumstances that this bill is meant to address, yet the minister cannot tell me whether it falls on one side of the line or the other. As I say, times have changed. Can the minister do better than that? Can she tell me whether in those circumstances—if a couple engages in what is blatantly a sexual act at night down at Cottesloe Beach but gets away with it because, by happy circumstance, no-one notices, but they have filmed it and later on one of them sends it on to someone else—that person will have committed an offence under the act?

Hon SUE ELLERY: I am not sure that I can take it much further. The member can keep coming up with examples—I used the number 37 000—but the advice I am given is that in the case he has described, it is quite likely that the prosecution will have a stronger case to put than in other circumstances. However, I have already made the point that it will depend on the particulars of the circumstances and whether the person would reasonably expect to be afforded privacy.

Hon MICHAEL MISCHIN: I think the minister has just highlighted the problem. I have given the minister a scenario, which I do not think is a particularly extravagant one, I would have thought. It is the sort of scenario that might arise and the facts are fairly simple. The minister cannot offer any guidance on whether it is something that the government would expect the police to charge. How will the government educate the public on this if it cannot tell us whether that simple scenario is intended to be covered by this legislation?

Hon SUE ELLERY: I think the member is being disingenuous. I said that the advice available to me was that in the scenario he described, the prosecution would have a strong case.

Hon Michael Mischin: "Stronger case", you said.

Hon SUE ELLERY: Okay, stronger case. I think it is disingenuous to say that I was not able to give the chamber any advice about that. I can and did. I make the point again that it will depend on the circumstances and what privacy a person might reasonably expect to be afforded.

Hon ALISON XAMON: Picking up on the scenario that Hon Michael Mischin has already put to the chamber, can I confirm that it is not the intention of this legislation to rule out the possibility of an aggrieved party seeking recourse to have an intimate image removed and to have the person responsible for its distribution charged, or to deny that party an opportunity to have that addressed simply because that image may have originally been produced in a public arena?

Hon SUE ELLERY: The honourable member is correct.

Hon MICHAEL MISCHIN: Let us say a sexual act is committed in a public place and recorded—it does not have to be by a third party, it can be by the parties engaged in that act—perhaps as an act of bravado that they can distribute to their friends to show that they have had sex on top of the DNA Tower at Kings Park in broad daylight. No-one happens to see them and they distribute that image to a few friends. One of them, after the relationship goes sour, decides to send it to another group of friends and that is covered by this. Is that circumstance one in which the person would reasonably expect to be afforded privacy? Yes or no? What will be punished—the breach of privacy or the distribution of the image? Where do we draw the line with this?

Hon SUE ELLERY: I will go back to the intent of the bill. It is about the distribution of intimate images without consent. That is the policy of the bill. A range of scenarios is possible about which it is not possible for me to say, here and now, that in this particular case, I can guarantee that the police will or will not lay charges, and in that particular case, I can guarantee that the court will treat it in this way or will definitely not treat it in that way. I am not in a position to give the member that advice. The intent is to make it clear that the distribution of intimate images without consent is an offence. The bill provides the police—particularly for young people, but not just for young people—discretion to determine whether they should lay charges in the particular circumstances, and provides the courts discretion to take account of the particular circumstances in deciding the outcome of those charges. We could go through particular scenarios, but I do not think I will be able to satisfy the member that in every single one I will be able to say that the police's response will be X and the court's response will be Y. I am not in a position to do that. However, the construct of the bill is that it is about a private act, which is —

(a) in a state of undress; or

(b) using the toilet, showering or bathing; or

(c) engaged in a sexual act;

It is about whether the person would reasonably expect to be afforded privacy. Both the police and the courts will have to take into account those circumstances and the information in front of them at the time.

Hon MICHAEL MISCHIN: I thank the minister for telling us the policy of the bill, but it is structured in a particular way, with certain elements of an offence and some very long and detailed definitions. I do not expect the minister to go through every foreseeable combination and circumstance imaginable. I have put to her something that is not particularly complicated. A couple, in broad daylight, engages in a sexual act at the top of the Kings Park DNA Tower, where anyone is able to see them but, by happy circumstance, no-one does. It is something of which they are currently proud so they post it to a couple of friends. Of course, the fact that they have distributed it to certain people will not bar prosecution in due course for a further distribution down the track. But when the relationship sours, or perhaps when it has not soured—let us say that they are still in a relationship—without the knowledge of one of the parties, the other sends on the image. Will that person have committed an offence by distributing an intimate image—meaning "a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy" a sexual act? Can it be said or inferred from the evidence, beyond reasonable doubt, that one or other of the people would reasonably expect to be afforded privacy in those circumstances and, hence, there is the foundation of an offence or not? I would suggest that in New South Wales it would not be, because the terminology is "reasonable person would reasonably expect". However, we are talking about "the person would reasonably expect". Is there a difference in the way that the legislation would be applied? Can the minister give us any guidance at all? This is the government's bill. The government ought to be able to tell us, at least broadly speaking, how it is supposed to work rather than simply referring to the policy of it, saying that it is supposed to criminalise the distribution of intimate images without consent. There is more to it than that. There are definitions. It is a question of whether those definitions are framed satisfactorily to meet the mischief that the government proposes to address. Can the minister help us out at all?

Hon SUE ELLERY: The words "the person would reasonably expect" were deliberately crafted in that fashion. The legislation asks the court to stand in the shoes of the person depicted, not the person distributing or the person who receives, and consider from that person's point of view—from that person's perspective—whether that person had reasonable grounds, on the basis of the evidence provided, to expect privacy. That will be different in different circumstances but those words were crafted in that particular fashion to put the person whose image had been depicted at the centre and consider from their perspective whether there were reasonable grounds for them to have expected privacy.

Hon NICK GOIRAN: Regarding the choice of language found on page 3 of the bill and the definition of "intimate image", the minister has drawn an interesting point to my attention. The government has chosen to use the words "the person" rather than "a person". Does that mean that the test will be subjective or objective?

Hon SUE ELLERY: It is interesting because it is a shared objective. If the intent had been to consider solely the complainant's subjective expectations, the phrase could have been drafted—I touched on this in my second reading reply—as the person "had" a reasonable expectation of privacy. The wording that has been used—"the person would reasonably expect"—invites the court to stand in the shoes of the person depicted and consider from that perspective the objective question of whether there were reasonable grounds to expect privacy. It is a bit of a mix in that the court is invited to stand in the shoes of the person depicted and then consider from that point of view the objective question of all the circumstances that person found themselves in and whether there were reasonable grounds on which to expect privacy.

Hon NICK GOIRAN: At least from my perspective, I would like to round this out, and other members may like to continue their line of questioning on it. It is a combination of the two. The act is taking place in the middle of Murray Street Mall in broad daylight. Hundreds of people are walking through Murray Street Mall. The conduct has been captured and distributed. The person who is later offended that this distribution has taken place

subjectively says, "This is outrageous. I expected privacy. I am greatly offended that this image has been distributed." Even though that is that person's subjective view, the court will then engage, because of the words "would reasonably expect", and say, "That is entirely unreasonable" and therefore that instance would not be captured by this legislation.

Hon SUE ELLERY: That is correct. The court will consider the particular circumstances and will most likely arrive at the same position in the scenario that the member has described.

Hon MICHAEL MISCHIN: Can the minister assist the police officer who is faced with an intimate image of people filming themselves having sex at the top of the DNA Tower in Kings Park about whether that is something that is intended to be captured by this? The person comes along later and says, "Yes, I was quite happy to have sex at the top of the DNA Tower in Kings Park in broad daylight and I know that there were cars down in the car park and the like but no-one bothered us but my nasty girlfriend has now sent off a copy of this video. I reasonably expected to be afforded privacy up there because no-one was around and no-one was coming close." Is that the way this legislation is meant to work? The minister says that she cannot anticipate what the police might do but some police constable, who has emerged from the academy, is looking at this and someone has come along and said, "Here is a video of me that has been distributed. This is how it came about." Can you help him out at all and give some idea as to whether that is the mischief that this legislation is meant to be addressing rather than being left to the court?

Hon SUE ELLERY: It will depend on the circumstances to a certain extent. It has been a long time since I have been at the top of the DNA Tower so I do not know whether there are screens around the top. I do not know to what extent it is exposed. I would say that when standing in the middle of Murray Street Mall, one would be exposed and they would know they are exposed. Assuming that the "public viewability" of the top of the DNA Tower in Kings Park is the same as it is in Murray Street, I would give the same answer. It will depend on the circumstances of the particular evidence. If people are doing it in broad daylight, and if they are doing it in a public place in which, as the member described, there are lots of cars in the car park, I do not see how they could reasonably expect to be afforded privacy, but there might be other bits of evidence that I am not aware of.

Hon ALISON XAMON: I want to confirm that for the purposes of this legislation, merely the fact that it is daylight does not preclude potential recourse for someone under this legislation. The example of various malls have been given. I would suggest that people are going to be captured by CCTV, if nothing else. I think any reasonable person would expect that to be public. For example, it may be the middle of the day and people could be on what they think is a very, very secluded beach, perhaps up north where it is nice and warm, and unbeknownst to them, somebody may be filming or taking photographs but they would potentially reasonably expect that they would be afforded some privacy. I wanted the minister to confirm for the record that merely the fact that it is daylight does not preclude the discretion being applied in the future.

Hon SUE ELLERY: The honourable member is quite right. I was using the descriptors of that particular scenario that were given to me. It will be the case—that was my point exactly—that it will depend on the particular circumstances. It may be a public place but it is completely secluded.

Hon MICHAEL MISCHIN: I was going to ask the minister about the prospect of having sex in an elevator in a public building in between floors and whether that is a place in which someone could reasonably expect to be afforded privacy, but I suspect the answer would be that it all depends on the circumstances.

Hon Sue Ellery: No is what the answer will be if you ask me that question.

Hon MICHAEL MISCHIN: That is something. I am glad that we have got that far. At least a police officer will know what to do in those circumstances.

A question was asked earlier, and I think the minister touched on it in her second reading reply. The definition of "intimate image" states —

> (a) means a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy —
>
> …
>
> (b) includes an image, in any form, that has been created or altered to appear to show any of the things mentioned in paragraph (a);

That is, paragraph (a) refers to breasts, genital area et cetera. Is that meant to cover a cartoon depicting, say, a woman in a state of undress who is recognisably meant to be a particular person? Is that the sort of mischief that is meant to be covered by this provision?

Hon SUE ELLERY: I provided quite a detailed response to this question in my second reading reply. The definition of "intimate image" in proposed section 221BA requires that the image shows or appears to show one of the things mentioned in subparagraphs (i) to (iii); that is, the definition includes both what we might call authentic intimate images and images that appear to contain intimate content but are, in fact, fake. This language is intended to capture convincing fakes, not satirical mock-ups. So we would not expect that someone looking at a lewd caricature would conclude that it appears to show actual intimate content. Let us assume that someone is able to persuade the court that a caricature constitutes an intimate image. The accused person could then seek to rely on the reasonable conduct defence contained in proposed section 221BD(3)(d). In doing so, we would expect the accused to refer the court to the considerations listed in proposed subparagraphs (i) and (iv)—namely, "the nature and content of the image" and "the degree to which the accused's actions affect the privacy of the depicted person". If the nature of the image is clearly humorous and fake, the person's privacy is not affected because the image does not capture or appear to capture a private moment. Depending on the circumstances, the media activity defence in proposed section 221BD(3)(c) may also be relevant.

Hon NICK GOIRAN: My colleagues have asked a number of important questions around the definition of "intimate image", which is found on pages 3 and 4 of the bill in clause 4, which is before us. Without in any way wanting to cut off their line of questioning, I was hoping to ask a number of questions around the definition of "consent", which is found in this same clause. "Consent" is defined in what will be new section 221BB. I note that according to the explanatory memorandum, the government has made the decision to mirror proposed subparagraphs (i) and (ii) on section 319(2) of the Criminal Code. That is obviously a decision that is quite within the government's right to make. Has the government reviewed the necessity of section 319(2) of the Criminal Code?

Hon SUE ELLERY: The best advice available to me at the table is no. The provisions in this bill before us relied on the advice of the Office of the Director of Public Prosecutions. If the question is more broadly whether the government has considered a review of the existing provisions around consent in the Criminal Code, the best advice available to me is no, but it might be the case that other work is being done by other parts of government that we are not aware of at the table.

Hon NICK GOIRAN: Section 319(2)(a) of the Criminal Code, which, remember, is the section that the government says that it is mirroring this provision on, states —

> For the purposes of this Chapter —
>
> (a) ***consent*** means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;

The minister will see that in section 319(2)(a) of the Criminal Code, it is all captured in one subclause, whereas in this bill, the government has deemed it necessary to separate those provisions into proposed section 221BB(1) and (2). The minister's advice at this stage is that the government has not reviewed the necessity of the section in the Criminal Code that it says is necessary to use as a mirror for this new section. I take it that the minister is not in a position to advise whether any statutory review has looked into the necessity of that clause, or whether there has been any review by the Law Reform Commission or the Department of Justice.

Hon SUE ELLERY: As I answered, it is not that we are aware of. I am advised that, if the honourable member is thinking that in the bill before us the same provisions are effectively split into two subclauses as a consequence of any particular thinking around the meaning or the intent, that is not the case. It is my least favourite answer, but I am advised that Parliamentary Counsel's view was that the splitting in two, albeit with the words "without limiting the generality of subsection (1)", is the more modern way of drafting. As I said, it is my least favourite answer, but that is what I am advised.

Hon NICK GOIRAN: It is a little curious because, from time to time, government does get advice from Parliamentary Counsel emphasising and underscoring the necessity for things to be consistent, particularly within the same act. Nevertheless, that is the advice that has been given to government and the advice that it is running with. Is the minister in a position to advise whether there have been any cases that have turned on the phrase used in section 319(2)(a) of the Criminal Code?

Hon SUE ELLERY: No, I do not have that information available.

Hon NICK GOIRAN: The government is not sure whether there has been a review of this section. Remember, minister, the government is saying that it is very important —

Hon Sue Ellery: Honourable member, can I just correct you? It is not that the government is not sure; it is that I do not have the information available to me.

Hon NICK GOIRAN: Right at this moment?

Hon SUE ELLERY: Correct. I have advisers from the Department of Justice with me. There may be advice available from the DPP or others about whether particular cases have turned on that definition. I do not have that information available to me here. That is all I am saying.

Hon NICK GOIRAN: Sure. That is fine, minister, but I am going to operate on the basis that the government has chosen to have the best available advice at its disposal this afternoon for the progress of this bill and, according to that best advice, the government is not aware of any review of the section in the Criminal Code that it says is very important for this bill to use as a mirror. There has not been any review but, on top of that, the government is not aware of any cases that have turned on this very important language that it says needs to be used as a mirror. If the minister does not know of any review and does not know of any cases that have turned on the purpose of that section, why does the government assert that it is essential that we use that particular provision as a mirror for the provision in the bill?

Hon SUE ELLERY: I will ask the honourable member to repeat the last part of what he said in a moment because I was receiving advice. However, I am advised that the Director of Public Prosecutions provided advice on this particular terminology and the way that it was drafted. The DPP's advice was to keep the language that was in section 319 of the Criminal Code and that there is no change to the effect or intent by splitting it into two, which was done by the drafters.

Hon NICK GOIRAN: Was it the case that in an earlier draft of the bill, proposed section 221BB(1) and (2) was not in the original draft and that, subsequently, the DPP was consulted and they drew it to the government's attention, saying, "It's very important that you use that as a mirror"?

Hon SUE ELLERY: I cannot give the honourable member a precise answer of what was in the first draft, but the DPP was consulted before drafting began, while drafting was proceeding and once drafting was completed.

Hon NICK GOIRAN: When did the DPP provide the advice saying that it is essential that this particular provision be included in the bill?

Hon SUE ELLERY: I cannot give the member a precise date, but I am advised that it was early in the drafting process that the DPP expressed the view that it be expressed in the form that we have described.

Hon NICK GOIRAN: Was that expression by the DPP in writing or was it verbal?

Hon SUE ELLERY: It was in a meeting, I am advised. I cannot, as I said, give the member the date when it happened. The best recollection of the advisers with me is that it was early on in the drafting process.

Hon NICK GOIRAN: Did somebody in government take notes at that meeting and are those notes available to be tabled?

Hon SUE ELLERY: I am advised that notes were taken. I am not in a position to tell the member whether those notes can be tabled, because we need to determine whether they are considered part of cabinet-in-confidence. I am not in a position to answer that question, but I am advised that notes were taken during the meetings. The advice provided by the DPP was at a meeting.

Hon NICK GOIRAN: If the minister is not in a position to release those meeting notes, will she discuss that with the Attorney General and see whether they can be tabled?

Hon SUE ELLERY: I can ask. I think it would be very unlikely that the government—in fact, any government—would agree to release notes taken during the drafting consideration of a bill, but I am happy to ask the question.

Hon NICK GOIRAN: So that members are clear about what we are doing here, at the moment we are being asked to consider the inclusion of entirely unnecessary words in the bill on the basis that the government says that it is very important we include these words because they are found elsewhere in the Criminal Code. Interestingly, in the next breath the government says, "But we're not going to use the exact same words as elsewhere in the code; we're actually going to split that provision because Parliamentary Counsel says that it is more modern to do it that way." In all the circumstances, a statutory review has not been undertaken, it has not been referred to the Law Reform Commission, we cannot identify a single case in which this has been identified as a problem and it has turned on the phrase used in the provision, but we are being asked to agree to what are otherwise unnecessary words.

Hon Sue Ellery: Which words do you say are unnecessary?

Hon NICK GOIRAN: For example, proposed subsection (1) states —

> In this Chapter a reference to ***consent*** is a reference to consent freely and voluntarily given.

If that was not in the bill, that would already be the case. Consent is always interpreted as meaning freely and voluntarily given. It does not need words in the Criminal Code to suddenly attribute consent as being given in a free and voluntary fashion.

Hon Sue Ellery: Do you think it does harm to the bill?

Hon NICK GOIRAN: That is why I am asking why the government is saying that it is necessary to include it. The minister says that it is necessary because it is found elsewhere in the Criminal Code so the government has mirrored it on that particular provision, yet it has decided to split the provision. No review was done and no case indicates that it is actually necessary. I find it very peculiar. I agree with the minister. I cannot find any basis upon which it would provide any harm. It is just very, very peculiar that the government insists in the explanatory memorandum that we must have this in the bill because it is elsewhere in the Criminal Code, yet no-one has turned their mind to whether it is even necessary elsewhere in the code. There has been no review. However, we do know that advice was given at a meeting by the DPP and that there are some secret notes that may or may not be provided at a later stage. Be that as it may, I note the government also insists that in proposed subsection (2) we must have words that read —

> Without limiting the generality of subsection (1), consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit or any fraudulent means.

Was any consideration given to how to deal with consent that is obtained by mistake?

Hon SUE ELLERY: I am advised there is a general defence of mistake in the Criminal Code.

Hon MICHAEL MISCHIN: It is not a defence strictly so-called; it is an exculpating circumstance that must be disproved by the prosecution beyond a reasonable doubt. I am not sure that is quite what Hon Nick Goiran was driving at, because the so-called defence under section 24 of the Criminal Code of "mistake" is something that relieves an accused of criminal responsibility. What I think Hon Nick Goiran was driving at is if the consent is given by mistake by the person depicted in the image.

Hon Sue Ellery interjected.

Hon MICHAEL MISCHIN: The minister did not answer Hon Nick Goiran's question because I think she misunderstood his question.

Hon NICK GOIRAN: Perhaps I will clarify for the minister because there seems to be some confusion. There are a number of elements to consent. Even if consent is given, it may not have been given freely. It may have been given by mistake or it may have been given under pressure. They are all circumstances in which a court would ordinarily consider whether there has been—shall I call it—authentic consent. I think the true legal term is genuine consent. Has genuine consent been given, whether it be to a contract or, in this instance, to the distribution of an image? The government has gone out of its way to specify—I say unnecessarily—in this clause that the consent must have been given freely and voluntarily, but the government makes no mention that the consent must not be given by mistake or under pressure. It makes no mention of duress or undue influence, or any of those other criteria. I am simply asking why, because the government has decided to elevate the importance of one component of consent, which is that it needs to be freely and voluntarily given, but has decided to provide no statutory assistance to the court on any other component of consent. I am asking why.

Hon SUE ELLERY: We are still not entirely sure what kind of mistake the honourable member might be referring to, but let us provide two scenarios. If, for example, a person understood that certain things were going to happen, and they did not, or did not understand that certain things were going to happen and they did, and therefore the person made a mistake, that mistake is captured by the bill now before the chamber, in the words, "deceit or any fraudulent means". The person was tricked, for example, or misled, and therefore they made a mistake. That is captured under "deceit or any fraudulent means". If the honourable member means that a person made a decision and now regrets that decision, and that is the mistake, that is not captured, because at the time that consent was given, it was freely and voluntarily given. I presume that the court would test that. Perhaps the honourable member can assist by saying what other examples of mistakes he might be referring to.

Hon NICK GOIRAN: I said that it was not a simple case of a mistake. I also asked about undue influence and duress.

Hon Sue Ellery: Would you consider force and threat to cover the circumstances that you just gave?

Hon NICK GOIRAN: I would not. That is part of a number of circumstances that could be considered, but the point here is that the government has gone out of its way to expressly indicate that consent must be freely and voluntarily given. It was unnecessary for the government to do that, but it has chosen to do so. I am simply asking why it has chosen to use that language—"freely and voluntarily"—and ignore "duress and undue influence". Surely someone has turned their mind to this at some point, or is it simply a case of "the Director of Public Prosecutions told us at a meeting, of which we've got some secret notes, and that's why we have included this, but actually no-one has really turned their mind to the different elements of consent"?

Hon SUE ELLERY: Taking the pejorative out of what the member has just said about secret meetings and secret notes —

Hon Nick Goiran: It was not a secret meeting—you told us about that—but the notes are.

Hon SUE ELLERY: I told the member about the notes as well. That is not a secret either. I have just chosen not to share them, but I have said that I will give an undertaking to ask the question of the Attorney General.

In any event, it is essentially—pejorative taken out—as the honourable member described; that is, those people with responsibility for providing input into the best way to reflect the policy of the bill provided advice that the two provisions currently set out in the Criminal Code at section 319 should be those relied upon in the bill before us. The drafters considered that the more modern—my least favourite answer—way to express that was by splitting it in two, as it appears in the bill before us.

Hon NICK GOIRAN: The government says that it is very important that we use section 319(2) of the Criminal Code as the mirror for the proposed section that is before us. Why does the government give the age of consent as 16 years, when the very section that it is using as a mirror uses 13?

Hon SUE ELLERY: Reliance on 16 years as the age of consent reflected the state's general position when it comes to consent to sexual activity. There are certain offences in the code that rely on different ages for different elements, but the general position on the age of consent to sexual activity is 16. That is why it is relied upon in the bill before us.

Hon NICK GOIRAN: The government has chosen, if you like—my choice of words—to make a big deal about section 319(2). It is not me, it is the government that says that section 319(2) is a big deal and therefore we must include it to be consistent, and we must use it as our choice of language in proposed section 221BB, but section 319(2) states that a child under the age of 13 years is incapable of consenting to an act that constitutes an offence against the child. Now we are using the age of 16. Is it a mirror or partial mirror? What has been the basis of that? Was that again advice from the DPP, coming out of that same meeting?

Hon SUE ELLERY: Let us take the pejorative out of it again. I note that the member said that it is his expression that the government is making a big deal. The government is making no big deal about this whatsoever. The member asked a question about where the definition of consent came from, and I advised that it came from provisions set out in the Criminal Code. It is about the definition of consent. The age of consent is 16 for sexual activity, and it was not proposed to change that by way of the policy of this bill.

Hon NICK GOIRAN: Who was consulted on the choice of 16, rather than 13?

Hon SUE ELLERY: The consultation on keeping the age of 16 was deliberately considered, and consultation on that particular matter took place with, and advice was sought from, amongst others, the Commissioner for Children and Young People, the WA Police Force, the Director of Public Prosecutions, the Aboriginal Legal Service, and the Women's Council for Family and Domestic Violence Services. I do not have a list in front of me now, but I am advised that other non-government organisations might also have been involved.

Hon NICK GOIRAN: I am pleased to hear that there was intentional, very deliberate consultation with the stakeholders on this issue. The minister said that the Commissioner for Children and Young People was consulted. What did the children's commissioner say?

Hon SUE ELLERY: I am advised that the Commissioner for Children and Young People and indeed all other stakeholders expressed the view that 16 years was the appropriate age to refer to in these provisions of the bill.

Hon NICK GOIRAN: To be clear, no consulted stakeholder suggested an age other than 16?

Hon SUE ELLERY: I am advised, no.

Hon MICHAEL MISCHIN: Touching on the subject of consent, I can understand what has been driven at in proposed section 221BB, and also the purpose of section 319 in chapter XXXI of the Criminal Code, which deals with the question of consent more generally. Consent is framed in both cases as "a consent freely and voluntarily given". The Criminal Code then goes on to state what does not constitute free and voluntary consent and specifies —

> where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;

Those prescriptions address issues of consent in the nature of sexual conduct. That is reflected, as the minister said, in proposed section 221BB of the code. I take Hon Nick Goiran's point that it states nothing about consent being not freely and voluntary given if it is obtained by, amongst other things, duress or oppressive conduct, if you like. One can imagine circumstances in which a person persuades someone to consent to the distribution of an image in the same way that someone can persuade someone to engage in a sexual act by simply badgering them long enough until they finally give in. It cannot be said to be by force, necessarily, or by a specific threat, intimidation, deceit or fraudulent means, but simply through an oppressive harassment, conduct and oppression

over time. Can the minister confirm that in the government's view that would not be a consent freely and voluntarily given for the purposes of both a sexual offence under chapter XXXI of the code as well as what is being proposed in new chapter XXVA?

Hon SUE ELLERY: I am not sure of the point that the honourable member is getting to. If the person who was subject to that badgering was to mount an argument that that was consent achieved by intimidation, for example, which arguably they could, the argument is that that consent was not freely and voluntarily given. It will depend on the position of the person. I am not entirely sure of the point that the member is trying to make around what constitutes free and voluntarily given consent, given the use of words in proposed section 221BB(2) around force, threat, intimidation, deceit or any fraudulent means. They are words that could capture a whole range of behaviour and activities that result in consent being given in circumstances in which otherwise consent would not be given.

Hon MICHAEL MISCHIN: Perhaps I will clarify with an example. Let us say that person A is seeking the go-ahead, the consent, from person B. Person A says to person B, "Come on, let me show this photo to my mates", and person B says, "No, I don't want to do that." Person A keeps coming back to person B, saying, "Come on, there is no harm. Come on." They eventually wear person B down to the point that person B says, "All right! Do it." Is it at least arguable that that would not be a consent freely and voluntarily given?

Hon SUE ELLERY: I think the honourable member has answered his own question, because he said that the person eventually gives in, as in the question had been asked more than once, and in the scenario that the member has just given, the consent would not have been given. It is arguable that that meets the intimidation component of whether consent is freely and voluntarily given. It is arguable.

Hon MICHAEL MISCHIN: I would have thought it would not need to; I would have thought that it is a question of the line between persistent persuasion and harassment. Anyway, at least that is a possibility. Another feature of chapter XXXI of the Criminal Code deals with particular types of complainants and it is not being dealt with in this proposed chapter of the code. What about the circumstance in which the person whose image —

Hon Sue Ellery: Honourable member, where are you looking in the code?

Hon MICHAEL MISCHIN: I am looking at chapter XXXI of the Criminal Code that deals with sexual offences, but there is a feature I will get to in a minute that is not reflected in the proposed chapter—the case of incapable persons. A specific set of offences in chapter XXXI of the Criminal Code addresses the prospect of sexual offences against incapable persons. Plainly, they can be said to be giving consent to sexual activity and that consent may be freely and voluntarily given, not under any force, threat, intimidation, deceit or fraudulent means, but they can be, and I quote section 330(1) of the Criminal Code —

> … a person who is so mentally impaired as to be incapable —
>
> (a) of understanding the nature of the act the subject of the charge against the accused person; or
>
> (b) of guarding himself or herself against sexual exploitation.

That does not seem to be covered as a possibility in what is being proposed by this bill. It seems to me that there could be circumstances in which someone whose intimate image is going to be distributed has given consent to it, but they are mentally incapable of understanding what they are consenting to, in the same way as someone may not be capable of understanding the act to which they are giving consent, in the case of sexual conduct. Does the bill need to be amended to accommodate those peculiar circumstances to protect the mentally incapable people? Has it been considered?

Committee interrupted, pursuant to standing orders.

[Continued on page 7781.]