

**CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018**

*Committee*

The Deputy Chair of Committees (Hon Martin Aldridge) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

**Clause 1: Short title —**

**Hon SUE ELLERY:** I want to clarify comments I made yesterday during the second reading reply with respect to how the commonwealth legislation addresses the issue of images depicting people without their usual religious or cultural attire. I had been advised that civil penalties may flow from noncompliance with an order to take down such an image but not the original distribution. I am now advised that the original distribution can give rise to a civil penalty, albeit only in limited circumstances. That is where the distributor knows that the person depicted in the image consistently wears the missing cultural or religious attire whenever they are in public. This does not change the fundamental point that the relevant commonwealth provisions are limited to the civil arena.

**Hon NICK GOIRAN:** During the second reading debate, I asked about the interaction between this bill and the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018. I thank the minister for the preliminary advice that she provided during her reply to the second reading debate. She mentioned a couple of terms at that time. One was the term “complaint” and the other was “objection”. Can she indicate the difference between those two terms that are used in the commonwealth legislation? Why does our bill not use those same terms?

**Hon SUE ELLERY:** I am advised that we are essentially talking about two different purposes of the legislation, although they are complementary as well. The commonwealth regime is about establishing a civil complaints regime whereas ours is about establishing a criminal offence regime. Under the commonwealth legislation, a complaint is lodged by a person who is aggrieved because an image has been posted without consent. We understand that an objection is defined in the commonwealth legislation as being circumstances that might apply when that person did not lodge an original complaint but has since lodged an objection, so they did not initiate the process but they have since lodged an objection.

**Hon NICK GOIRAN:** Under the commonwealth legislation, is there any ability to prosecute criminal offences or is it solely a matter of establishing a regime for which there can be civil litigation?

**Hon SUE ELLERY:** I am advised that with respect to the commonwealth jurisdiction, this element around distribution in the commonwealth regime is purely civil. However, I am advised that recently the commonwealth introduced some criminal provisions to its Criminal Code relating to the distribution as well. With respect to the bit around complaints and objection, in the commonwealth legislation, it is a civil regime.

**Hon NICK GOIRAN:** The minister referred to the recent change by the commonwealth to establish some criminal provisions around distribution. How recent was that and what is that legislation?

**Hon SUE ELLERY:** I am advised that it came into force on 1 September this year. It was originally in the same package as these measures. That is the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018. The relevant provisions that we have been talking about took effect from 1 September.

**Hon NICK GOIRAN:** I am a little thrown by the explanation of the act because I think I heard the minister say it was the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018. That is the act that I have been referring to.

**Hon Sue Ellery:** I said it was part of the package but those particular provisions took effect from 1 September. That is the advice that I have been given with respect to the complaints and objections component.

**Hon NICK GOIRAN:** So that there is no confusion, there is one single federal act.

**Hon Sue Ellery:** Correct.

**Hon NICK GOIRAN:** They just came into operation at two separate times.

**Hon SUE ELLERY:** I am advised that the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018 did two things: it amended the Enhancing Online Safety Act 2015 and it also amended the commonwealth Criminal Code with respect to those provisions that we talked about a few minutes ago. I am also advised, for the purposes of accuracy, that it all came into effect on 1 September 2018. I may have inadvertently created some confusion.

**Hon NICK GOIRAN:** So some federal offences are captured by the recent changes made to the legislation by the federal Parliament, which came into effect on 1 September 2018. That brings me to my question: is it possible that a person can be captured twice for a single distribution? Could they be captured at the state level in Western Australia because of this legislation and also captured by those criminal provisions at the federal level?

**Hon SUE ELLERY:** I am advised that yes, it is possible, and that it is not unusual. However, the state jurisdiction—the state police—will focus on enforcing the provisions in the state’s laws.

**Hon NICK GOIRAN:** Who would prosecute those offences under the federal act and who would prosecute those offences under the Western Australian act, which is before us at the moment? Would those agencies be able to collaborate with any evidence that they obtain, or would work need to be duplicated and separate investigations and separate prosecutions need to be run?

**Hon SUE ELLERY:** I am advised that WA police could prosecute for both. Of course, in addition, in respect of the commonwealth, the Australian Federal Police could prosecute. Regarding collaboration, the honourable member may already be aware of the Australian Cybercrime Online Reporting Network, the national database triaging system in which all jurisdictions share information, particularly around cyber types of offences.

**Hon NICK GOIRAN:** Has the state done an analysis to ascertain whether there is any form of image that would be distributed and would be captured by the legislation before us that would not already be captured by the federal act that came into force on 1 September 2018?

**Hon SUE ELLERY:** I am advised that there may well be overlap but that the two regimes were established for essentially different purposes. The commonwealth regime was established around people acting with the intent of harassment or menacing, and around regulating the use of a carriage service. That was done because the commonwealth is the regulator for carriage services. What that regime would not cover, for example, is somebody at a school physically posting something that could be seen by everybody.

**Hon Nick Goiran:** Like a hard-copy poster?

**Hon SUE ELLERY:** Yes. That would not be captured by the commonwealth regime because, of course, the commonwealth was looking to use the bits that it regulates already.

**Hon Michael Mischin:** Under the communications powers et cetera.

**Hon SUE ELLERY:** Correct.

**Hon ALISON XAMON:** In my contribution to the second reading debate, I raised concerns about whether, inadvertently, people who were the subject of unwelcome images and subsequently forwarded them would be captured by this legislation. Specifically, I referred to those instances in which people receive unwelcome images and either forward them on to friends for support or republish them, particularly on a website, for the express purposes of shaming people who have sent unwelcome images. At that point, I went into a little bit more detail about the sorts of circumstances I was referring to. I want to know whether this legislation has any protections for those people.

**Committee interrupted, pursuant to standing orders.**

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*Sitting suspended from 4.15 to 4.30 pm*