CRIMINAL LAW AMENDMENT (INTIMATE IMAGES) BILL 2018

Committee

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

Clause 4: Chapter XXVA inserted —

Committee was interrupted after the clause had been partly considered.

Hon SUE ELLERY: Before we went into question time, the question was around an incapable person being able to "freely and voluntarily" consent. I am advised that during the break, the advisers at the table sought advice from the Office of the Director of Public Prosecutions. I advise the chamber that if a person is not able to understand what they are consenting to, consent cannot be said to be given freely and voluntarily.

Hon MICHAEL MISCHIN: If that is the case, why do we have provisions in the Criminal Code under chapter XXXI, "Sexual offences", that specifically protect incapable persons who are so mentally impaired as to be incapable of understanding the nature of the act or the subject of the charge against them or of guarding themselves against sexual exploitation? Why is it not thought fit to have a similar punishment or provisions to deal with those who may be mentally incapable of providing consent to the release of intimate images of themselves?

Hon SUE ELLERY: In the process of the consultation with the respective agencies and others, no advice was given that a particular provision needed to be included in the bill before us about an incapable person. However, regarding the use of the language "freely and voluntarily given", the advice received from the ODPP during the break was that, based on the history of case law, an incapable person is not able to freely and voluntarily give consent and therefore it is expected that, when considering whether consent is voluntarily or freely given and there is evidence to the incapacity of the person concerned, they will be deemed to be unable to freely and voluntarily give consent.

Hon NICK GOIRAN: I want to go back to the age of consent that is used in the term we are considering, which is consent. The minister indicated earlier that no stakeholder the government has consulted advised there should be any age other than 16; hence, the government chose that the threshold should be 16 years. Would someone else be in a position to give consent on behalf of a person who is under 16 years of age?

Hon Sue Ellery: I am advised not.

Hon NICK GOIRAN: For example, a child who is three years of age—therefore, someone who is under 16 years of age—is incapable of consenting to the distribution of an image, so will the parent of that child be able to consent to the distribution of that image?

Hon SUE ELLERY: I am advised that specific consideration has been given to this—the example is described as a baby in the bath–type picture. Proposed subsection (6) provides that a person under 16 cannot consent to distribution. That is consistent with the general position in the Criminal Code that persons under the age of 16 are unable to consent to conduct of a sexual nature. It is certainly not intended that proud parents sending a naked baby photo to relatives be criminalised. The bill does not seek to achieve this by enabling parents to consent on behalf of the child—a position that could have undesirable implications—but through the acceptable conduct defence contained in proposed section 221BD(iii)(d).

Hon NICK GOIRAN: If I understand correctly, the parent cannot give consent on behalf of their child, but the parent will have a defence available to them.

Hon Sue Ellery: Correct.

Hon NICK GOIRAN: How will the bill deal with a parent who distributes the picture of the child at or around the age of three and then, at a later stage, for instance when the child turns 18, the child no longer wants that image distributed?

Hon SUE ELLERY: I can relate to the very example the honourable member has given. There is a photo of me and my two-year-old friend Robyn in a pool with no clothes on that both our sets of parents continue to distribute.

Several members interjected.

The DEPUTY CHAIR: Order, members!

Hon SUE ELLERY: I do not mean to diminish this at all; this is a serious matter. However, I am advised that the court will still rely on the consideration of whether a reasonable person will form the view in the particular circumstances that it was acceptable. It is still an application of the reference I gave before—that is, through the acceptable conduct defence in proposed section 221BD(iii)(d).

Hon NICK GOIRAN: I understand that defence is available.

The DEPUTY CHAIR: Honourable members, there is an undercurrent of conversation happening around the chamber. I ask that if you need to have an urgent conversation, take it outside; otherwise, can we keep it more quiet.

Hon NICK GOIRAN: Members are probably talking about their concern about this situation, because it will capture many, many parents in Western Australia who quite frequently distribute images of their child in what I describe as quite innocent circumstances and which I believe the government does not intend to be captured by this bill.

Hon Michael Mischin interjected.

Hon NICK GOIRAN: That is a good point. Before I continue, have we got any further with the secret notes?

Hon Sue Ellery: No, I have not. When would I have had the opportunity to ask the question?

Hon NICK GOIRAN: I do not think the minister would have because she has been engaged in parliamentary business, but others at her disposal might have been able to knock on the door of the Attorney General to ask him whether he is prepared to unlock the cabinet and reveal the secret notes. But we will wait for another occasion for that.

Back to this issue, it is still not clear to me whether the government is saying that even though it does not intend that such circumstances be captured, the bill can capture those circumstances and, therefore, a court can find that the defence is not satisfied. I remind the minister that earlier when we were considering the definition of intimate image, she indicated to the chamber that it is a combination of a subjective and objective test. The judicial officer will first of all have to consider what the person thinks about this matter. Remember, I am indicating that it is an 18-year-old who is now objecting to that image being distributed, so they are clearly saying that it is not reasonable for that to be distributed. The court then has to consider whether it thinks it is reasonable. The government is saying that it thinks it is reasonable. Are we giving an assurance to parents in Western Australia that every time they distribute such an image, they can sustain the defence outlined at proposed section 221BD?

Hon SUE ELLERY: That is what the defence is designed to address, in part. However, it is useful to step through the processes. The first step is that the 18-year-old will have to talk to the police and the police will have to make a judgement about whether to lay charges. Before it ever gets to the court and the court has to decide whether 56-year-old Sue Ellery can object to her parents continuing to use that photo of her and Robyn, the police will have to make a decision that it is in the public interest to lay charges. Although it is technically possible, a defence is built into legislation. On top of that, a series of decisions will have to be made about whether pursuing charges is in the public interest.

Hon NICK GOIRAN: I think that is entirely reasonable if the distribution of the image happens before the person turns 18 and before the person is able to, in a legal sense, provide consent. However, if a person captured in the circumstances that the minister has described—the minister and her friend Robyn—after the age of 18 —

Hon Sue Ellery: Say at their twenty-first!

Hon NICK GOIRAN: Yes, at their twenty-first birthday—insist to their parents that they do not provide consent, and they expressly indicate to their parents, "Under no circumstances do I want that image of me circulated", will the parents have an ongoing defence available to them even in those circumstances and they are then free to continue to distribute that image, despite the express lack of consent provided by an adult?

Hon SUE ELLERY: The court would apply exactly the same test I have described—that is, that which is set out in proposed section 221BD(3)(d).

Hon SIMON O'BRIEN: As we contemplate this clause, I want to bring to the attention of the chamber proposed section 221BD; in particular proposed subsection (3). In fact, I find the whole proposed section rather offensive. This has been creeping into the drafting and formulation of legislation in recent times, and I know I have spoken about it before. It concerns me that, in relation to the dialogue that has recently happened with Hon Nick Goiran, talking about the innocent practice of two or three-year-olds sometimes having pictures taken of them frolicking around in a state of undress, having just jumped out of the bath or swimming in the pool with a mate at a young age, I do not think that any reasonable person, including everyone in this place, would want to see that sort of activity criminalised. This bill is constructed in such a way that such activities are criminalised. Is that the government's intention, because that is what it is doing in the way that it has constructed this bill?

Hon SUE ELLERY: No, that is not what the government intends with this legislation. This legislation is about distribution of intimate images, in which a person is engaged in a private act, in a state of undress, using the toilet, showering, bathing or engaging in a sexual act, in which the person would reasonably expect to be afforded privacy. I do not think a two-year-old or a three-year-old can form a judgement about whether they reasonably expect to be afforded privacy. It is not the intention of the bill to go down that path, and I know that the honourable member does not believe that it is the intention of the government to criminalise the activity of parents joyfully sending gorgeous, cute photographs of their kids around to friends and family. The safeguard is to make sure that, if an unreasonable person were to take that action, and the police were to make the judgement that it was in the public interest to pursue that, and the court was to consider it as well, there is a defence, to ensure that it cannot happen.

Hon SIMON O'BRIEN: Thanks for that. I want to make crystal clear to members in this place the point that I am making, if they will forgive my poor grammar. I recognise what the minister is saying. Just now she has responded to a what-if situation presented by Hon Nick Goiran about the parents who have a photo of an infant child lying on the rug, and what have you, and then produce it again when the child has achieved their majority, perhaps to embarrass them at a twenty-first birthday party, or something like that. It is a common enough scenario. What then, if the person who is the subject of the photo wants to object to that, and says, "Now hang on, I am now in a position where I'm not a two-year-old; I'm old enough to be asked for consent, and therefore I'm old enough to withhold consent." I think that is the essence of what Hon Nick Goiran was putting to the minister. I think this bill would make it an offence for anybody to then distribute that image again. That is what it does—it criminalises that behaviour.

Up to this point in time, if a scenario were to arise such as the one that we are contemplating—it is a common enough scenario, I should think—the response from officialdom as well as from the community at large would be, "Stiff bickies, mate. Your parents have put up with enough from you so that if they want to tease you with an old baby photo being on display at the twenty-first birthday party, and you get upset about that, well toughen up, princess." That is what they would say. That is the standard of our society, and that is the standard that I subscribe to. However, this bill says that, in that scenario, someone then transmitting that photo—mum or dad, or grandma—would be committing an offence. I do not think that that is the standard of our society, and I do not think it is the sort of law that we should be legislating. If anyone wants to argue the toss in that—I think the world is going to the pack in many ways—I think that basic understanding is a fair reflection of our standards in this society, and yet this legislation would make it a crime.

I can see that the minister is reflecting on that, because she is a thoughtful person.

Hon Sue Ellery: Despite the damage done by my parents.

Hon SIMON O'BRIEN: Yes, she has overcome considerable trauma that we have just heard about, even despite a lack of evidence, but we believe her because we know she is a person of integrity. We also know that she will receive the points that I am making in a constructive way.

What do we do, then, if a person who was a three-year-old, but is now a 19-year-old or a 21-year-old, insists on pushing this matter by saying, "No, I am going to make a complaint to the police." The first thing the parents ought to do is cancel the twenty-first party they are presumably paying for, and write the ungrateful little so-and-so out of their will. Those are the practical things that need to happen, because he is probably too big and ugly to give him a clip over the ear. Actually, we are not allowed to do that anymore these days, are we?

Hon Michael Mischin interjected.

Hon SIMON O'BRIEN: Oh dear, yes—thank you, Basil.

The minister at the table then seeks to provide reassurance to us to say that the police would then have to decide whether they are going to pursue this matter, so there is a protection that is built in. It is up to the police, apparently, to take the action to bring a charge if one is to be brought. I have a great deal of respect for the police, as we all do, but on occasion people make errors of judgement. They have four-day manhunts with paramilitary units and Saracen armoured vehicles, and then when they bring in the accused, who has been assisting them at length with their inquiries, someone forgets to put a note up to say that perhaps they ought to oppose bail. People make errors of judgement. I am aware of a trainee police recruit at Victoria Park, I think it was, in my electorate. He was straight out of the academy, and cars were being stopped for random checks. The officer involved checked a person's a licence, and did not like the look of them, apparently, so put a yellow sticker on the car because he identified that the window washer fluid reservoir was less than full. For *Hansard*'s benefit, that generated a few rolled eyes in the chamber. That is what actually happened. Occasionally, people make mistakes, whether it is through youthful enthusiasm or misunderstanding their role. Even the police can make mistakes. Let us say that the person wanting to press their complaint insists on a charge being laid, and instead of being told what they should be told, which is, "Go away, mate. We have important things to deal with", a police officer decides to bring a charge. It could happen; hell, we are meant to be passing a law right now to enable that to happen. It would be unlikely that such an event would occur—we would hope so—but understand, members, that we would be enabling this scenario to occur, and I would bet that it will happen. The minister says, "That's all right. Having sought advice and having recourse to the bill as it's printed, there's a defence to the charge." The defence, as set out in proposed section 221BD(3)(d), for example, states —

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

It then lists six potential criteria. Mind you, it says "each of the following", but proposed subparagraph (vi) is "any other relevant matters", so I do not know whether or not that is compulsory or not. Now that I read it, that is not very well drafted. If a person can prove that to a court, that is all right; they have a defence. That is what the government has put to us, except I have taken a little longer to say it. But I think that is the government's position:

it is all right. It is a bit like saying, "Hey, if you're not doing anything wrong, you've got nothing to worry about." It is a little like that, is it not? It is not acceptable that we encroach and make people liable to criminal charge when they should not be charged. It is not good enough to say, "But it's all right because you've got a defence." That is completely back to front.

The DEPUTY CHAIR: Hon Simon O'Brien.

Hon SIMON O'BRIEN: It is not a good thing to continue to create offences whereby people who should not be charged will be charged, and then accept the standard that it is all right for them to be charged because they have a defence, if they can go into court and prove certain things. Why should that mum and dad have to go into court and prove a whole range of matters set out in this proposed subparagraph? That is wrong, yet this government, through its legislation, proposes that we accept this bill that contains that provision. If members do not agree with it, it means that they presumably think it is okay for the things that are meant to be captured by this bill to occur. It is not okay for those things to occur, and that is why we are supporting this bill. But I do not like the way I am seeing this sort of legislation constructed. This is not the first time that we have seen this happen, in which the government says, "Blow it, it doesn't matter that this will scoop up innocent, unintended people into the net because we have given them a defence." When they are charged by the police, will they be arrested, I wonder? We have some pretty officious police from time to time. Will these people be arrested and taken into custody? In any case, if they are charged, they will have to do a lot of things. They will suffer a lot of trauma from that. They would have to retain lawyers at great expense, with all the stress of going to court to prove that they have a defence. That is wrong. Members ought to contemplate that before we pass this sort of legislation. I do not know why the government cannot see the basic injustice in what is being proposed in its very legislation by this clause.

Hon SUE ELLERY: The honourable member is right when he talks about what is consistent with community standards. The reference he was making to community standards was about the joyful practice of parents and family members exchanging photos of their kids, sometimes in a state of undress. Proposed section 221BD(3)(d) states that when the distribution was in circumstances in which —

> a reasonable person would consider the distribution of the image to be acceptable, —

That is the first saving provision number one —

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

The reasonable person defence is intended to give courts the capacity to consider the myriad factors that might amplify or diminish the criminality of a given distribution. It recognises that there are circumstances in which the distribution of an intimate image is entirely consistent with community standards. That is the example of the happy, joyful, healthy family distributing photos of their child, and should therefore not give rise to criminal liability. The alternative that I think the honourable member is suggesting is that because we have put in a defence, we are therefore criminalising the action of parents sharing those photos. The alternative, as I see it, is that we would use very prescriptive language to describe the kind of photos that could be distributed and could not be distributed. Unfortunately, members, there are parents who abuse their children and film it, record it and distribute it. There are people who do that. We have seen some horrific cases very recently in our courts of men effectively pimping out their daughters and others recording those photos—the Evil 8. People would recall that. We can go down the path of trying to come up with a very prescriptive list of offences—which would make it pretty hard, because we take the risk that we will always leave something out—or we take the alternative approach, which we have, and use language that provides that a judgement needs to be made by the police about whether it is in the public interest to lay a charge in the first place on the basis that the distribution was in circumstances in which a reasonable person would consider all those factors and come to the conclusion that Pete and Rosemarie Ellery circulating the picture of Sue and Robyn was not acceptable.

That is the alternative approach and that is the drafting process that the government has adopted. It is based on the very point that the honourable member makes; that is, we do not want to penalise parents who are doing it in a joyful, healthy and happy way, because that is completely consistent with community standards. I think it is the right approach to take.

Hon SIMON O'BRIEN: I thank the minister for that. I just want to conclude my remarks about this. I think I have made the point that I want to make, but I have to go a step further, having listened carefully. This is where we have

to part company, because I do not think this government gets it. The alternatives that have just been presented to us are that we can either have the bill before us or we have some other bill that has provisions in it that are so prescriptive that in fact they would be a great shortcoming and there would probably be all sorts of holes and could not possibly cover, as the minister said earlier, the 37 000 examples that might arise. Neither of those approaches address the problem that I have identified, because it is about how this bill is constructed. None of us think that the central offensive behaviour that this bill is meant to address should not be curtailed; I have heard no expression from anybody saying that that form of offensive behaviour should be encouraged or permitted. That is not the issue. In relation to whether some parents do horrible things to the vulnerable children they are meant to be protecting, sadly, in some cases yes. I might add that we have already got laws to deal with that. That has nothing to do with the bill before us. No, it is about the way we go about constructing legislation, and, sadly, this chamber does not have the prerogative to construct the legislation. That is up to the government and how it instructs its drafters, and that is the problem. The problem is that the government is not prepared to entertain an approach other than the one we have. I was not suggesting that what the minister was suggesting would be the alternative—no, no. I am saying that the approach in the bill before us is the problem; it creates an offence for all sorts of behaviour, allowing that there might be 37 000 variations and some of them quite innocuous. It says that for all sorts of reasons a person can be charged; they have committed an offence. That is the starting point, and then out of the goodness of its heart the government is going to give the accused a defence, if they are able to prove certain things. That is not the way we have traditionally gone about things for the last several hundred years. I am suggesting that the government has a long, hard think, and actually does something to get away from this idea of prescribing things. I do not think the minister quite understands this in the way that I comprehend it. My problem with this is that the government is already trying to be too prescriptive. I am not suggesting that it be more prescriptive. We have all of these explanations—definitions of this and definitions of that. What does "distribute" mean? What does "engage in a private act" mean? What does "intimate image" mean? What does "media activity" mean? There are all of these definitions. What about simply making it an offence to distribute private images without consent if a person is behaving in a malicious manner, for example? Then it is up to the authority charging someone with the offence to prove that someone was acting with evil intent. That is how our justice system has been formulated over the last umpteen hundred years. Now we seem to have a departure by which a person can be caught up in a charge and then they have to prove their innocence. That is what having a defence means, and that should not be the first recourse of a draft bill. Maybe we are going to have to agree to disagree on this, but I think it is a very serious matter that will need to be addressed. I will be interested to see what nuances this law might throw up in due course, because I am pretty sure there will be some unintended consequences. Anyway, I can only raise these matters and bring them to the attention of the chamber, because I do not think this should be happening. I hold that view very firmly and I regret that governments do not understand the nature of the problem they are creating.

Hon MICHAEL MISCHIN: I endorse the views expressed by Hon Simon O'Brien. Again, I take a short trip down memory lane to some legislation that our government introduced dealing with unlawful interference with lawful activities. We heard every member of the Labor Party bang on endlessly about how the legislation reversed the onus of proof because it required someone charged with an offence simply to say what their state of mind was at the time they had engaged in some activity that was interfering with another lawful activity. It was a very harmless question of someone saying, "Yes, I stood in front of a tractor"—or whatever it happened to be—"but my intention was X." It could have been something entirely within their own mind and knowledge. Yet, here we are requiring a reversal of the onus of proof for parents to establish that their actions are innocent, and that a reasonable person would consider the distribution of the image of their child, naked in the bath, to be acceptable, having regard to a whole lot of prescribed circumstances. That is precisely the sort of thing that we heard an awful lot of high moral ground vapouring about over the course of eight years, yet now it seems to have been forgotten. The champions of justice have been quite happy to reverse the onus of proof in every case, not just something within the person's knowledge, but to persuade a court as to what a reasonable person would think are acceptable standards. There is a way around this—not an easy one, I grant it. There are a number of exculpatory factors in our Criminal Code. They carry an evidential burden: an honest and reasonable, but mistaken, belief on the part of an accused, duress on the part of an accused and all sorts of things. They simply require some evidence that the prosecution then has to disprove beyond reasonable doubt. It can be done here, I would have thought, with a little bit of ingenuity and a little bit of work. I can quite understand a reversal of the onus of proof in respect of genuine scientific, educational or medical purposes. I do not want an image of me naked at the doctor's surgery being distributed without the doctor having to go to the trouble of explaining why it was thought to be for scientific, educational or medical purposes. Let them prove that. If it is reasonably necessary for the purpose of legal proceedings, yes, I entirely agree; it should be defence, something that those involved should have to establish on the balance of probabilities. If the person has distributed the image for media activity purposes, yes, I agree entirely; the media can take some responsibility and can get into court and establish a defence on the balance of probabilities in accordance with these criteria. Otherwise, what is wrong with saying that a person is not criminally responsible if a reasonable person would consider the distribution of the image to be acceptable, having regard to each of the following to the extent relevant: the nature and content of the image; the circumstances in which the

image was distributed; the age, mental capacity, vulnerability or other relevant circumstances of the depicted person; the degree to which the accused's actions affected the privacy of the depicted person; the relationship between the accused and the depicted person; and any other relevant matters. That is something that the prosecution would then have to overcome beyond reasonable doubt as part of its case.

Hon Simon O'Brien: Actually, it could be amended in that way if you had an one hour and a half to work on it.

Hon MICHAEL MISCHIN: It could be amended in that way. I do not know whether it would take that much; there would be a little bit of reformatting. I would like the government to entertain that possibility. I do not see it as being impossible. I see it as preserving the fact that there could be distributions of intimate images without consent that are not unreasonable and that the prosecution would have to establish that.

Sitting suspended from 6.00 to 7.30 pm

Hon MICHAEL MISCHIN: Before the dinner suspension, we had a discussion about the emphasis in the legislation, which is essentially criminalising certain conduct, making a blanket offence that is subject to those who have committed that offence being able to establish a defence. I have suggested that that can be redressed or amended. I am wondering whether the minister has had an opportunity to consider that and is prepared to entertain amendments to rectify the position or whether the government will maintain that there should be a reversal of proof to prove innocence, something the government has been steadfastly critical of when in opposition.

Hon SUE ELLERY: Prior to the break, Hon Simon O'Brien in particular was querying why the defendant, as opposed to the state, should bear the burden of establishing that a reasonable person would consider the distribution to be acceptable in the circumstances. What I am asking members to think about is the nature of the cases that are likely to come before the courts. If we are anticipating that a large proportion of these cases will involve parents sharing baby photos or other similarly innocent circumstances, it might be appropriate to require the state to establish that the distribution was not in line with community standards. That is not what the government is anticipating. As I have already made the point, police are not in the habit of prosecuting parents who circulate pictures of their babies, and I do not see that changing. On the contrary, we anticipate that the type of case the court will be dealing with is much more likely to involve a relationship between adults gone sour or a distribution for the purposes of titillation, intimidation, prestige seeking or some other misguided motive. The government argues that in those circumstances, the onus should be on the defendant to establish that the distribution was in line with current community standards.

The alternative position would require the state to litigate again and again the very basic principle that the non-consensual distribution of intimate images is, in the type of cases that will become before the courts, inherently unacceptable. The exclusions in proposed section 221BD(4) relate to circumstances in which, in most cases, the question of criminal liability should not even arise. Those are circumstances that refer to office bearers, the police and others, for example, intended to protect legitimate law enforcement activities or people who are reporting lawful conduct. The reasonable person defence is not in this same category and, therefore, it is appropriate that it remain as a defence, which the accused must prove on the balance of probabilities rather than take that component out of where it sits in the bill now, which is what Hon Simon O'Brien asked us to consider, and move it into proposed subsection (4).

Hon ALISON XAMON: I listened intently to Hon Simon O'Brien's contribution and I thought some really pertinent points were made. One of the things that it particularly highlighted—I think this has also been illustrated through the course of the discussion we have had in the Committee of the Whole House over the last several hours—is that there is a risk in the way the legislation is drafted in that there could be unforeseen consequences. There is no question that this chamber is of one mind in supporting the stated policy intent behind this legislation, and that is that when an intimate image has been taken of someone who was not intending that it be subject to broader distribution, but that subsequently happens, the person who has distributed that image should be made liable for that and it should be an offence. Indeed, I once again support the provisions in the legislation that enable very swift recourse by the victim of the distributed image being able to ensure that measures can be taken to have that immediately rectified. It will be a concern if we find that even one parent who has circulated baby photos, for example, is subject to the provisions of this legislation. It is absolutely unacceptable that if a parent innocently circulates innocent photos they should have to wait until they get to court to be able to clear their name. Likewise, I have now raised concerns about the possibility that people who are subject to unwelcome intimate images and who then attempt to address the matter may find themselves subject to legal proceedings. An example that I think is very common is when someone who receives an unwelcome image may decide to then subsequently forward it on to the offending person's mother and say, "Look at what you've raised; you might want to bring your child into line." I think that would be a pretty sensible way to address it, but would still be in violation of the legislation as constructed and I think would be contrary to the policy intent of this Criminal Law Amendment (Intimate Images) Bill. We now have question marks over the level of discretion that can be raised around whether a picture taken in a public place would invite the protections of this legislation. This raises the fact we are becoming very reliant on police

discretion in order to determine that the stated policy intent of the bill is upheld, that public standards are not offended and that we ensure that people who otherwise should not be charged are not charged. Is any work being undertaken or is there an intention to do any work in the creation of prosecutorial guidelines for police?

Hon SUE ELLERY: I do not have advisers from police at the table with me, but I am advised that we are not aware of whether prosecutorial guidelines are being developed. However, it is the case that whenever a new offence regime is introduced, police go through the process of training and establishing an investigative framework. It is likely that they will be considering a prosecutorial framework but I am not in a position to answer that tonight. I am happy to take it on notice and speak to the Minister for Police to raise it with the Commissioner of Police. I cannot give the member an answer from the table tonight.

Hon NICK GOIRAN: The debate that has been taking place today has conveniently moved to proposed section 221BD, "Distribution of intimate image". Can the minister inform the chamber what scientific purposes justify the distribution of intimate images without consent?

Hon SUE ELLERY: An example relating to genuine scientific purpose might be when the lead researcher in a clinical trial for a new genital herpes treatment takes a series of close-up before-and-after photos to gauge the effectiveness of the treatment. Those images are then made available on a shared drive that is accessible only to the other members of the research team. In agreeing to participate in the trial, the patient consented to the photographs being taken but was not specifically asked to consent to the images being made available on the shared drive.

Hon ALISON XAMON: In response to that matter, I can actually foresee scenarios whereby even though we are only talking about close-ups of genitalia, there may be instances in which people can nevertheless be identified. I am thinking, for example, of people who choose to have their genitalia tattooed, sometimes with quite specific tattoos. In situations in which somebody has not given consent and there may be a scenario whereby potentially they could be identified through particular characteristics, I was wondering whether there would be any recourse if they were to become aware that their genitals had been circulated for all to see.

Hon SUE ELLERY: Seriously! The debate was about genuine scientific purpose. There is nothing genuinely scientific about tattoos. That would not fit within the purpose of a genuine scientific purpose. It is not related to that definition at all.

Hon Alison Xamon interjected.

Hon SUE ELLERY: The member stood and asked, following on from the question about genuine scientific purpose, whether someone who gets their genitalia tattooed and is then identified, because of other reasons, might be captured by a genuine scientific purpose. I will read this out again. In agreeing to participate in the trial—this is in a case of a patient who has a tattoo that might be able to identify them; that is number one, the person has to agree to participate in the trial—the patient consented to the photographs being taken. If the patient thinks that they can be identified, first, they do not need to participate in the trial and, second, they do not need to consent to the photographs being taken.

Hon NICK GOIRAN: No, no, that is wrong. I draw to the minister's attention proposed section 221BD(3)(a) on page 6. It refers to the defence to a charge. The defence to the charge is used only in circumstances in which the person has not consented. When the minister says that the person does not need to consent, we know that. What we are talking about is the possibility of someone still distributing the image because of genuine scientific purposes even though the person has not consented.

Hon Alison Xamon: And could potentially be identified.

Hon SUE ELLERY: The advice I am given is that it is still possible to run that defence about genuine scientific purpose because the person consented to participating in the trial and the person consented to the photographs being taken. Frankly, again—I am sorry to keep saying this—I understand that members would like me to give a prescriptive yes or no, but it is not possible. It seriously will depend on the particular circumstances and all those variables that we have already canvassed a number of times that need to be taken into account; in the first instance about whether a charge is laid and, in the second instance, what the court considers about the particulars of the defence.

Hon NICK GOIRAN: Can I just ask the minister to keep in mind that it is not me who has inserted the words "genuine scientific" in this bill; it is the government. I was simply asking what scientific purposes does the government say justify the distribution of intimate images without consent. Until the minister gave an example, I could not think of any. I could not understand what this wonderful scientific purpose would be that would necessitate the distribution of an intimate image without the consent of the person. Sure, with the consent of the person it is not an issue, but it was about "without consent". The minister gave an example and I thank her for clarifying it.

What media activity purposes does the government say justify the distribution of intimate images without consent?

Hon SUE ELLERY: The honourable member is asking about proposed section 221BD(3)(c), when the distribution was for a media activity purpose. This defence is available only when the person distributed the image

for a media activity purpose and did not intend the distribution to cause harm to the person depicted and reasonably believed the distribution to be in the public interest. An example might be when a journalist publishes a photo of a prominent politician engaged in a sexual act—the example I have been given is with a Russian spy. This may arguably be in the public interest. I laugh but I should not—it is a serious issue. Again, whether it is in the public interest will depend on the circumstances. The defence aims to ensure that the new criminal offences do not have a chilling effect on the freedom of speech and debate as part of our democracy.

Hon MICHAEL MISCHIN: There is a bit of a problem with that one. Let us assume that that happens. The defence requires that media offender to prove, on the balance of probabilities, that they distributed the image for media activity purposes—yes, to sell newspapers or whatever—that they reasonably believed the distribution to be in the public interest, okay, but that they also did not intend the distribution to cause harm to the depicted person. I would have thought that the whole point of putting the picture of the prominent politician or, indeed, the Russian spy on the front page of the newspaper is to do them harm. How does that actually preserve the ability of the media to forthrightly report scandal and the like? It is certainly not being done for their good.

Hon SUE ELLERY: The key word there is "intend". The intent is not to cause harm to the depicted person and they reasonably believed the distribution to be in the public interest.

Hon Michael Mischin: They have to satisfy three things.

Hon SUE ELLERY: They do.

Hon MICHAEL MISCHIN: If I were to publish a photograph of the Leader of the House in an intimate situation with someone who is a spy, how would I possibly do that without the intention of doing them some harm? It is not going to help her reputation, or maybe it does—I do not know—but I would have thought that it is pretty reasonable to assume that it would not.

Hon Sue Ellery: It depends which bits of reputation you value.

Hon MICHAEL MISCHIN: It may damage the reputation of the spy—I do not know. It seems to me that an element of harm is inherent in that. As a reporter, I am not doing it to do the Leader of the House good.

Hon SUE ELLERY: Honourable member, it is not intended that that be the only judgement that is made. At the same time, the judgement needs to be made about whether the person reasonably believes the distribution to be in the public interest.

Hon Michael Mischin: But it is all three.

Hon SUE ELLERY: Correct; that is what I am saying. At the same time, the person reasonably believes the distribution to be in the public interest. Again, it will go back to the particulars of the circumstances. It is about the intent. Did the person distribute it or publish it because they intended to cause the person harm? It is not, if one makes a judgement that the greater call is that it is in the public interest.

Hon MICHAEL MISCHIN: Let me put it another way. A scandal in the United States was reported some time last year, I think. It could have been the year before—time flies with scandals in the United States. As I recall, a mayor of a city was filmed snorting lines of cocaine and at the same time getting up to interesting affairs with prostitutes. If I were the reporter publishing that, I could state that I distributed it for media activity purposes, mainly to report; that I reasonably believed its distribution to be in the public interest; and that I intended to damage that politician's career—I intended to expose him for the hypocrite that he was and to embarrass him, so that he would lose public office and be affected. That is plainly harm. Of course I intended by the publication to distribute it in order to do harm to the affected person. I need to prove all three of those to establish a defence, not two of them.

Hon SUE ELLERY: Again, it goes back to intent. It is less about the journalist making a judgement about personally wanting to do harm to person X—the mayor in that case—as opposed to wanting to expose the inappropriate use of public facilities, public office and public standing. It is about the intent. What was the purpose? Was the purpose that there was a longstanding feud between the mayor and the journalist about some personal issue, or was the intent that it is inappropriate for a public officer to use public money, public places or public facilities to conduct that activity? In that case the intent was not about harming the person but about protecting democracy, the mayoral office or whatever the situation was.

Hon MICHAEL MISCHIN: The idea is that, as the journalist, I would be able to say, "Look, because I have distributed an intimate image without the consent of those people, you have charged me, or even if you haven't, I am a criminal. To relieve myself of criminal responsibility, I have to establish, on the balance of probabilities—namely, that it is more likely than not; it is not just a reasonable doubt—that I did it for media activity purposes." I can tick off that one, because I just have to point to the newspaper. I reasonably believed it to be in the public interest, so I testify, "Well, look, this is unsavoury activity of a public figure with a criminal lowlife et cetera, who is doing criminal things. I think the public needs to know that about its elected representatives. I didn't intend to cause any harm to him." Who is going to believe that? It is not a matter of me asserting it and someone having

a reasonable doubt about whether I intended harm; I have to prove that I did not intend to cause harm. If I were to assert, "I did not intend to cause any harm to the two people in that photo", the question is: what did I intend? I intended some other public interest. Did I think that harm was going to be done to his reputation? Yes, of course; I would be stupid to deny it, but I did not intend that. I mean, seriously, the whole point of getting it out there is to damage the man's career, and perhaps the prostitute's career. That is a positive defence. That is what the government is asking be established on the balance of probabilities, not that it be disproved.

Hon SUE ELLERY: I do not know how to say it another way, other than if the honourable member were to read the proposed section in its entirety, he would find that proposed section 221BD(3)(d) provides a defence whereby —

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

It goes on to list all the things we talked about before. In respect of the provisions in paragraph (c) around the distribution of the image for media activity purposes, it is about the intent of the person and it is about the particular circumstances. Although I appreciate that the honourable member would like to present a number of particular scenarios and for the government's response to be, "In scenario X, the position of the police will be Y and the position of the court will be Z", I am just not in a position to do that. In each of the provisions the member has referred to, the police will need to make a judgement about the public interest and the courts will then need to make a judgement about whether the defence is based on evidence that is reasonable. In any event, we know that people are being harassed, horrified, vilified and abused by people distributing photographs of them—images taken of them without their consent, either naked or in sexual positions—and that that is occurring between people who do not have a media relationship. It is occurring in many, many cases because a relationship has gone sour. That is what the proposition is about. The notion is that the courts will be filled with either parents sending images of their small children or journalists publishing images of naked people in the bath or in the shower or engaged in sexual activities and then being called to account accordingly. In fact, the purpose of the legislation before us is to deal with a real problem—not journalists being inappropriately captured by this legislation or parents inappropriately sending pictures of their little children. The problem we are dealing with in the community in many, many cases is about relationships that have gone sour and people—for the most part men—then choosing to distribute, in colloquial language, revenge porn to somehow get back at someone who they think has done them wrong in a relationship. That is the problem that we are trying to address with this legislation. Although it is right that we should review the provisions to make sure that at the edges we are not capturing someone we did not intend to capture or causing unintended consequences, it is not notions like the one we just explored about journalists that we will have clogging up the courts inappropriately and therefore being an unintended consequence. The purpose of the legislation is about addressing the real problem facing our society—that is, the circulation of these images.

Hon NICK GOIRAN: The minister has misunderstood the reason I have asked these questions. On the example I gave of parents, the minister is quite right that the reason I asked that question was to make sure that they will not be unduly captured by this legislation and, as was outlined by my friend Hon Simon O'Brien, to make sure that they will not be unnecessarily put to the expense of having to defend a needless charge. The minister was quite right to identify that. But my questions about scientific purposes and media activity are quite different. I am trying to satisfy myself that it is necessary to have a defence. When it comes to parents, I think it is very important that there is a defence if there is the possibility that they will be charged, but I want to be satisfied that there is even a remote possibility that a scientist could genuinely have a need to distribute one of these images without consent. The minister gave an example that I am not enamoured of. I think it is a bit of a stretch, but I will not lose any sleep over it.

The minister's example of media activity is a bit more of a problem and, with respect to those who constructed that example, it does not fit the defence set out in proposed section 221BD(3)(c). As my friend Hon Michael Mischin identified, it will be necessary to satisfy the three limbs of the defence. The example given of the Russian spy clearly does not satisfy proposed paragraph (c)(ii). Plainly, if a journalist were to distribute that image, it could only possibly be with the intent of distributing to cause harm to the depicted person. Otherwise, it makes no sense that they would distribute the image. I am not satisfied that the example given by the government demonstrates why it is necessary for the chamber to agree to that defence in the legislation. If the chamber was minded to delete that particular defence, the bill would not fall down. All the important reasons for the defence that the minister has just identified that will enable the legislation to capture those heinous situations will be able to be done. The only thing that will not be able to be done is a clever journalist coming along and applying this defence in an inappropriate fashion. I would be interested in government giving another example of why it is necessary, for media activity purposes, to distribute intimate images without consent. If the minister is not in a position to provide an alternative example, is she in a position to identify who was specifically consulted about the necessity of this media activity defence? Who were those people and what did they say?

Hon SUE ELLERY: The alternative example I can give the honourable member is the image that went around the world of Kim Phuc in the Vietnam War. The image is of a young girl fleeing an awful napalm attack. She is

running down the road naked. It is a well-recognised international image. She is naked and she is clearly in distress. However, the image was an incredibly powerful message to send about the consequences of war and in particular what was going on in that war. That image is another example.

Hon NICK GOIRAN: I have to say that from my perspective—other members may have a different view—that is a far more satisfying example than the earlier one the minister gave. If that is what the government intends reasonable distribution by media of an image that might otherwise be captured by this important bill we are seeking to pass to mean, I am far more satisfied with that example. The question would be: would the person have reasonably expected to have been afforded privacy in those circumstances? Of course, that is where the definition of intimate image starts. Members might remember the discussion we had earlier this afternoon around the subjective test and the objective test. Without having given the matter a great deal of thought, my initial reaction is that, at both the subjective and objective levels, that person in that situation would not have reasonably expected to have been afforded privacy because, as I understand it, they were fleeing for their life and their safety. In those circumstances, I imagine that people have far higher priorities than worrying about their privacy. Nevertheless, if a defence is necessary for a media outlet in those circumstances, I could live with that. I have to say that I am far less satisfied with and a bit troubled by the minister's first example, and I would hope that the courts would not apply the defence in those circumstances, because I do not believe that they warrant a defence for what is plainly an invasion of privacy and has only been done to cause harm to the depicted persons.

Nevertheless—and perhaps other members may wish to return to this issue—while we are still considering this distribution the proposed section identified at pages 5 to 7 in the bill, can the minister outline the official duties that a law enforcement officer would undertake that are not for the administration of justice that would justify the distribution of intimate images without consent?

Hon Sue Ellery: Was the honourable member asking about proposed section 221BD(4)(c) and the administration of justice?

Hon NICK GOIRAN: I can clarify. Page 7, proposed section 221BD(4), it is the interaction between proposed section 221BD(4)(a) and (c). I totally understand the necessity for proposed section 221BD(4)(c), which says it is not an offence "for a person to distribute an intimate image for the purposes of the administration of justice". We would very much want that to be the case because we want our law enforcers to enforce the very act before us. My question is the interaction with proposed subsection (4)(a), where it says —

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

My question is: what are the official duties that the law enforcement duties would be undertaking that were not for the administration of justice that would justify the distribution of images without consent?

Hon SUE ELLERY: I am unable to give the member an example. I am advised that proposed section 221BD(4)(a), (b) and (c) were constructed to provide a broad catch-all of the range of functions that are carried out by those officers who would be enforcing this legislation. There was concern that there should not be a gap. That is why the proposed section was drafted in such a way to ensure that everything that was possibly captured was captured and that there were no loopholes that might prevent them from being able to properly carry out the functions in enforcing these particular provisions.

Hon NICK GOIRAN: Minister, during the consultation process, did somebody draw to the government's attention that if it had only proposed subsection (4)(c), there would be a loophole; hence, proposed subsection (4)(a) was inserted?

Hon SUE ELLERY: No. I am advised that nobody particularly drew that to the government's attention. It was, if anything, done out of an abundance of caution to make sure that there was no possible option of something that a person enforcing those laws ought be able to do for the purpose of effecting the laws not being covered.

Hon NICK GOIRAN: I am not enthusiastic about proposed section 221BD(4)(a), because I think it will do the opposite. I think it will give wriggle room for a mischievous individual to argue they are doing something in the course of their official duties when, in actual fact, yes, technically they might be doing something in their official capacity in their official duties, but it is not for any genuine administration of justice. I am far more comfortable with proposed subsection (4)(c) than proposed subsection (4)(a), particularly when a specific scenario cannot be provided or a set of duties that might be captured by proposed subsection (4)(a) that is not otherwise caused by proposed subsection (4)(c). If it were up to me and me alone, I would delete proposed section 221BD(4)(a) completely, but that is just my remarks at this point in time. Further to this clause, is the minister able to advise the house whether the person who distributes the image needs to be ordinarily a resident in WA to be captured by this law?

Hon SUE ELLERY: I am advised that there needs to be a connection with Western Australia, whether it is that the victim resides in Western Australia or the act of distributing the image occurred in Western Australia. The

question of the territorial application of criminal law is addressed in section 12 of the Criminal Code. That provides that it is an offence under WA laws if —

> (b) at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia.

It further clarifies that an offence is committed in WA —

> even if the only thing that occurs in Western Australia is an event, circumstance or state of affairs caused by an act or omission that occurs outside Western Australia.

The defendant need not be in the jurisdiction to have committed an offence under WA law. It follows that the new distribution offence can be committed by a person situated outside Western Australia, provided that that nexus required by section 12 exists. It also means that the offence can be committed by a person situated in Western Australia even when the victim is located outside Western Australia because that nexus with WA exists. When those issues arise, the Australian Cybercrime Online Reporting Network provides a platform for determining which jurisdiction will assume the lead responsibility for the investigation. Authorities would also rely on the standard arrangements that are in place to facilitate investigation and prosecution across jurisdictional boundaries.

Hon NICK GOIRAN: Further, will ACORN's consideration of the jurisdiction also include international jurisdictions or is that just domestic ones?

Hon SUE ELLERY: I am advised that ACORN will capture only domestic, as in Australian, information. Other provisions, for example, reside in other laws about children, for example, and the distribution of images of children internationally.

Hon NICK GOIRAN: If I understand correctly, a perpetrator or a prospective offender under this legislation that we are going to pass need not ordinarily be a resident of Western Australia?

Hon SUE ELLERY: Correct. But there would need to be some nexus with Western Australia. Perhaps the victim would be in Western Australia.

Hon NICK GOIRAN: Going back to our earlier discussion, I think originally sparked by Hon Alison Xamon and her queries about education and making sure that children and young people are aware of these laws, we are talking about not only prospective victims, but also prospective offenders being educated about the new state of Western Australia's criminal law. That is a bit of a difficulty when the prospective offender does not live in the Western Australian jurisdiction. For example, with her Minister for Education and Training hat on, the minister may have responsibility for educating those in the public system in our state, but not in other states or in other countries. How will those other prospective offenders have any idea that they are breaching Western Australian law?

Hon SUE ELLERY: I am advised that there are similar laws to these in every jurisdiction except Queensland and Tasmania, and it is anticipated at some point it will probably be enacted in those jurisdictions. I assure the honourable member that although I am not prepared to take on responsibility for running an education campaign in Queensland or Tasmania, I participate in the relevant Council of Australian Governments' Education Council and the Attorney General participates in SCAG—the Standing Committee of Attorneys-General. I do not know whether it is still called that. It is now called CAG—Council of Attorneys-General. That is a hideous name. Both of us are on those councils and regularly share information with our colleagues in any event about relevant laws.

Hon NICK GOIRAN: Is there a minimum age at which a person might be captured by this legislation? In terms of a prospective offender, is the minimum age 10?

Hon SUE ELLERY: I am advised, yes.

Hon NICK GOIRAN: Therefore, it could be the case that an 11-year-old, a grade 6 student, not in Western Australia or New South Wales but potentially in Queensland or Tasmania, who has absolutely not the faintest idea that we are having this debate or that this law is being passed, and most certainly is not regularly each night perusing the State Law Publisher for any updates on Western Australian law —

Hon Sue Ellery: Or the comments of Hon Nick Goiran.

Hon NICK GOIRAN: —indeed—could be captured by this legislation. However, as the minister has identified, hopefully in due course those jurisdictions will pass similar laws and their education ministers will roll out their own education campaigns. An 11-year-old in London, New York, Ottawa or Wellington could be captured by this very legislation. Notwithstanding the fact that they were once upon a time friends with a Western Australian student and maybe even went to a Western Australian school, which is where the image was taken, and at the time it was the culture within their peer group for these types of images to be distributed and disseminated, and they have moved to New Zealand or some other jurisdiction and have no idea about this debate, they could be captured by this legislation.

Hon SUE ELLERY: Correct.

Hon MICHAEL MISCHIN: I remain concerned about the approach that has been taken, which has been quite eloquently explained by Hon Simon O'Brien and Hon Nick Goiran. I inquire whether the government would be prepared to give further consideration to the emphasis and approach that has been adopted. As has been explained, we are faced with a broad course of conduct that will be made a crime. That is qualified in only two respects. Proposed section 221BD states in subsection (4) —

> Nothing in subsection (2) —

That is the offence-creating provision —

> makes it an offence …

It then lists certain circumstances. So, we have a criminal activity, however, in certain specific circumstances, nothing in proposed subsection (2) makes that criminal activity an offence, notwithstanding that the elements of the offence may have been satisfied; otherwise, everyone else has to avail themselves of a number of defences that are set out in proposed subsection (3). That lists specific defences in respect of scientific, educational and medical purposes; specific defences in respect of legal proceedings; specific, although fairly narrow, defences in respect of media activity; and a broad catch-all towards the end. That lists the defences to the criminal activity that is being proscribed, which is very broad. We are basically saying this activity is illegal, unless the person can prove on the balance of probabilities that they fall within certain categories, rather than saying the person is not criminally responsible, as prescribed in chapter V of the Criminal Code, for a variety of exculpatory factors. I ask whether the government would be prepared to convert in essence what is in proposed subsection (3)(d) into an exculpatory circumstance along the lines of what is prescribed in chapter V for honest and reasonable and mistaken belief and things of that character. Before the minister dismisses that out of hand and says this is the approach the government has taken and it is the only way in which it can be practicably done and the like, I understand that the legislation has drawn on the New South Wales Crimes Amendment (Intimate Images) Act 2017. That act adopts a similar practice to what has been adopted in this bill, with the exception that in section 91T of that act, the sorts of things that are prescribed as defences in our bill are listed as a series of circumstances. Section 91T refers to section 91P, which is about recording images without consent, and section 91Q, which is about distributing images without consent, and states in part —

> (1) A person does not commit an offence against section 91P or 91Q if:
>
> (a) the conduct alleged to constitute the offence was done for a genuine medical or scientific purpose, or —

It does not say anything about educational purpose —

> (b) the conduct alleged to constitute the offence was done by a law enforcement officer for a genuine law enforcement purpose, or
>
> (c) the conduct alleged to constitute the offence was required by a court or otherwise reasonably necessary to be done for the purpose of legal proceedings, or
>
> (d) a reasonable person would consider the conduct of the accused person acceptable having regard to each of the following (to the extent relevant):
>
> (i) the nature and content of the image, …

It then lists the sorts of things that are listed in this bill. I may be wrong about this, because that may be a defence in the manner in which we regard defences, and perhaps the minister's advisers can assist with that. However, it seems to me to be saying that a person does not commit an offence in that case, and the prosecution would have to disprove that beyond reasonable doubt, rather than the accused having to establish that on the balance of probabilities. Be that as it may, I inquire whether the government would be prepared to reconsider the manner in which it has approached this and entertain an amendment. I am sure the amendment can be refined by those more informed than I am, and without having to do it on the run, along the lines of the document that I will pass to the minister, in which essentially proposed section 221BD(3)(d) is converted into a separate subsection and commences along the lines of —

> A person is not criminally responsible for the distribution of an image contrary to subsection (2) if:

It then lists all the circumstances that are currently set out as subparagraphs (i) to (vi), but they are renamed paragraphs (a) to (f). I am not suggesting that the drafting is by any means flawless, and I expect that the order of the subparagraphs would need to be rearranged, because defences should come after exculpatory factors and the like. However, with refinement, that amendment would intend, as far as I can see, an approach of a similar vein to that adopted in the New South Wales legislation. It would also, more importantly, so far as our legislation is concerned, make it plain that we are not simply criminalising everything and then looking for exceptions that people have to prove on the balance of probabilities, but that the burden of proof will remain with the prosecution and will temper any charges that are laid. That sort of emphasis would allay, not entirely, but to a large extent, the

concerns expressed by Hon Simon O'Brien. I will pass to the minister a copy of what I have in mind and invite the minister to consider that and let me know what she thinks.

Hon SUE ELLERY: We will take that under advisement. I now have some advice at the table about the New South Wales provisions. I am advised that NSW operates under statute; unlike Western Australia, it does not have a Criminal Code. So I cannot respond in detail to that query now.

Progress reported and leave granted to sit again, on motion by Hon Sue Ellery (Leader of the House).