

# EFFICACY OF INTIMATE IMAGE LEGISLATION IN WESTERN AUSTRALIA

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IMAGE-BASED SEXUAL ABUSE—*CRIMINAL CODE ACT  
COMPLIATION ACT 1913* (WA)—CHAPTER XXVA—SECTION  
221BD—CRIMINAL LAW—SEXTING—UPSKIRTING—  
REVENGE PORNOGRAPHY—SEXTORTION

## ABSTRACT

*The practise of sending nude or sexual images, commonly termed ‘sexting’, within domestic relationships is growing at an extraordinary rate. As sexting and other similar practices gain popularity, the prevalence of image-based sexual abuse increases. This article critically analyses image-based sexual abuse laws across international and domestic jurisdictions and evaluates the effectiveness of Chapter XXVA — Intimate Images of the Criminal Code (WA). Chapter XXVA effectively regulates the non-consensual distribution of intimate images. The legislation also effectively regulates the creation and distribution of digitally altered intimate images, and the legislation makes it an offence to threaten to distribute an intimate image. However, the legislation is lacking in its regulation of voyeurism and ‘upskirting’. This article argues that Chapter XXVA should be amended to create specific provisions to address these harmful behaviours and provide recourse and justice for victims of such abuse. This article also argues that unless the legislation is accompanied by a rigorous education program, the deterrent purpose of the legislation will be defeated.*

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## I INTRODUCTION

While not a new phenomenon, image-based sexual abuse ('IBSA') has increased in prevalence due to the rise of smartphones and social media platforms.<sup>1</sup> These platforms facilitate the mass distribution of images, a process which can cause more harm in a shorter period of time than was possible before the Internet.<sup>2</sup> IBSA can be split into three main categories: a nude or sexual image being taken without consent, a nude or sexual image being distributed to third parties without consent, and threatening to distribute a nude or sexual image.<sup>3</sup> In 2019, the Western Australian legislature inserted 'Chapter XXVA – Intimate Images' into the *Criminal Code Act Compilation Act 1913 (WA)* ('*Criminal Code*').<sup>4</sup> The purpose of the amendments was to protect victims of IBSA by providing recourse, including rectification orders (often requiring the images be removed, forfeited or destroyed), and to impose harsh penalties to deter this conduct.<sup>5</sup> While no single piece of legislation addresses every aspect of IBSA and its evolving nature, this is no excuse for inaction.<sup>6</sup> Chapter XXVA contains comprehensive IBSA legislation which addresses deficiencies in IBSA laws identified in other Australian and international jurisdictions. Chapter XXVA effectively regulates multiple types of IBSA and is sufficiently broad to capture improvements in technology that may facilitate IBSA in the future.<sup>7</sup> Chapter XXVA is an important step for Western Australia and sends an

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<sup>1</sup> Nicola Henry, Asher Flynn and Anastasia Powell, 'Image-Based Sexual Abuse: Victims and Perpetrators' (2019) 572(1) *Trends & Issues in Crime and Criminal Justice* 1, 2.

<sup>2</sup> Ibid 1.

<sup>3</sup> Anastasia Powell et al, *Image-Based Sexual Abuse: An International Study of Victims and Perpetrators* (Summary Report, February 2020) 3.

<sup>4</sup> Criminal Law Amendment (Intimate Images) Act 2019 (WA).

<sup>5</sup> *Criminal Code Act Amendment Act 1913 (WA)* ('*Criminal Code (WA)*'); Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).

<sup>6</sup> *Criminal Code (WA)* (n 5); Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4310 (Peter Katsambanis).

<sup>7</sup> *Criminal Code (WA)* (n 5); s 221BD; Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4319 (Lisa Harvey).

‘unambiguous message to the community that image-based abuse is serious and harmful and will not be tolerated’.<sup>8</sup>

IBSA is described in the media by reference to several problematic terms. ‘Revenge porn’ describes the non-consensual distribution of nude or sexual images by a jilted ex-lover.<sup>9</sup> ‘Upskirting’ and ‘down-blousing’ refer to the non-consensual creation of nude or sexual images, typically photographed from beneath or above a woman, without the victim’s consent and in a public place.<sup>10</sup> These terms are narrow in scope and do not adequately describe IBSA. The term ‘revenge porn’ implies the victim is somehow blameworthy as it suggests that the victim must have done something to invoke the perpetrator’s vengeful response.<sup>11</sup> Furthermore, if IBSA was limited to revenge pornography, numerous acts of non-consensual distribution which were not motivated by revenge would not fall within the definition of IBSA.<sup>12</sup> Similarly, upskirting and down-blousing relate to the taking of images without consent and do not cover the non-consensual distribution of images taken with consent. Unfortunately, the Western Australian legislation fails to adequately address the first category of IBSA, which includes voyeurism and other practices such as upskirting and down-blousing. Amendments should be made to Chapter XXVA to capture this form of IBSA and provide protection for victims of voyeurism, upskirting, and down-blousing.<sup>13</sup> Moreover, a rigorous education program outlining the types of behaviours that constitute offences, and the severe penalties that can be imposed, should accompany this legislation in order to deter IBSA. A program of this sort has

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<sup>8</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 August 2018, 5022b–5024a (Sue Ellery) 1.

<sup>9</sup> Nicola Henry, Asher Flynn and Anastasia Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (Report to the Criminology Research Advisory Council, March 2019) 12.

<sup>10</sup> Ibid; Tyrone Kirchengast and Thomas Crofts, ‘The Legal and Policy Contexts of ‘Revenge Porn’ Criminalisation: The Need for Multiple Approaches’ (2019) 19(1) *Oxford University Commonwealth Law Journal* 1, 5 (‘The Legal and Policy Contexts’).

<sup>11</sup> Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Phenomenon Colloquially Known as 'Revenge Porn'* (Report, February 2016) 16; Kirchengast and Crofts, *The Legal and Policy Contexts* (n 10) 277.

<sup>12</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 12.

<sup>13</sup> Henry, Flynn and Powell, ‘Image-based Sexual Abuse: Victims and Perpetrators’ (n 1) 11.

not been introduced in Western Australia, and as a result, the deterrence purpose of Chapter XXVA is largely defeated.<sup>14</sup>

## II WHY WAS CHAPTER XXVA INTRODUCED?

### A IBSA: A Growing Phenomenon

IBSA is a pervasive and rapidly growing issue around the world. In a survey conducted in 2019, 1 in 3 (37.7%) people surveyed (out of a total of 6,109 participants from Australia, New Zealand and the United Kingdom) had been the victim of at least one type of IBSA.<sup>15</sup> These results included 1 in 3 (33.2%) reporting that someone had taken a nude or sexual image of them without consent, 1 in 5 (20.9%) reporting that a nude or sexual image of themselves had been shared without their consent, and nearly 1 in 5 (18.7%) reporting that they had been threatened with the sharing of a nude or sexual image.<sup>16</sup> Moreover, 1 in 7 (14.1%) respondents had experienced all three forms of IBSA.<sup>17</sup> These results are indicative of a steep increase in the prevalence of IBSA. In 2017, a study found that only 1 in 10 Australian adults reported having had a nude or nearly nude image of themselves distributed without their permission.<sup>18</sup> Similarly, the 2014 study showed that 11 percent of those surveyed had a sexually explicit image distributed without their consent while under the age of eighteen.<sup>19</sup> The 2019 data paints a remarkably different picture, with 45.3 percent of 16–19 year old respondents having experienced IBSA.<sup>20</sup> Another 2013 study of 606 private school students in Utah found that

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<sup>14</sup> Legal and Constitutional Affairs Reference Committee (n 11) 43; Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4156b-4159a (John Quigley) 1.

<sup>15</sup> Powell et al (n 3) 3.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Nicola Henry, Asher Flynn and Anastasia Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (2018) 19(6) *Police Practice and Research* 565, 569.

<sup>19</sup> Heidi Strohmaier, Megan Murphy and David DeMatteo 'Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences' (2014) 11(3) *Sexuality Research and Social Policy: Journal of NSRC* 245, 250.

<sup>20</sup> Powell et al (n 3) 4-6. Also note the incidence of IBSA between genders is even (38.1% for females and 37.4% for males) However, males perpetrate IBSA more often than females (22.3 percent of men reported engaging in IBSA compared to 13.1 percent of women).

40 percent of students acknowledged receiving an intimate image and 25 percent then forwarded that image to others.<sup>21</sup>

Powell et al found IBSA is more prevalent in vulnerable populations: 2 in 3 (65.6%) Aboriginal and Torres Strait Islander people surveyed had experienced one or more forms of IBSA, compared to 1 in 3 non-Indigenous participants.<sup>22</sup> Moreover, 1 in 3 (35.9%) Indigenous participants had experienced all three forms of IBSA, while only 1 in 8 (12.2%) non-Indigenous respondents had similar experiences. One in two respondents with a disability indicated that they had been the victim of a form of IBSA.<sup>23</sup> Similarly, 56.4 percent of LGBTIQ+ identifying participants surveyed had been victims of IBSA, as opposed to 35.4 percent of heterosexual respondents.<sup>24</sup> These statistics show that IBSA is commonplace within Australia and that its effects are far-reaching. Unfortunately, IBSA statistics are inherently inaccurate as they only capture the proportion of people who have actual knowledge that their images have been distributed, meaning these statistics are likely underestimating the true proportion of Australians impacted by IBSA.<sup>25</sup>

The prevalence of IBSA is alarming when considering the consequences and harm suffered by the victims. A 2019 study titled *Shattering Lives and Myths: A report on image-based sexual abuse* identified the harms suffered by IBSA victims as ranging from social isolation to suicide attempts.<sup>26</sup> One participant was embarrassed and ashamed of the images and was so fearful of their distribution that she overdosed in an attempt to take her own life.<sup>27</sup> For another, the threats of distribution had a paralysing effect and he now struggles to sleep for more than two hours before checking his

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<sup>21</sup> Strohmaier, Murphy and DeMatteo (n 19) 246.

<sup>22</sup> Powell et al (n 3) 4.

<sup>23</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 34.

<sup>24</sup> *Ibid* 34; Powell et al (n 3) 3.

<sup>25</sup> Henry, Flynn and Powell, 'Image-based Sexual Abuse: Victims and Perpetrators' (n 1) 8–9.

<sup>26</sup> McGlynn et al (n 26).

<sup>27</sup> *Ibid* 4.

phone to see if the images have been posted.<sup>28</sup> Other victims divulged that their partners used IBSA as a means of control.<sup>29</sup> They disclosed that their ex-partners' use of IBSA was not always to seek revenge after a break-up. Rather, IBSA was used as a continued means of control to degrade, humiliate, and even coerce victims into returning to the relationship.<sup>30</sup> Many victims experience isolation from their friends, family, and online communities, often resulting from the victim's embarrassment and shame, as well as a lack of trust.<sup>31</sup> Moreover, the psychological impacts of IBSA are extreme. Unlike other forms of trauma or abuse, IBSA can be enduring as the images remain online and can be shared, downloaded, and discovered by an ever-growing audience. IBSA can take an equal or even greater psychological toll than a single traumatic incident as IBSA often forms part of a perpetual cycle of abuse that is difficult to escape.<sup>32</sup>

#### B *Prior to Chapter XXVA: IBSA and Criminal Offences*

Prior to 2019, victims of IBSA had little success pursuing an action against their perpetrator within the criminal law. Some IBSA cases can be prosecuted under other provisions of the *Criminal Code* (WA), including stalking,<sup>33</sup> threatening with an intent to gain,<sup>34</sup> indecency,<sup>35</sup> and offences relating to the use of surveillance devices.<sup>36</sup> Unfortunately, these offences do not accurately capture the harm caused by IBSA,<sup>37</sup> nor do they provide the victim with relief, such as the removal and forfeiture of images. The circumstances in which these offences can be used to prosecute IBSA are limited as many forms of IBSA do not satisfy the requisite elements of these offences. IBSA cases are

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<sup>28</sup> Ibid 3.

<sup>29</sup> Ibid 4.

<sup>30</sup> Ibid 4.

<sup>31</sup> Ibid 8.

<sup>32</sup> Ibid 7.

<sup>33</sup> *Criminal Code* (WA) (n 5) s 338E.

<sup>34</sup> Ibid ss 338A, 398

<sup>35</sup> Ibid s 323.

<sup>36</sup> *Criminal Code* 1995 (Cth) s 474.17.

<sup>37</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 65.

often successfully prosecuted based on additional facts and circumstances not directly linked to the IBSA, which satisfy the elements of the other criminal offences, for example, stalking.<sup>38</sup> In such cases, a conviction for IBSA is typically incidental to another offence. Where these additional circumstances do not exist, it is unlikely that IBSA victims will be able to attain justice. Consequently, these other criminal offences are not regularly used by law enforcement agencies to charge perpetrators of IBSA. As such, prior to the introduction of Chapter XXVA, victims were often unsuccessful in pursuing their matter through the criminal law.<sup>39</sup>

### C IBSA and Civil Remedies

While victims of IBSA have recourse to civil remedies, the nature of IBSA means the elements of civil causes of action are often difficult to make out.<sup>40</sup> For example, in order for defamation to be made out, the victim would need to prove that the imputation of the image could cause them to lose standing.<sup>41</sup> As the consensual distribution of intimate images between partners is an increasingly commonplace activity,<sup>42</sup> Dr Anna Bunn suggests in her article titled *Non-consensual Online Publication of Intimate Images: Civil Remedies* that it is unlikely that a reasonable Australian would think less of the victim for taking or sharing the image in the first instance.<sup>43</sup> As many intimate images do not carry defamatory imputations, an action for IBSA in defamation is unlikely to succeed.

Bunn also suggests that an action for infringement of copyright is a possibility where the image that was distributed without consent is one taken

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<sup>38</sup> Ibid 50.

<sup>39</sup> Ibid 74.

<sup>40</sup> Anna Bunn, 'Non-consensual Online Publication of Intimate Images: Civil Remedies' (2016) 132 (1) *Precedent (Australian Lawyers Alliance)* 25, 26.

<sup>41</sup> *Radio 2UE Sydney v Chesterton* (2009) 238 CLR 460; Defamation Act 2005 (WA) s 6.

<sup>42</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 12; *Wilson v Ferguson* [2015] WASC 15, [81] (Mitchell J).

<sup>43</sup> Bunn (n 40) 26; *Wilson v Ferguson* (n 42) [81] (Mitchell J).

by the victim (for example, a ‘selfie’).<sup>44</sup> As such, copyright infringement may be an available cause of action in some IBSA cases dealing with sexting.<sup>45</sup> However, where images are taken by another person—either covertly in the case of voyeurism or overtly in a domestic relationship—an action for copyright infringement would not be available as the victim would not be the copyright owner.<sup>46</sup>

Historically, IBSA victims have brought civil actions against their abusers under an equitable action for breach of confidence.<sup>47</sup> For breach of confidence to be made out, the ‘information’ in question must be of a confidential nature; communicated or obtained in circumstances importing an obligation of confidence; and used without authorisation.<sup>48</sup> In *Wilson v Ferguson*,<sup>49</sup> Ferguson (‘the Defendant’) published 16 images and two videos of Wilson (‘the Plaintiff’) to the Defendant’s Facebook page.<sup>50</sup> The images and videos showed the Plaintiff engaged in sexual activities or naked.<sup>51</sup> The explicit nature of the images was sufficient to suggest their confidential character, particularly when coupled with the Plaintiff’s emphasis on the deeply personal nature of the content and the fact that the images were not in the public domain before the distribution.<sup>52</sup> The Plaintiff had instructed the Defendant to refrain from sharing the images, which implied a relationship of confidence.<sup>53</sup> Mitchell J found that the Defendant owed an equitable obligation of confidence to the Plaintiff to keep the images confidential.<sup>54</sup> By posting the images and videos to his Facebook page, the Defendant made them available to around 300 people, many of whom worked with both the

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<sup>44</sup> Bunn (n 40) 26; *Copyright Act 1968* (Cth) s 36.

<sup>45</sup> *Copyright Act 1968* (Cth) s 36.

<sup>46</sup> Bunn (n 40) 26.

<sup>47</sup> *Ibid* 27.

<sup>48</sup> *Wilson v Ferguson* (n 42) [46] (Mitchell J).

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* [27] (Mitchell J).

<sup>51</sup> *Ibid* [22]-[23] (Mitchell J).

<sup>52</sup> *Ibid* [56] (Mitchell J).

<sup>53</sup> *Ibid* [58] (Mitchell J).

<sup>54</sup> *Ibid* [55] (Mitchell J).



Defendant and Plaintiff.<sup>55</sup> The Plaintiff was awarded \$35,000 in damages for embarrassment, anxiety, and distress; \$13,404 for lost income; and an injunction to prevent the continued dissemination of the images and videos.<sup>56</sup>

In cases where electronic accounts have been hacked and images posted online, Bunn suggests it would be more difficult to make out the elements of a breach of confidence as the plaintiff may not be able to identify the hacker and name them as the defendant of the action.<sup>57</sup> However, should this hurdle be overcome, an equitable breach of confidence may be pursued. In *Wee Shuo Woon v HT SRL*,<sup>58</sup> the Court of Appeal in the Republic of Singapore found that emails that were subject to legal professional privilege retained their confidential character despite being hacked and uploaded to WikiLeaks.<sup>59</sup> The Court concluded that as the emails were only a very small part of around 500 gigabytes of data that was pilfered, few people if any had knowledge of their existence. Although the emails were theoretically accessible to anyone intensively searching WikiLeaks, the emails and their contents were not considered to be public knowledge, nor in the public domain.<sup>60</sup> *Wee Shuo Woon v HT SRL* demonstrates that information which has been hacked can retain its confidential character despite being disseminated online, depending on *inter alia*, on how widely the images or videos have been disseminated.<sup>61</sup> As the explicit nature of intimate images suggests an inherently confidential character,<sup>62</sup> it is possible that hacked intimate images, although leaked into the public domain, could retain their confidential character and result in a successful action for breach of confidence. However, at the time of writing

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<sup>55</sup> Ibid [28] (Mitchell J).

<sup>56</sup> Ibid [85] (Mitchell J).

<sup>57</sup> Bunn (n 40) 27.

<sup>58</sup> *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid [40]-[43].

<sup>61</sup> Ibid.

<sup>62</sup> *Wilson v Ferguson* (n 42) [56] (Mitchell J).

this article, there is no Australian case law that confirms this position, and this area of law remains unsettled by Australian courts.

In 2007, the New South Wales Law Reform Commission recommended that provision be made for a statutory tort for serious invasions of privacy.<sup>63</sup> The scope of this tort would cover the misuse of private information, intrusions upon seclusion and would likely also cover the non-consensual distribution of intimate images.<sup>64</sup> The Commission suggested that extending the equitable doctrine of breach of confidence to include the protection of privacy would distort both principles.<sup>65</sup> The Commission stated that confidentiality and privacy are not co-extensive; in equity, the obligation relates to the conscience of the entrusted person, whereas privacy relates to the private information or object itself.<sup>66</sup> Additionally, while most confidential acts and information could be considered private, not all private acts are confidential (some private acts are considered to be in the public domain for the purposes of equity).<sup>67</sup> Should this tort be enacted, this cause of action may provide victims of IBSA with an accessible remedy through damages for economic loss, emotional distress, or an injunction preventing the dissemination of the private material. However, the costly and lengthy civil proceedings may still represent a barrier to victims attaining justice. A number of High Court authorities have considered whether a common law tort for invasions of privacy might be developed in Australia;<sup>68</sup> however, at the time of writing, no such tort has come to fruition.

The difficulties in bringing a civil action against perpetrators of IBSA highlights the importance of enshrining IBSA as a form of sexual violence

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<sup>63</sup> New South Wales Law Reform Commission, *Invasion of Privacy* (Consultation Paper No. 1, 2007) 54 [2.79].

<sup>64</sup> Bunn (n 40) 25, 28.

<sup>65</sup> *New South Wales Law Reform Commission* (n 63) [2.79].

<sup>66</sup> *Ibid* [2.80].

<sup>67</sup> *Ibid*.

<sup>68</sup> See, eg. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 and *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646.

within the *Criminal Code* (WA). Doing so would help protect, and provide justice for, victims who suffer harm as a result of IBSA.<sup>69</sup> Prior to the 2019 amendment, Western Australia's legislation was piecemeal, and victims often fell through legislative gaps as existing remedies did not effectively address IBSA. The existing criminal offences often failed to adequately remedy the mischief, and the requirements of civil remedies remain difficult for IBSA victims to meet.<sup>70</sup> Even if the IBSA was within the scope of a civil remedy, litigating a civil cause of action is a lengthy and costly process that can leave justice out of reach.<sup>71</sup> As many IBSA victims seek judicial relief to prevent further dissemination of the intimate images, the potential length of civil litigation could render the process futile as the images would likely remain online, with distribution continuing until relief is granted.<sup>72</sup> Additionally, an injunction can only be granted if a legal or equitable right has been infringed, meaning that if a victim is unable to establish an arguable case, they have no recourse to an injunction.<sup>73</sup> Chapter XXVA targets this issue through the introduction of specific IBSA offences to effectively prosecute offenders and serve justice. Section 221BE of the *Criminal Code* (WA) states that the court may order a person charged with an intimate image offence to take reasonable steps to remove, retract, recover, delete, destroy, or forfeit to the State any intimate image to which the offence relates. This important provision curbs the perpetual nature of IBSA by preventing further dissemination of the images in a timely manner.

### III CONSTRUCTION OF CHAPTER XXVA

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<sup>69</sup> *Criminal Law Amendment (Intimate Images) Act 2019* (WA); Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 47.

<sup>70</sup> Bunn (n 40) 28.

<sup>71</sup> Wouter De Vos and Theo Broodryk, 'Fundamental Procedural Rights of Civil Litigants in Australia and South Africa: Is There Cause for Concern? (part 1)' (2019) 3 *Tydskrif Vir Die Suid-Afrikaanse Reg* 425, 425.

<sup>72</sup> Bunn (n 40) 26-27.

<sup>73</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (n 68).

In many Australian jurisdictions, problematic terminology, such as revenge porn (which often imputes victim blaming connotations) is avoided by encapsulating offences in specific IBSA provisions. These IBSA provisions introduce offences for distributing or threatening to distribute an intimate image in order to deter this conduct, hold perpetrators to account, and support victims through take-down measures such as rectification orders.<sup>74</sup> The following discussion identifies the elements that make up these provisions and provides a comparison of IBSA drafting in Australia and internationally.

### A *Intimate Images*

Across jurisdictions, a variety of approaches have been taken to define images or videos that fall within the prohibition on non-consensual distribution mandated by IBSA legislation. The most common and arguably the most effective approach involves referring to the material as ‘intimate images’.<sup>75</sup> In Canada, an intimate image is defined as a visual recording of a person made by any means including a photograph, film or video recording, in which the person is nude, exposing his or her genital organs, anal region or her breasts, or is engaged in explicit sexual activity where there is a reasonable expectation of privacy.<sup>76</sup> A similar approach has been adopted throughout Australia. Western Australia’s definition is clear and comprehensive:

- (a) a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy —
  - (i) the person’s genital area or anal area, whether bare or covered by underwear; or
  - (ii) in the case of a female person, or transgender or intersex person identifying as female, the breasts of the person, whether bare or covered by underwear;or

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<sup>74</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 1 (John Quigley).

<sup>75</sup> *Criminal Code* (WA) (n 5) s 221BA; *Criminal Code Act 1899* (Qld) s 207A; *Summary Offences Act 1966* (Vic) s 40; *Crimes Act 1900* (ACT) s 72A; *Crimes Act 1900* (NSW) s 91N.

<sup>76</sup> Protecting Canada from Online Crimes Act SC 2014, c 13; Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 49.

- (iii) the person engaged in a private act; and
- (b) includes an image, in any form, that has been created or altered to appear to show anything mentioned in paragraph (a).<sup>77</sup>

Not all common law jurisdictions have adopted such a thorough definition of ‘intimate image’, meaning some victims of IBSA have no recourse under their jurisdiction’s specific IBSA legislation. The relative inadequacies arising in these definitions are explored through a comparison of IBSA legislation in Australia and overseas.

In Western Australia, Queensland, New South Wales, and the Australian Capital Territory, the definition of ‘intimate images’ accounts for the breasts of a female, transgender, or intersex person.<sup>78</sup> These broad definitions provide protection and recourse for a wider range of victims than in Victoria,<sup>79</sup> South Australia,<sup>80</sup> and international jurisdictions,<sup>81</sup> where the definition of ‘intimate images’ only extends to images of breasts belonging to a female, limiting protection to cis-gender females.

In England, Wales, and Scotland, a sexual element is required in the definition of ‘intimate images’.<sup>82</sup> This does not capture non-sexual images or videos, such as someone showering or using the toilet.<sup>83</sup> Western Australia, South Australia, New South Wales, and the Australian Capital Territory avoid this outcome by including the terms ‘private act’ and ‘circumstances in which the person would reasonably expect to be afforded privacy’ to capture situations where the victim’s genitals may or may not be exposed, and a sexual act may or may not be engaged in.<sup>84</sup> As the non-consensual taking and

<sup>77</sup> *Criminal Code (WA)* (n 5) s 221BA.

<sup>78</sup> *Criminal Code (WA)* (n 5) s 221BA; *Criminal Code Act 1899* (Qld) s 207A; *Crimes Act 1900* (ACT) s 72A; *Crimes Act 1900* (NSW) s 91N.

<sup>79</sup> *Summary Offences Act 1966* (Vic) s 40.

<sup>80</sup> *Summary Offences Act 1953* (SA) s 26A(2).

<sup>81</sup> *Protecting Canada from Online Crimes Act SC 2014*, c 13; *Harmful Digital Communications Act 2015* (NZ) s 216G.

<sup>82</sup> Legal and Constitutional Affairs Reference Committee (n 11) 10.

<sup>83</sup> Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 83; Des Butler, ‘Revenge Pornography: Are Australian Laws Up To The Challenge?’ (2017) 8(1) *International Journal of Technoethics* 56, 60.

<sup>84</sup> *Criminal Code (WA)* (n 5) s 221BA; *Summary Offences Act 1953* (SA) s 26A(2); *Crimes Act 1900* (NSW) s 91N; *Crimes Act 1900* (ACT) s 72A.

distribution of non-sexual images can be just as harmful and distressing as those of a sexual nature, broadening the scope of ‘intimate images’ to capture non-sexual intimate images promotes the purpose of the legislation.<sup>85</sup> Henry, Flynn and Powell suggest in their report titled *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* that these additions exclude situations where one reasonably expects to be observed, such as sunbathing at a beach, hence limiting the scope of the provision to not over-extend the criminal law.<sup>86</sup>

The definition of intimate images in s 221BA(b) of the *Criminal Code* (WA) captures ‘morph porn’: where the victim’s face is taken from an innocuous image and photoshopped onto a naked, or sexual image of someone else.<sup>87</sup> Queensland and New South Wales have similar provisions to provide recourse for victims of morph porn.<sup>88</sup> While arguably not as personal as having a nude photo of oneself distributed, morph porn can be equally—if not more—distressing, as the images can often be more graphic than those taken in a domestic relationship.<sup>89</sup> As the imputations are more likely to be defamatory, victims of morph porn are more likely to succeed in an action in defamation than victims of other forms of IBSA. Nevertheless, it is important that IBSA victims are protected under the *Criminal Code* (WA) in situations not sufficient to constitute defamation or breach of confidence, and to protect those who cannot afford a costly civil suit.<sup>90</sup>

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<sup>85</sup> Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 83.

<sup>86</sup> *Ibid* 85; Thomas Crofts and Tyrone Kirchengast, ‘A Ladder Approach to Criminalising Revenge Porn’ (2019) 83(1) *The Journal of Criminal Law* 87, 94.

<sup>87</sup> *Criminal Code* (WA) (n 5) s 221BA(b); Alyse Dickson, ‘Revenge porn: A Victim Focused Response’ (2016) 2 *University of South Australia Student Law Review* 42, 46.

<sup>88</sup> *Criminal Code Act 1899* (Qld) s 207A; *Crimes Act 1900* (NSW) s 91N.

<sup>89</sup> Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 93.

<sup>90</sup> Bunn (n 40), 26.

In 2013, South Australia was the first Australian jurisdiction to implement specific, criminal IBSA laws.<sup>91</sup> The legislation defines an ‘invasive image’ as depicting a person in a place other than a public place:

- (a) engaged in private act; or
- (b) in a state of undress such that —
  - (i) in the case of a female — the bare breasts are visible; or
  - (ii) in any case — the bare genital or anal region is visible.<sup>92</sup>

This terminology has not been adopted by other Australian jurisdictions, perhaps because ‘invasive image’ may connote creating a reprehensible image that an ordinary person would deem to be outside of the standards of morality or decency. This would encompass only a small portion of IBSA.<sup>93</sup> For example, under South Australian laws, a photo of a person in underwear taken in a loving relationship would not satisfy the definition of an invasive image, as statistics show that the consensual sharing of sexualised images within a relationship is common practice and likely to be within the standards of morality, decency, and propriety.<sup>94</sup> This could potentially leave the victim without recourse if the image was distributed without consent.<sup>95</sup> However, the South Australian legislation also contains a provision titled ‘Indecent Filming’, which covers filming another person in a state of undress in circumstances which a reasonable person would expect to be afforded privacy, which may capture a wider range of IBSA, although this remains to be seen.<sup>96</sup>

## B *Distribute*

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<sup>91</sup> Legal and Constitutional Affairs Reference Committee (n 11) 6.

<sup>92</sup> *Summary Offences Act 1953* (SA) s 26A(2).

<sup>93</sup> Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 60; Des Butler (n 83) 59.

<sup>94</sup> *Summary Offences Act 1953* (SA) s 26A(2); Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 60.

<sup>95</sup> *Summary Offences Act 1953* (SA) s 26A(3).

<sup>96</sup> *Ibid* s 26D.

Under s 221BD of the *Criminal Code* (WA), it is an offence to distribute an intimate image of another person without their consent. In Western Australia, ‘distribute’ means communicating, exhibiting, selling, sending, supplying, offering, transmitting, or making the image available for access by electronic or other means to a person other than themselves or the depicted person.<sup>97</sup> This drafting does not criminalise ‘sexting’, but rather non-consensual distribution to third parties.<sup>98</sup> The definition’s scope is sufficiently broad to capture improvements in technology that may facilitate IBSA. However, as with all legislation that regulates behaviour associated with technology, this definition will likely need to be amended as technology and methods of distribution change.<sup>99</sup>

The Australian Capital Territory legislation defines ‘distribute’ as including to send, supply, show, exhibit, transmit or communicate to another person.<sup>100</sup> The inclusion of ‘show’ is unique and aims to provide protection to a greater number of victims and deter all forms of IBSA.<sup>101</sup> While physically showing an intimate image to others does not result in widespread availability of the intimate image, sharing intimate images by showing them to others can still cause distress, embarrassment, and harm. The broad definition of ‘distribute’ provides protection for the highest number of victims, and creates a strong deterrent, thereby helping to fulfil the legislation’s key purpose.<sup>102</sup> However, there exists an evidentiary issue as it is difficult to prove that an image has been shown by one person to another. As such, this form of distribution is unlikely to be prosecuted in practice,<sup>103</sup> likely rendering it ineffective as a means of obtaining justice for victims.<sup>104</sup>

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<sup>97</sup> *Criminal Code* (WA) (n 5) s 221BC.

<sup>98</sup> Explanatory Memorandum, Criminal Law Amendment (Intimate Images) Bill 2018 (WA) 4.

<sup>99</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).

<sup>100</sup> *Crimes Act 1900* (ACT) s 72B.

<sup>101</sup> *Ibid.*

<sup>102</sup> Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 81.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.* 83.



Despite these limitations, the inclusion of ‘show’ in the *Criminal Code* (WA) would likely assist in deterring the non-consensual distribution of intimate images, especially if an education program highlighted that merely showing an intimate image to another person without consent is a criminal offence.<sup>105</sup> Henry, Flynn and Powell state that the dominant purpose of IBSA legislation is deterrence, while prosecuting the conduct is a subsidiary aim.<sup>106</sup> While ‘show’ is not essential for the effective operation of IBSA laws, it likely would assist with the deterrent purpose of the legislation and could be a valuable addition to s 221BC of the *Criminal Code* (WA).

### C Consent

The offence created under s 221BD of the *Criminal Code* (WA) is only satisfied if an intimate image is distributed without the depicted person’s consent. The *Criminal Code* (WA) defines ‘consent’ as being freely and voluntarily given.<sup>107</sup> Aligned with sexual assault offences, a person under the age of 16 cannot consent to the distribution of an intimate image.<sup>108</sup> The provision also provides that consent cannot be obtained by force, threats, deceit, intimidation or fraudulent means.<sup>109</sup> Additionally, a person who consents to the distribution of an intimate image of themselves on a particular occasion is not, only because of that fact, to be regarded as having consented to the distribution of the image or any other image on another occasion.<sup>110</sup> Similarly, if a person distributes an image of themselves, this does not indicate that they have consented to any further distribution.<sup>111</sup>

The New South Wales and South Australian definitions of consent contain a mental element—the perpetrator must have known that the victim

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<sup>105</sup> Ibid 83.

<sup>106</sup> Ibid 15, 50, 72, 83.

<sup>107</sup> *Criminal Code* (WA) (n 5) s 221BB(1).

<sup>108</sup> Ibid s 221BB(6).

<sup>109</sup> Ibid s 221BB(2).

<sup>110</sup> Ibid s 221BB(3).

<sup>111</sup> Ibid s 221BB(5).

did not consent, or have been reckless as to whether the victim consented.<sup>112</sup> As the *Criminal Code* (WA) does not have a similar mental element, the Western Australian offence is determined objectively and can be made out solely on the physical elements. This reduces the number of elements required to be proved beyond reasonable doubt by the prosecution and ultimately favours the victims as the legislation condemns the conduct in all circumstances, not just where an intention or motive to distribute the intimate image is present.<sup>113</sup>

In Queensland, consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.<sup>114</sup> Studies show that people with disabilities are more likely to be victims of IBSA with nearly 50 percent of respondents with a disability indicating that they had been subject to a form of IBSA.<sup>115</sup> Queensland's inclusion of a requirement for cognitive capacity to consent is a pertinent inclusion that provides additional protection for those with a mental impairment who do not have the cognitive capacity to consent to distribution. The requirement for cognitive capacity also protects those under the age of sixteen and those who are unconscious and do not have the capacity to consent.<sup>116</sup> While the *Criminal Code* (WA) does not expressly require cognitive capacity to consent, s 221BC(7) states that the section does not limit the grounds on which it may be established that a person does not consent to the distribution of an intimate image, providing scope for discretion regarding capacity and consent.<sup>117</sup>

#### D *Intention to Cause Distress and Outcome of the Distribution*

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<sup>112</sup> Tyrone Kirchengast and Thomas Crofts, 'A Critical Analysis Of The Conduct And Fault Elements In Revenge Porn Criminalisation' (2019) 43(4) *Criminal Law Journal* 274, 286.

<sup>113</sup> Ibid.

<sup>114</sup> *Criminal Code Act 1899* (Qld) s 223(5).

<sup>115</sup> Henry, Flynn and Powell, 'Image-based Sexual Abuse: Victims and Perpetrators' (n 1) 34.

<sup>116</sup> Tyrone Kirchengast and Thomas Crofts, 'A Critical Analysis of the Conduct and Fault Elements in "Revenge Porn" Criminalisation' (2019) 43 (4) *Criminal Law Journal* 274, 278.

<sup>117</sup> *Criminal Code* (WA) (n 5) s 221BC(7).

In the United Kingdom, IBSA legislation requires that the perpetrator intended to cause distress by distributing the intimate image.<sup>118</sup> While there is a risk that IBSA legislation criminalises accidental acts—for example, the inadvertent attaching of a file to an email—the inclusion of a requirement that a perpetrator intend to cause distress significantly limits the operation of the legislation.<sup>119</sup> Intimate images are distributed for numerous reasons—bragging, boredom, recklessness—and many motives will not contain an inherent intention to cause distress (and thus will not be covered by the legislation).<sup>120</sup> Australian jurisdictions do not include a requirement of intention to cause harm or distress in IBSA legislation.<sup>121</sup> This is partly because litigation would be significantly extended while the prosecution attempts to prove this mens rea.<sup>122</sup> Focusing upon a mental element may act as an unnecessary red herring as it is the act of taking or distributing the intimate image that is the primary cause of the harm.<sup>123</sup> Additionally, where distribution is accidental, the perpetrator may be able to avail the defence of accident under s 23B of the *Criminal Code* (WA) and avoid criminal responsibility, hence removing the need for a mental element.<sup>124</sup>

A similar requirement is present in New Zealand and California, where ‘serious emotional harm’ must have resulted from the distribution.<sup>125</sup> This requirement focuses on the result of the distribution and only criminalises behaviour that causes serious emotional harm to the victim. The *Criminal Code* (WA) does not impose such a restriction, but rather allows for the

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<sup>118</sup> *Criminal Justice and Courts Act 2015* (UK) s 33(1); Meghan Fay, ‘The Naked Truth: Insufficient Coverage for Revenge Porn Victims’ (2018) 59 *Boston College Law Review* 1839, 1855.

<sup>119</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4323 (David Honey).

<sup>120</sup> Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 91.

<sup>121</sup> *Criminal Code* (WA) (n 5) s 221BA; *Summary Offences Act 1953* (SA) s 26A(2); *Crimes Act 1900* (NSW) s 91N; *Crimes Act 1900* (ACT) s 72A; *Criminal Code Act 1899* (Qld) s 207A; *Summary Offences Act 1966* (Vic) s 40.

<sup>122</sup> Henry, Flynn and Powell, *Responding to ‘Revenge Pornography’: Prevalence, Nature and Impacts* (n 9) 92.

<sup>123</sup> *Ibid* 12.

<sup>124</sup> *Criminal Code* (WA) (n 5) s 23B.

<sup>125</sup> *Harmful Digital Communications Act 2015* (NZ) s 22; Cal Pen Code §647(j)(4) (2021).

potential prosecution of any instance of IBSA to deter the conduct, opposed to only cases that result in serious emotional harm.<sup>126</sup> The onus of proof could be unduly shifted to the victim if they were required to prove that serious emotional harm resulted from the IBSA as it may be difficult to prove the extent of harm suffered, and some victims may be unaware of the image's distribution.<sup>127</sup> Henry, Flynn and Powell argue it should be assumed that harm has been caused by the image's creation, distribution or the threat of distribution without consent, rather than the victim's response.<sup>128</sup> Furthermore, this requirement may prejudice resilient victims who did not suffer serious emotional harm but who still desire justice. As such, where IBSA is distributed with an intention to cause harm or results in serious emotional harm, these could be aggravating factors relevant to sentencing; however, they should not form requirements or conduct elements of IBSA offences. These requirements would limit the scope of the offence, excluding some IBSA cases from prosecution and preventing victims from obtaining justice.<sup>129</sup>

## E *Threats*

'Sextortion' is the threat of distributing an intimate image for personal gain (money, additional intimate images, sexual acts, or to coerce the victim to act or abstain from something).<sup>130</sup> In New South Wales, for sextortion, it is irrelevant whether the images actually existed or not and whether actual fear resulted from the threat.<sup>131</sup> The prosecution must show, however, that the accused intended to cause fear or apprehension from that threat.<sup>132</sup> Queensland, Victoria, South Australia, and the Australian Capital Territory

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<sup>126</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 55.

<sup>127</sup> *Ibid* 90.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid* 12.

<sup>130</sup> *Ibid* 14.

<sup>131</sup> *Crimes Act 1900* (NSW) s 91R.

<sup>132</sup> *Ibid* s 91R.

all have provisions providing for the threat of distributing intimate images.<sup>133</sup> In Western Australia, sextortion is a crime under ss 338(e), 338A and 338B of the *Criminal Code (WA)*.<sup>134</sup> Unlike in New South Wales, there is no need to prove the accused intended to cause fear or apprehension, just that there was a threat to distribute an intimate image.<sup>135</sup> This broader scope serves the purpose of the legislation by capturing all threats of IBSA and hence serving justice for more victims, including those whose threats lacked the requisite intent to cause fear or apprehension.

#### F *Voyeurism and Upskirting*

Voyeurism can be defined as the taking or distributing of intimate images for sexual gratification.<sup>136</sup> In England, voyeurism offences are limited to the classic scenario of a perpetrator with sexual motives, installing covert cameras and filming others without their consent.<sup>137</sup> This typically occurs in changerooms, bathrooms, bedrooms, and other places where one reasonably expects to be afforded privacy.<sup>138</sup> The English legislation is not broad enough to cover modern variants of voyeurism such as upskirting or down-blousing as a victim in those circumstances is not engaged in a private act such as changing clothes or showering. Instead, a victim of upskirting is typically going about their usual business in public spaces (including on public transport, in nightclubs and in shops) when the image or video of their genitalia is captured.<sup>139</sup>

In Victoria, upskirting legislation covers the intentional observation, electronic capture, and distribution of the genital or anal region with the aid

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<sup>133</sup> *Summary Offences Act 1953 (SA)* s 26AD; *Crimes Act 1900 (ACT)* s 72E; *Criminal Code Act 1899 (Qld)* s 229A; *Summary Offences Act 1966 (Vic)* s 41DB.

<sup>134</sup> *Criminal Code (WA)* (n 5) ss 338(e), 338A and 338B.

<sup>135</sup> *Ibid* ss 338(e), 338A and 338B; *Crimes Act 1900 (NSW)* s 91R.

<sup>136</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 14.

<sup>137</sup> *Ibid* 53.

<sup>138</sup> *Ibid* 53.

<sup>139</sup> *Ibid* 53.

of a device, without that person's consent, in a situation where a reasonable person would expect not to be observed.<sup>140</sup> This offence was successfully prosecuted, inter alia, in *Finley v R*,<sup>141</sup> and has a maximum penalty of three months' imprisonment. Unfortunately, this legislation does not cover down-blousing, a remarkably similar behaviour. The *Crimes Act 1990* (NSW) contains similar offences; however, difficulties can arise in proving a perpetrator acted for the purpose of sexual gratification.<sup>142</sup> This occurred in 2015 where a nurse took pictures of a patient's genitalia while they were under anaesthetic.<sup>143</sup> However, the patient did not have a cause of action because she could not establish beyond reasonable doubt that the images were taken to obtain sexual gratification.<sup>144</sup> This represents a major hurdle that prevents many perpetrators from being successfully prosecuted.<sup>145</sup>

Western Australia does not have specific legislation targeting voyeurism or upskirting; however, some cases have been prosecuted under s 203 of the *Criminal Code* (WA).<sup>146</sup> In *Wright v McMurchy*,<sup>147</sup> a taxi driver was convicted of performing indecent acts in public after taking photos up the skirt of an intoxicated passenger. While s 203 provides another avenue to prosecute this form of IBSA, the lack of a specific upskirting offence represents a significant gap in Western Australia's IBSA legislation and should be amended with the addition of a provision similar to s 41B of the *Summary Offences Act 1996* (Vic).<sup>148</sup> Such a provision would directly address these problematic and unacceptable behaviours and remedy this gap

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<sup>140</sup> *Summary Offences Act 1966* (Vic) ss 41A, 41B and 41C.

<sup>141</sup> [2018] VSCA 202.

<sup>142</sup> *Crimes Act 1900* (NSW) ss 91J, 91K and 91L; Henry, Flynn and Powell, Responding to 'Revenge Pornography': Prevalence, Nature and Impacts (n 9) 53.

<sup>143</sup> Sophie Scott, 'Sydney nurse who took explicit photo of patient under anaesthetic still practising in NSW', *ABC News* (online, 6 November 2015) <<https://www.abc.net.au/news/2015-11-06/sydney-nurse-takes-explicit-photo-of-patient/6916174>>.

<sup>144</sup> Henry, Flynn and Powell, Responding to 'Revenge Pornography': Prevalence, Nature and Impacts (n 9) 62.

<sup>145</sup> Ibid.

<sup>146</sup> *Criminal Code* (WA) (n 5) s 203.

<sup>147</sup> *Wright v McMurchy* (2011) 42 WAR 113.

<sup>148</sup> *Summary Offences Act 1966* (Vic) s 41B.

in Western Australian IBSA law.<sup>149</sup> As one in three respondents from a 2019 study reported that they had been a victim of the non-consensual creation of intimate images, it is imperative that Parliament amend Chapter XXVA so that victims are afforded protection from all three categories of IBSA.<sup>150</sup>

#### IV DEFENCES

In Western Australia, it is a defence to a charge of distributing an intimate image without consent under s 221BD of the *Criminal Code* (WA) if the distribution of the intimate image was for genuine scientific, educational or medical purposes.<sup>151</sup> It is also a defence if the distribution was for media activity purposes and the distributor did not intend to cause harm to the depicted person, and the distributor believed it was in the public interest to distribute the image.<sup>152</sup> Moreover, it is a defence if the distribution was reasonably necessary for legal proceedings or if a reasonable person would consider the distribution of the image to be acceptable.<sup>153</sup> The exception regarding the reasonable person test gives the court capacity to consider factors that expand or reduce the criminality of a non-consensual distribution. These include, but are not limited to, the nature of the content, the circumstances in which the image was distributed, and the mental capacity or vulnerability of the person depicted.<sup>154</sup> For example, the distribution of nude baby photos would not be an offence as these would be considered acceptable distributions by a reasonable person.<sup>155</sup> Similarly, it is not an offence for a law enforcement agency to distribute an intimate image when acting in the course of their official duties.<sup>156</sup> This inclusion ensures that legitimate law

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<sup>149</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 61.

<sup>150</sup> *Criminal Code* (WA); Powell et al (n 3) 3.

<sup>151</sup> *Criminal Code* (WA) (n 5) s 221BD(3)(a).

<sup>152</sup> *Ibid* s 221BD(3)(c).

<sup>153</sup> *Ibid* s 221BD(3)(b) and (d).

<sup>154</sup> Explanatory Memorandum, Criminal Law Amendment (Intimate Images) Bill 2018 (WA) 5.

<sup>155</sup> *Ibid* 5.

<sup>156</sup> *Criminal Code* (WA) (n 5) s 221BD(4).

enforcement activities are not frustrated by this offence.<sup>157</sup> The defence of accident under s 23B of the *Criminal Code* (WA) may also be available for an unintentional distribution.<sup>158</sup>

## V PUNISHMENT AND REMEDIES

Similar to other Australian jurisdictions, Western Australia imposes a statutory maximum penalty of three years' imprisonment for the non-consensual distribution of intimate images to third parties, or eighteen months' imprisonment and a fine of \$18,000 if tried summarily.<sup>159</sup> These hefty penalties are a strong deterrent and send a clear message that the non-consensual distribution of intimate images will not be tolerated.<sup>160</sup> In Western Australia, a conviction under s 221BD of the *Criminal Code* (WA) is subject to the protections and diversionary measures available under the *Young Offenders Act 1994* (WA), including a caution or referral to a juvenile justice team.<sup>161</sup> A conviction will also not result in a person under the age of eighteen being registered as a sex-offender under the *Community Protection (Offender Reporting) Act 2004* (WA). This is because the legislation recognises that young people are unlikely to have displayed the sexual deviancy necessary to pose an ongoing risk to the community and warrant sex-offender registration.<sup>162</sup> A 2018 study titled 'Vagaries, Anxieties and the Imagined Paedophile: A Victorian Case Study on Mandatory Sex Offender Registration for Young Adult Registrants Convicted after Non-Consensually Distributing Intimate Images' found the emotional and practical impacts of registration on the youths were immense, upending their career trajectories and

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<sup>157</sup> Ibid s 221BD(4).

<sup>158</sup> Ibid s 23B.

<sup>159</sup> Ibid s 221BD(2).

<sup>160</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis) 1.

<sup>161</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4156b–4159a (John Quigley) 3.

<sup>162</sup> Ibid.



compromising their mental health.<sup>163</sup> On top of these concerns, registration also has implications for the youths' family lives. If the youths are registered, they may not be able to live at home or in foster care as they would be in proximity to children.<sup>164</sup> The purpose of the IBSA legislation is to protect victims; mandatory registration of young offenders who did not display sexual deviancy nor pose a risk to the community would not further this purpose.<sup>165</sup> As such, Western Australia's stance of not registering minors as sex-offenders when convicted under s 221BD is an important one.

For many IBSA victims, the most important remedy is removal of images or other intimate media from the Internet.<sup>166</sup> In October 2017, the Office of the eSafety Commission introduced a complaints portal whereby members of the public can report IBSA and request the timely removal of images. This important service provides effective relief for victims while also referring victims to relevant support services.<sup>167</sup> Similarly, a court may order a person charged with an intimate image offence to take reasonable steps to remove or forfeit the image to the State.<sup>168</sup> Furthermore, as the court process can be lengthy and images can continue to be distributed during that time, a rectification order could mitigate further harm to the victim.<sup>169</sup> Rectification orders are controversial as a person need only be charged, not convicted of an offence before a rectification order can be enforced.<sup>170</sup> This appears to impute a presumption of guilt rather than innocence. However, on one view, if an

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<sup>163</sup> Laura Vitis, 'Vagaries, Anxieties and the Imagined Paedophile: A Victorian Case Study on Mandatory Sex Offender Registration for Young Adult Registrants Convicted after Non-Consensually Distributing Intimate Images' (2018) 7(4) *Crime Justice Journal* 115, 122–123.

<sup>164</sup> *Ibid.*

<sup>165</sup> If the youths have been found not to pose an ongoing risk to the community, being registered as a sex offender for a significant period of time will not provide additional benefit to the community as the Court has already stated that they do not display sexual deviancy or pose a future risk. Mandatory registration on a sex offender registry imposes a disproportionate punishment on those young offenders.

<sup>166</sup> Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 577.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Criminal Code* (WA) (n 5) s 221BE.

<sup>169</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4313 (Peter Katsambanis); Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4156b-4159a (John Quigley).

<sup>170</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4313 (Peter Katsambanis).

offence was not committed, then the accused does not suffer any detriment by forfeiting the image.<sup>171</sup> Orders that assist in removing images from the public are important avenues of recourse for victims as they stop the perpetual and constant nature of the abuse that occurs while images remain online and accessible.<sup>172</sup> As such, the benefit derived from serving the rectification order prior to a conviction would likely outweigh the burden placed on the accused.<sup>173</sup> Victims of IBSA may also have recourse under the Western Australian Government Criminal Injuries Compensation Scheme, which provides compensation for loss or injury to victims of crime.<sup>174</sup> Victims who suffer mental or nervous shock as a result of IBSA may be able to claim compensation for pain and suffering, loss of income, loss of enjoyment of life, and medical or psychological expenses.<sup>175</sup>

## VI EFFECTIVENESS

In July 2019, Mitchell Brindley was the first person in Western Australia to be charged under s 221BD after posting naked images on fake Instagram accounts of a former girlfriend.<sup>176</sup> The prosecutor advocated for a jail term to deter this behaviour. However, Brindley avoided imprisonment and was sentenced to a twelve-month intensive supervision order.<sup>177</sup> This case was heavily publicised in Western Australian media, showing the prosecution of an appropriate offender, which served as a first step towards deterring IBSA.

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<sup>171</sup> Ibid.

<sup>172</sup> McGlynn et al (n 26) 7.

<sup>173</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).

<sup>174</sup> Government of Western Australia, *Victims of Crime* (Web Page) <[https://www.victimsofcrime.wa.gov.au/C/criminal\\_injuries\\_compensation.aspx#:~:text=The%20WA%20Government%20Criminal%20Injuries,an%20offence%20or%20alleged%20offence](https://www.victimsofcrime.wa.gov.au/C/criminal_injuries_compensation.aspx#:~:text=The%20WA%20Government%20Criminal%20Injuries,an%20offence%20or%20alleged%20offence)>.

<sup>175</sup> Ibid.

<sup>176</sup> Charlotte Hamlyn, 'First person convicted under new WA 'revenge porn' laws avoids jail sentence', *ABC News* (online, 22 July 2019) <<https://www.abc.net.au/news/2019-07-22/mitchell-brindley-first-person-in-wa-sentenced-for-revenge-porn/11331022>>.

<sup>177</sup> David Webber, 'First Person Charged Under WA Revenge Porn Is Set to Plead Guilty Over Instagram Images', *ABC News* (online 20 May 2019) <<https://www.abc.net.au/news/2019-05-20/first-person-charged-under-wa-revenge-porn-laws-to-plead-guilty/11130368>>.

While the Western Australian legislation is comprehensive and captures a wide range of problematic behaviours, there is a significant risk that, if not accompanied by a rigorous education program outlining the conduct constituting offences and the relevant penalties, the deterrence purpose of the legislation will be defeated.<sup>178</sup> It is not the legislators' intention to incarcerate a third of the population for these offences; the harsh penalties are intended to act as a strong deterrent and convey the message that IBSA will not be tolerated. Western Australia has not implemented a sufficient education program, and without informing the public of the existence and severity of this legislation, a larger proportion than intended will be sentenced to up to three years in jail, defeating the deterrence purpose of the legislation.<sup>179</sup>

Western Australian legislators should also consider creating an education program for police officers and those who enforce these laws. Numerous qualitative studies report that police are ill-equipped to deal with IBSA reports and that many engage in victim-blaming or lack the sensitivity needed when addressing such distressing matters.<sup>180</sup> The private and embarrassing nature of the content is another barrier to the conduct being reported, meaning many cases go unheard.<sup>181</sup> A training program for relevant law enforcement agencies on best practice regarding IBSA reporting may increase victims' willingness to come forward.<sup>182</sup>

Unlike sexual assault offences, victims of IBSA are not afforded anonymity or media blackouts at trial as of right.<sup>183</sup> The lack of an anonymity provision is a key critique of Chapter XXVA,<sup>184</sup> as the intimate and private nature of IBSA warrants an automatic grant of anonymity at trial.<sup>185</sup> If not

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<sup>178</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4311 (Lisa Harvey) 9.

<sup>179</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4322 (David Honey).

<sup>180</sup> Henry, Flynn and Powell, 'Image-based Sexual Abuse: Victims and Perpetrators' (n 1) 13.

<sup>181</sup> *Ibid.*

<sup>182</sup> McGlynn et al (n 26) 11.

<sup>183</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 97.

<sup>184</sup> *Ibid.*

<sup>185</sup> McGlynn et al (n 26) 13.

anonymised, the publicity associated with a court hearing could lead to the images being distributed and accessed more widely as the victims' names may be published in news reports and other external sources. This lack of anonymity as of right is a significant barrier to approaching police and proceeding to court as many victims are simply not willing to engage in these processes if their name will also be published.<sup>186</sup> Under the *Criminal Procedure Act 2004* (WA), the court can make an order that prohibits the publication of the whole or part of the proceeding outside the courtroom if it is in the interest of justice to do so,<sup>187</sup> or make an order prohibiting or restricting publication of any matter which is likely to lead members of the public to identify a victim of an offence.<sup>188</sup> The principle of open justice requires that court proceedings be open to public and professional scrutiny to prevent injustice and to instil confidence in the integrity and impartiality of the judicial system.<sup>189</sup> The principle of open justice requires that any departure from this rule be both exceptional and as narrow as reasonably necessary.<sup>190</sup> However, s 171(4) of the *Criminal Procedure Act 2004* (WA) provides an 'unequivocal indication that it can be in the interest of justice to protect the identities of victims of crime'.<sup>191</sup> This protection is consistent with policy contained in the *Victims of Crime Act 1994* (WA).<sup>192</sup> However, victims may not be aware of these protections and may choose not to approach authorities because they are fearful of having their case publicised. In order to combat these barriers to reporting and facilitate greater access to justice for victims, the *Criminal Code* (WA) should be amended to provide victims with automatic anonymity, media blackouts or suppression orders at trial. Such an amendment would encourage more victims of IBSA to come forward and

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<sup>186</sup> Ibid.

<sup>187</sup> *Criminal Procedure Act 2004* (WA) s 171(4)(b).

<sup>188</sup> Ibid s 171(4)(c).

<sup>189</sup> *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

<sup>190</sup> *Re Hogan; Ex part Western Australian Newspapers Ltd* [2009] WASCA 221, 298 [40] (McLure P).

<sup>191</sup> Ibid 298 [41] (McLure P).

<sup>192</sup> Ibid.

ultimately proceed to court as it would provide protection for the victim throughout the criminal justice process, a key aim of Chapter XXVA.<sup>193</sup>

Law enforcement agencies also face barriers to enforcement, namely that IBSA provisions are summary offences in a number of jurisdictions.<sup>194</sup> As a summary offence, law enforcement responses, including powers of arrest and the ability to obtain a warrant to seize devices, are limited.<sup>195</sup> In Western Australia, distributing an intimate image without consent is an indictable offence that can also be tried summarily.<sup>196</sup> This provides law enforcement agencies with their full range of investigation powers and provides the option to try less serious cases summarily in the Magistrates Court, side-stepping challenges faced in South Australia and Victoria.<sup>197</sup>

Prosecution is difficult when an IBSA offence crosses jurisdictional borders. If an image is uploaded in Victoria, for example, there is little recourse for a victim who resides in Western Australia as the cross-jurisdictional nature of the offence makes it difficult for police to establish which State has jurisdiction.<sup>198</sup> To effectively prosecute IBSA offences, uniform or Commonwealth legislation should be implemented.<sup>199</sup> In 2015, a private members bill attempting to cover IBSA was introduced but lapsed in 2016.<sup>200</sup> Social media does not have state boundaries, and neither should these offences.

## VII FINAL REMARKS

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<sup>193</sup> McGlynn et al (n 26) 13.

<sup>194</sup> *Summary Offences Act 1966* (Vic); *Summary Offences Act 1953* (SA).

<sup>195</sup> Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 570.

<sup>196</sup> *Criminal Code 1913* (WA) (n 5) s 221BD.

<sup>197</sup> Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 570.

<sup>198</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 99.

<sup>199</sup> *Ibid* 100.

<sup>200</sup> Criminal Code Amendment (Private Sexual Material) Bill; *Ibid* 58.

IBSA is a complex phenomenon that requires equally complex regulation to effectively protect victims and deter these widespread and harmful behaviours.<sup>201</sup> The *Criminal Code* (WA) effectively regulates IBSA in Chapter XXVA by making express provision for the offence of non-consensually distributing an intimate image with a statutory maximum penalty of three years' imprisonment, or if tried summarily, a statutory maximum penalty of eighteen months' imprisonment and a fine of \$18,000.<sup>202</sup> Chapter XXVA is comprehensive and makes provision for numerous forms of IBSA in order to protect as many people from IBSA as possible.<sup>203</sup> Although not contained within Chapter XXVA, threatening to distribute an intimate image is prohibited under ss 338(e), 338A, and 338B and carries the same penalties as distributing an image without consent under s 221BD of the *Criminal Code* (WA).

While there is some protection for victims of upskirting under s 203 of the *Criminal Code* (WA), Chapter XXVA should be amended to include specific upskirting provisions to fill this significant gap in Western Australia's IBSA legislation. The inclusion of a provision similar to s 41B of the *Summary Offences Act 1996* (Vic) would provide justice for victims of upskirting and voyeurism who currently fall through this legislative crack.<sup>204</sup> As with all legislation pertaining to the regulation of technology, IBSA legislation—in particular the definition of 'distribute'—must be regularly amended to keep pace with technological improvements and remain effective.<sup>205</sup> As cultural practices change, so too must these laws.<sup>206</sup> Parliament has acknowledged this need by embedding a requirement for the

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<sup>201</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 14.

<sup>202</sup> *Criminal Code* (WA) (n 5) s 221BD.

<sup>203</sup> This includes providing for victims of 'morph porn' (*Criminal Code* (WA) (n 5) ss 221BA and 221BD) and transgender victims whose breasts were exposed in an image that was distributed without their consent.

<sup>204</sup> *Criminal Code* (WA) (n 5) s 203.

<sup>205</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).

<sup>206</sup> Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 58.

relevant Minister to prepare a report in 2022 to review the operation and effectiveness of the legislation within s 221BF of the *Criminal Code (WA)*.<sup>207</sup>

Even if the most comprehensive and unambiguous IBSA laws were implemented, there would still be numerous barriers to reporting IBSA that would prevent cases from reaching the courts.<sup>208</sup> The private and sensitive nature of the content often makes victims reluctant to report IBSA to the police.<sup>209</sup> When this reluctance is coupled with victim-blaming and a lack of empathy from law enforcement agencies, it is clear why many cases never make it to court. An education program for police and other relevant law enforcement officers focusing on building empathy and providing accurate advice could aid in improving the willingness of victims to seek help and ultimately proceed to trial.<sup>210</sup> Additionally, the lack of anonymity as of right in court proceedings and the potential for further publicity of their intimate images is another burden that many victims are unwilling to bear.<sup>211</sup> As such, victims of IBSA should also be afforded automatic anonymity or media blackouts at trial to reduce these barriers to justice.<sup>212</sup>

Unfortunately, harsher penalties alone do not necessarily deter criminal conduct. As one of the principal purposes of IBSA legislation is deterrence, Western Australia must also invest in an extensive education program to inform the public of existence of the IBSA laws and their severe penalties.<sup>213</sup> Without actual knowledge of the consequences of their actions, people will continue to engage in these harmful behaviours.<sup>214</sup> Additionally, as the Western Australia IBSA legislation is contained within the *Criminal Code (WA)*, this does not empower the victim or provide an accessible avenue to

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<sup>207</sup> Criminal Code (WA) (n 5) s 221BF; *Criminal Law Amendment (Intimate Images) Act 2019 (WA)*.

<sup>208</sup> Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 574.

<sup>209</sup> McGlynn et al (n 26) 6.

<sup>210</sup> Ibid 5.

<sup>211</sup> Ibid 13.

<sup>212</sup> Ibid 1.

<sup>213</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 August 2018, 4311 (Lisa Harvey).

<sup>214</sup> Ibid.

gain relief as the decision to prosecute the matter lies with the State, not the victim.<sup>215</sup> Should a statutory tort for serious invasions of privacy become part of Western Australian law, victims may be success obtaining compensation for their loss and suffering through this civil cause of action.<sup>216</sup>

As it stands, the *Criminal Code (WA)* is largely effective in regulating IBSA as it captures a wide range of potential victims within two of the three main categories of IBSA. Chapter XXVA imposes harsh penalties for offending conduct and sends a strong message that IBSA is unacceptable. However, prosecuting IBSA that traverses State borders is difficult, and victims are often unable to obtain justice.<sup>217</sup> Ultimately, in order to effectively regulate IBSA, the Commonwealth Government must implement uniform IBSA legislation to provide consistency across jurisdictions.<sup>218</sup>

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<sup>215</sup> Bunn (n 40) 25.

<sup>216</sup> Ibid 25, 28.

<sup>217</sup> Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 577.

<sup>218</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 August 2018, 5022b-5024a (Sue Ellery) 3; Ibid 577.