

**Submission to the Government of Western Australia
Department of Justice
Office of the Commissioner for Victims of Crime
regarding the**

**Statutory Review of the *Criminal Law Amendment
(Intimate Images) Act 2019***

**on behalf of the
Youth Affairs Council of Western Australia (YACWA)**

29 January 2024



ACKNOWLEDGEMENT OF COUNTRY

The Youth Affairs Council of Western Australia acknowledges Aboriginal and Torres Strait Islander peoples as the traditional custodians of the lands, waterways and plains on which we live, work and play. This land always has been, and always will be, Aboriginal land.

ABOUT YACWA

The Youth Affairs Council of Western Australia (YACWA) is the peak body for young people and the youth sector that supports them in Western Australia. YACWA operates primarily as a human rights organisation that seeks to address the exclusion of young people in a rapidly changing society. YACWA represents around 60 youth sector organisations and 418 individual members, including both young people and compassionate community members.

ABOUT THE YEP PROJECT

YACWA's Youth Educating Peers (YEP) Project is a peer-led sexual health education service delivering programs to young people and the youth sector in Western Australia.

AUTHORSHIP

This submission was authored by Claudia Carles with assistance from Lorna Geraghty and Zoe Sullivan (The YEP Project) and Paul Litherland (Cyber Safety Educator; WA Police).

Introduction

The Youth Affairs Council of Western Australia appreciates and welcomes this opportunity to provide feedback on the *Criminal Law Amendment (Intimate Images) Act 2019* (the Act). Young people in Western Australia are engaging in digital sexual practices in high numbers¹ and are disproportionately impacted by Image Based Abuse. We hope that this review will foreground the lived experience and needs of young people in Western Australia to maximize the positive impact of this legislation.

Method

The recommendations made in this submission are based on the expertise of the Youth Affairs Council of Western Australia and the Youth Educating Peers (YEP) Project. We also refer to data sets from the Australian Research Centre in Sex, Health and Society's *7th National Survey of Australian Students and Sexual Health 2021, Western Australia Report*² which are based on the responses of 693 secondary students in Western Australia aged between 14 and 18 years old.

Contents

- 1. Summary of recommendations**
- 2. Context: Young people and online sexual practices**
- 3. Commentary**
 - 3.1. Removal orders: sections 221BE (2) and (3)**
 - 3.2. Education**
 - 3.3. Protection of victims of Image Based Abuse under 16 years old**
 - 3.4. Amendment of definitions**
- 4. Conclusion**

¹ Kauer, S., Power, J., Fisher, C., and Bourne, A., *The 7th National Survey of Australian Secondary Students and Sexual Health in 2021, Western Australia Report* (ARCSHS Monograph Series, No. 135) p 32.

² Ibid.

1. Summary of recommendations

Our recommendations to the Attorney-General for the improvement of this Act are as follows:

1. Expand the e-Safety Commissioner’s capacity to assist the process of tracking, locating, removing, and/or destroying intimate images from the internet by investing in enhanced cybersecurity infrastructure with inter-jurisdictional capabilities.
2. Invest in peer-led, State-wide education for young people regarding Western Australia’s *Criminal Law Amendment (Intimate Images) Act 2019*, the meaning of Image Based Abuse, and safe digital sexual practices.
3. Streamline Chapter XXV and XXVA of the *Criminal Code Act Compilation Act 1913 (WA)* to protect victims of Image Based Abuse who are under 16 years of age.
4. Amend Western Australia’s definition of an *intimate image* to include provisions relating to “attire of religious or cultural significance” in alignment with section 15 of the *Online Safety Act 2021 (Commonwealth)*.
5. Amend Western Australia’s definition of *consent* in alignment with section 53P (1) of the *Crimes Act 1958 (Victoria)*.

2. Context: Young people and online sexual practices

Data from the 7th *National Survey of Australian Students and Sexual Health 2021, Western Australia report* demonstrates the prevalence of digital and online sexual practices (also referred to as ‘sexting’) in the lives of young people in Western Australia. We call on Government to engage with the contemporary reality that young people under the age of 18 are highly engaged with digital sexual practices, including producing and sharing intimate images, even when aware of the risks of criminal offending.³ Legislative reform should endeavor to safeguard the rights of young people who are sexting in a rapidly evolving digital landscape.

Prevalence

Of the 693 young people aged 14-18 who responded to the survey:

- 81.4% of respondents had received a sexual text,
- 78.7% of respondents had received a sexual photo,

³ Ibid, pages 32-36.

- 66.4% of respondents had sent a sexual text, and
- 58.6% of respondents had sent a sexual photo.⁴

Most affirmative respondents reported engaging in digital sexual practices at a frequency of once per month or more.⁵

Attitudes

The attitudes of survey respondents towards their participation in online sexual practices are overwhelmingly positive. Most young people agreed that their reasons for sending sexual images were ‘to be fun/flirty’, ‘to feel sexy’ and to give ‘a sexy present’ to their partner.⁶ When receiving sexual images, positive feelings such as ‘happy’, ‘excited’ and ‘horny’ were reported in much higher ratings than negative feelings such as ‘embarrassed’, ‘upset’ and ‘guilty’.⁷ The majority of respondents also demonstrated strong awareness that sending and/or receiving intimate images involves risk and the possibility of negative consequences. The data shows that young people are cautious about sexting:

- 96.1% of respondents agreed or strongly agreed with the statement ‘you have to be careful about sexting’;
- 90.9% of respondents agreed or strongly agreed with the statement ‘sending photos may have serious negative consequences’; and,
- 88.3% of respondents agreed or strongly agreed with the statement ‘sending sexual photos is risky’.⁸

Sharing images of others

- 19% of respondents reporting having sent an intimate image of someone else;⁹ and 14.1% of respondents (98 young people) reported having an intimate image of them shared without their consent.¹⁰

3. Commentary

3.1 Removal orders: sections 221BE(2) and (3)

We welcome and applaud the Act’s introduction of section 221BE(2):

⁴ Ibid, page 32.

⁵ Ibid.

⁶ Ibid, page 34.

⁷ Ibid.

⁸ Ibid, 36.

⁹ Ibid, 32.

¹⁰ Ibid, 35.

*"If a person is charged with an intimate image offence, the court may order the person to take reasonable actions to remove, retract, recover, delete, destroy or forfeit to the State any intimate image to which the offence relates within a period specified by the court."*¹¹

Section 221BE(3) further empowers the court to:

*"Make an order under subsection (2) whether or not the person is convicted of the offence".*¹²

Together these measures introduce an important and effective measure to protect victims of Image Based Abuse (IBA). Removal orders offer a meaningful, non-criminal remedy to young victims of Image Based Abuse whose priority is the removal of their intimate image from the internet. Young victims of Image Based Abuse are more likely to know the perpetrator personally than adult victims and are less likely than adults to want to pursue prosecution for this reason.

We are concerned, however, that sections 221BE(2) and (3) are limited in their ability to reduce harm caused by IBA due their placement of the onus to remove the image on the perpetrator. What remedy is available to a victim of IBA in circumstances in which the perpetrator may not be able to remove the image after taking 'all reasonable steps'? Government needs to increase investment into supporting the process of tracking, locating, removing and/or destroying intimate images of victims of IBA, particularly in complex inter-jurisdictional contexts where images may be located on international servers. Government needs to protect young victims in circumstances in which the 'reasonable actions' of the perpetrator may not be sufficient to permanently remove an image from the internet. To improve the effective operation of this Act, Government must increase support for victims by increasing investment of resources into image removal processes.

Recommendation 1: Expand the e-Safety Commissioner's capacity to assist the process of tracking, locating, removing, and/or destroying intimate images from the internet by investing in enhanced cybersecurity infrastructure with inter-jurisdictional capabilities.

3.2 Education

Young people in Western Australia are inadequately educated on consent, sexting, and Image Based Abuse. Government should increase investment into peer-led, State-wide sex education programs that include online and digital sexual practices to address this

¹¹ *Criminal Law Amendment (Intimate Images) Act 2019 (WA)*, s 221BE(2).

¹² *Ibid*, s 221BE(3).

and ensure that the Act will effectively prevent the perpetration of IBA and protect young victims of IBA.

While much-needed consent education will be mandated in Western Australia's education system from 2024 onwards, we are concerned that sex education programs are being delivered with inadequate or no attention to digital and online sexual practices, and as a result young people are practicing digital sex without sufficient consent education. Some young people in Western Australia may be perpetrating IBA unintentionally due to lack of education and awareness. Young people with disabilities, LGBTIQ+ young people, young Aboriginal and Torres Strait Islander people and culturally and linguistically diverse young people are more likely to become victims *and* perpetrators of IBA than their wider population peers. Government must invest in engaging sex education programs that include and respond to the needs of young people in these demographics.

We are also concerned that young victims of IBA may not be aware that removal orders and prosecution are remedial options available to them through this legislation.

We hope that improved education regarding Image Based Abuse will provide a pathway for improved education and resourcing for young people to learn about consent, relationships, sexuality and their rights too. The Western Australian sexual health sector including the Youth Educating Peers (YEP) Project, the Sexuality Education Counselling and Consultancy Agency (SECCA), the Aboriginal Health Council of WA (ACHWA), Ishar Multicultural Women's Health Services and Sexual Health Quarters (SHQ) are well-placed to do this work if provided with sufficient resourcing.

Increased investment into youth-specific, peer-led education is necessary to improve the effective operation of the Act in the lives of young Western Australians.

Recommendation 2: Invest in peer-led, State-wide education for young people regarding Western Australia's *Criminal Law Amendment (Intimate Images) Act 2019*, the meaning of Image Based Abuse, and safe digital sexual practices.

3.3 Protection of victims of Image Based Abuse under 16 years old

Under current Western Australian legislation, a young person under 16 years of age may be charged with 'producing child exploitation material' if they take an intimate image of themselves.¹³ If a young person in this scenario becomes a victim of Image Based Abuse, they are unable to safely seek a remedy under the *Criminal Law Amendment (Intimate Images) Act 2019* without making themselves visible to the justice system as a potential perpetrator of 'producing child exploitation material'. To ensure that young people in these circumstances are able to access remedies available under the Act without fear of

¹³ *Criminal Code Act Compilation Act 1913* (WA), s 218.

prosecution under section 218 of Western Australia's *Criminal Code*, Chapters XXV and XXVA of this Act should be streamlined to protect young people under 16 years of age from risk of prosecution for creating intimate images of themselves.

Young people should be able to rely on legislation to protect them in this scenario. The possibility of discretionary use of police powers is not sufficient protection.

Recommendation 3: Streamline Chapter XXV and XXVA of the *Criminal Code Act Compilation Act 1913 (WA)*.

3.4 Amendment of definitions

To improve the operation of the Act, the following amendments should be made to definitions of 'intimate image' and 'consent' to include important detail to improve outcomes for young people:

Recommendation 4: Amend Western Australia's definition of an *intimate image* to include provisions relating to "attire of religious or cultural significance" in alignment with section 15 of the *Online Safety Act 2021 (Commonwealth)*.

Recommendation 5: Amend Western Australia's definition of *consent* in alignment with section 53P(1) of the *Crimes Act 1958 (Victoria)*.

4. Conclusion

The *Criminal Law Amendment (Intimate Images) Act 2019* offers young people a welcome legislative intervention that addresses Image Based Abuse (IBA) in Western Australia. As a sector we are particularly appreciative of the inclusion of removal orders in sections 221BE(2) and (3) as a non-criminal remedial option for young people who are victims of IBA. Increased investment into the removal process and education programs for young people will improve the operation of this Act by supporting victims and preventing perpetration of IBA. Streamlining Chapters XXV and XXVA of the *Criminal Code Act Compilation Act 1913 (WA)* will increase access to remedies for victims under 16 years old, and amendments to definitions of 'intimate image' and 'consent' will further improve the Act's ability to prevent harm to young people in Western Australia.

Sources cited

Kauer, S., Power, J., Fisher, C., and Bourne, A., *The 7th National Survey of Australian Secondary Students and Sexual Health in 2021, Western Australia Report* (ARCSHS Monograph Series, No. 135)

Criminal Law Amendment (Intimate Images) Act 2019 (WA)

Criminal Code Act Compilation Act 1913 (WA)

Online Safety Act 2021 (Commonwealth)

Crimes Act 1958 (Victoria)