GOVERNMENT OF WESTERN AUSTRALIA

Department of Justice

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

Final Report

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1 Executive Summary

The *Criminal Law Amendment (Intimate Images) Act 2019* (the Act) commenced on 15 April 2019, criminalising the non-consensual distribution of intimate images.

This report fulfils the requirement under section 221BF(1), which instructs the Attorney General to carry out a statutory review of the Act as soon as practicable after the third anniversary of its commencement. The Department of Justice (the Department) has undertaken this review (the Review) on behalf of the Attorney General.

The commencement of the Review was postponed to coincide with the Department's review of criminal justice responses to sexual offending. Due to its original start date, the Review collected quantitative data from the Department's Court and Tribunal Services and the Western Australia Police Force (WA Police) for the period between the Act's commencement and the end of 2022. Because of this, only offences captured within this period have been analysed in the Review.

The Review considers whether the intimate image provisions are operating as intended based on consultation with key stakeholders and a review of data. Overall, the qualitative and quantitative data collected during the Review indicates intimate image abuse is underreported in Western Australia (WA), and that reports of intimate image abuse experience high attrition rates. Further, the data indicates that barriers to reporting and issues with takedown orders exist, which may limit the Act's effectiveness.

The Review also contemplates whether the placement of image-based offences in the *Criminal Code Act Compilation Act 1913* (Criminal Code) impacts the effectiveness of the Act and makes the suggestion to align the provisions with other sexual offences.

Notwithstanding this, the Review finds the Act's objectives remain valid, and qualitative data provided by stakeholders suggests the Act is broadly meeting its objectives by facilitating the successful prosecution of perpetrators. However, the Review finds that gaps have emerged in WA's image-based abuse legislation, predominantly due to rapidly evolving understandings of technology-facilitated abuse. Most notably, the Act:

- includes some finite definitions;
- does not include provisions to address the creation, production, and procurement of intimate images without consent; and
- does not include sending an unsolicited intimate image to another person without their consent ('cyberflashing').

While the Act has achieved its primary objective of enabling prosecution, the Review identifies emerging behaviours and gaps that were not fully contemplated at the time of its introduction.

To address these gaps, the Review suggests criminalisation of these behaviours and amendments to certain definitions.

The Review considers that the Act's operation and effectiveness is likely to be impacted if not accompanied by appropriate preventative initiatives, with stakeholders considering education to be the most effective solution.

In conclusion, while the Act made considerable progress and comprehensively addresses a wide range of image-based abuse behaviours, there are areas where it

may fall short or require refinement to effectively combat evolving forms of abuse in a digital landscape.

2 Findings and Recommendations

2.1 Findings

1. The wording of section 221BD and section 338B sufficiently enables the prosecution of perpetrators distributing or threatening to distribute intimate images without consent.

   The operation of the Act meets the objective of criminalising the non-consensual distribution or threatening the non-consensual distribution of intimate images.

2. Only a small number of takedown orders are being issued and there is no formal process to enforce them.

   The wording of the Act supports the issue of takedown orders but there are concerns with implementation.

3. The inclusion of the threat offence within existing threat provisions (s 338) is appropriate, and the penalties applicable under this section are proportionate to the harm caused.
4. Image-based abuse is underreported in Western Australia and reports of intimate image abuse to WA Police experience high attrition rates.
5. The current penalties for the offences in the Act are sufficient.
6. Victims experience barriers to reporting offences, which may limit the effective operation of the Act.
7. Media campaigns and educational initiatives have not effectively targeted young people or improved understanding of the Act and image-based offences.
8. The current definition of ‘intimate image’ supports prosecution of the offences in the Act and is broad enough to capture evolving technology trends, but the definition may not adequately capture all circumstances where image-based abuse may occur.
9. The Act does not capture behaviours related to the creation, production, and procurement of intimate images without consent which is a gap in WA’s image-based abuse legislation.
10. The Act does not include provisions to address distribution of an intimate image to another person without their consent (‘cyberflashing’).

2.2 Recommendations

1. WA Police to undertake further work to determine why takedown orders are not being issued.
2. WA Police develop a rectification order protocol that includes procedures relating to requesting takedown orders, enforcing takedown orders, and the breach process. When developing the protocol, WA Police should seek advice from the eSafety Commissioner and consider processes in place for child exploitation material offences.
3. WA Police and the Department of Justice strengthen collaboration across agencies and jurisdictions to combat the perpetration of intimate image abuse and increase capacity to track, locate, and remove image-based abuse material from the internet.
4. The Department of Justice to undertake further policy work on introducing circumstances of aggravation for all image-based abuse offences.
5. The WA Government develop age-appropriate information and education about intimate image-based abuse, criminal justice responses, and available support services.
6. The Department of Justice develop a contact and referral point for victims of image-based abuse to receive information about criminal justice or alternative responses, and to receive referrals for support. In developing a contact point, the Department of Justice should consider collaborating with non-government support organisations.
7. The Department of Justice to undertake further policy work on amending the definition of 'engaged in a private act' and related definitional provisions to:
    - include diverse cultural understandings of 'state of undress';
    - contemplate circumstances of a private act beyond the three currently listed in section 221BA of the Act; and
    - consider whether the definition of 'intimate image' appropriately captures all persons intended to be protected by the provisions.
8. The Department of Justice undertake further policy work on categorising image-based abuse offences as sexual offences within the Criminal Code.
9. The Department of Justice undertake further policy work on criminalising the creation, production, and procurement of intimate images without consent. The policy work should consider:
    - emerging technology trends;
    - the application of the existing threat provisions contained in section 338 to the new offences; and
    - circumstances of aggravation.
10. The Department of Justice undertake further policy work on criminalising the distribution of an intimate image to another person without their consent ('cyberflashing').

3 The *Criminal Law Amendment (Intimate Images) Act 2019*

3.1 About the Act

The Act came into operation on 15 April 2019 in response to the Government's 2017 pre-election commitment to criminalise the non-consensual distribution of intimate images, a form of technology-facilitated sexual abuse.

According to the second reading speech, the intent of the legislation was to criminalise intimate image abuse and denounce the behaviour as unacceptable by enabling police and courts to hold perpetrators to account and provide victims with an avenue for justice. It also made clear that blame for the harm caused by the non-consensual distribution of intimate images lies firmly with the distributor, not the victim (subject of the image), and it aimed to send an unambiguous message to the community that image-based abuse is serious and harmful, and it will not be tolerated.[1]

3.2 The objects of the Act

The Act amends the Criminal Code to do three things:

1. Section 4 inserts new Chapter XXVA, titled 'Intimate Images' into the Criminal Code and creates a new offence criminalising the non-consensual distribution of intimate images (s 221BD);
2. Empowers courts to make rectification ('takedown') orders, requiring a person charged with the offence to remove or destroy the image(s) in question; and
3. Section 5 of the Act amends the existing threat offences in Chapter XXXIIIA of the Criminal Code to ensure that existing threat offences apply to a threat to distribute an intimate image.

4 Scope of the Review

4.1 The Review provisions of the Act

The Act is administered by the Attorney General, and the Department of Justice (the Department) is the public sector agency principally assisting the Attorney General.

Section 221BF(1) of the Criminal Code requires a review of the Act's operation and effectiveness to be undertaken as soon as practicable after the third anniversary of its commencement. The Act commenced on 15 April 2019, and as such, the statutory review was due to commence after 15 April 2022. However, the commencement of the review was postponed to coincide with the Department's review of criminal justice responses to sexual offending.

The Department, through the Office of the Commissioner for Victims of Crime, has conducted the Review on the Attorney General's behalf. The outcomes of the Review are set out below.

The Review is based on data and consultation undertaken during the period 2019-2022. Updated data for 2023 and 2024 has been included in this report for completeness and transparency; however, it has not been relied upon in forming the Review's findings or recommendations. Analysis and conclusions are confined to the defined review period to ensure consistency with stakeholder consultation and the evidence base available at the time.

[1] J. Quigley, Extract from Hansard, Legislative Assembly – Thursday, 28 June 2018, p4156b-4159a.

4.2 Terms of reference

The review plan for the statutory review was endorsed by the Department's Evaluation and Review Steering Committee (ERSC) before being submitted to the Attorney General. In line with the review plan, the Review considered the operation and effectiveness of the Act, as prescribed in section 221BF(1).

The '**operation**' of the Act implies objective consideration of the implementation of the Act and related consequences. As such, the Review endeavours to consider the practical outcomes, including any issues or unintended consequences from introducing the provisions.

The '**effectiveness**' of the Act provisions involves consideration of whether it is meeting the desired policy objectives, and the associated impact of the provisions, as outlined in the Explanatory Memorandum and Second Reading Speech for the Bill (refer to section 3.1).

4.3 Methodology

4.3.1 Activities undertaken

In assessing the operation and effectiveness of the Act, the Review:

- researched relevant literature and reports;
- conducted a jurisdictional comparison analysis;
- developed and distributed a discussion paper and consultation questions;
- consulted with relevant WA Government agencies, non-government organisations, and relevant persons; and
- collected and analysed quantitative and qualitative data.

4.3.2 Stakeholder consultation and submissions

Targeted consultation was undertaken by inviting submissions from relevant stakeholders with justice functions and those that provide community services to persons impacted by this legislation, other relevant public authorities, community legal organisations, and organisations that assist victims. With respect to judicial officers, the Magistrates Court (Chief Magistrate), the District Court (Chief Judge), and the Children's Court (President of the Children's Court) were contacted for consultation.

Each stakeholder was sent the discussion paper and a list of consultation questions to guide their submission. Stakeholders were asked to consider issues that were divided into two categories:

1. Issues relating to the existing provisions of the Act; and
2. Matters that currently fall outside of the Act but could potentially be incorporated into the Act.

Stakeholders were advised that issues relating to child abuse material were not being addressed in this Review because this conduct is criminalised in other sections of the Criminal Code (WA) and the *Criminal Code Act 1995* (Cth).

Appendix A lists the stakeholders who submitted to the Review, and **Appendix B** provides a complete list of stakeholders who were invited to submit.

Several submissions assisted in identifying legislative issues with suggested amendments, while others raised broader policy and practice issues intersecting with multiple areas of law and community concern. The work undertaken by organisations

and individuals in bringing these matters to the attention of the Review is acknowledged and appreciated.

The report has focused primarily on issues that relate to the operation and effectiveness of the Act raised during the consultation process.

5 Findings

5.1 Current State

Image-based abuse (IBA) is an umbrella term referring to the non-consensual creation, production, or sharing of intimate images, and extends to include threats to engage in such behaviours.[2] It can also include coercing someone into taking and sharing intimate images, redistributing unwanted intimate images, the unsolicited distribution of intimate images ('cyberflashing'), and using artificial intelligence (AI) to engage in any of these behaviours.

IBA has become increasingly prevalent in the last few years, likely due to the ubiquitous nature of personal communication technology and the ease with which the general population can create and share images and videos. IBA is often categorised as a form of gendered abuse.[3] While not limited to male perpetrators committing IBA against female victims, research suggests a substantial proportion of the harm associated with IBA is thought to arise from its gendered nature, including its links to family and domestic violence (FDV) and coercive control.[4]

The data provided by the WA Police for this review is consistent with the research. A large majority of the offences reported during the specified timeframe were committed by male perpetrators, almost half of which were flagged for 'family violence.' The data provided only allowed for an analysis of trends; due to different data sets, specific perpetrator demographic information could not be reported. Perpetrator demographics skewed younger, with most reported offences committed by persons aged 29 or younger. The data also indicated that most perpetrators were recorded in the non-Aboriginal and Torres Strait Islander category; however, no further demographic breakdown was provided.

Consistent with findings in the literature[5] and among other Australian jurisdictions,[6] the low number of reported cases indicates the behaviours covered under the Act are underreported. Of the reported cases, the data revealed that almost half (46.10%) of those cases prosecuted were grouped with other offences, rather than prosecuted on their own (53.90%). Additionally, high levels of attrition are apparent

[2] N Henry and G Beard, 'Image-based sexual abuse perpetration: A scoping review' (2024) 0(0) *Trauma, Violence & Abuse* <https://doi.org/10.1177/15248380241266137>.
[3] Ibid.
[4] Anastasia Powell, 'Intimate Intrusions: Technology Facilitated Dating and Intimate Partner Violence' in A. Powell, A. Flynn, and L. Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Palgrave Macmillan, 2021) <https://doi.org/10.1007/978-3-030-83734-1_9>; N Henry and G Beard, 'Image-based sexual abuse perpetration: A scoping review' (2024) 0(0) *Trauma, Violence & Abuse* <https://doi.org/10.1177/15248380241266137>.
[5] It is believed a considerable portion of victims of IBA do not report their experiences. For example, it is estimated that only 35% of Australians who have experienced IBA pursue any formal action, with even fewer reporting the behaviours to the police.
[6] Sentencing Advisory Council, 'Sentencing Image-based Sexual Abuse Offences in Victoria' (2020), *Victoria State Government* https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-10/Sentencing_Image_Based_Sexual_Abuse_Offences_in_Victoria.pdf.; N Henry, A Flynn and A Powell, 'Responding to 'Revenge Pornography': Prevalence, Nature, and Impacts' (2019) (Report to the Criminology Research Advisory Council), *Australian Institute of Criminology* https://crg.aic.gov.au/reports/1819/08-1516-FinalReport.pdf.

between all stages of the criminal justice process (i.e., report to police, lodgement in court, and finalisation; see section 5.2.1 for further discussion).

No victim data was provided to the Review. The lack of victim data represents a substantial gap and prevents interrogation of factors that may increase vulnerability for specific population cohorts and measures to address these factors.

As mentioned in the discussion paper, an upward trend in IBA reports has been observed since 2020, thought to be because of the online shift seen in social and intimate relationships in response to the COVID-19 pandemic. This trend is supported by the data, which demonstrates a general increase in the number of reports of behaviours contravening section 221BD and section 338B between 2019 and 2022 (see Table 1).

Table 1. All ss 221BD, 221BE and 338B reported offences in the WA Police Incident Management System between 1 Jan 2019 and 31 December 2024[7], inclusive (including number flagged for 'family violence').

Section	Offence Name	2019	2020	2021	2022	2023	2024	Total
221BD	Without consent distributed an intimate image of another person	104 (70)	151 (82)	178 (87)	215 (88)	261 (128)	254 (140)	**1163 (595)**
221BE	Fail to comply with a rectification order to remove, retract, recover, or delete any intimate image	0 (0)	0 (0)	1 (0)	0 (0)	0 (0)	0 (0)	**1 (0)**
338B	Threatened to distribute intimate image	12 (7)	51 (30)	45 (28)	85 (29)	66 (41)	86 (62)	**345 (197)**
Total		**116 (77)**	**202 (112)**	**224 (115)**	**300 (117)**	**327 (169)**	**340 (202)**	**1509 (792)**

5.1.1 Enabling prosecution

When asked to comment on the Act's operation and effectiveness, overall stakeholders' responses highlighted its strengths. The reforms implemented by the Act at the time were recognised as being nation-leading, especially in relation to its representation of diverse gender identities and sexualities in its definitions, and its attempts to counteract emerging technologies. Stakeholders also commended the Act generally for its victim focus without referring to specific sections.

In their feedback, WA Police noted their belief that the Act sufficiently enables prosecution of those offences prohibited by the Act as, *"… it covers circumstances encountered by investigators,"* and referenced the data included in Table 1 as evidence of this. Similarly, the Office of the Director of Public Prosecutions (ODPP) and other agencies agreed that the wording of the provisions cover current circumstances encountered by legal agencies and sufficiently enable prosecution.

Data provided by the Department's Court and Tribunal Services indicates an increase in lodgements and finalisations across the selected timeframe (see Tables 2 and 3). This data provides evidence that the wording of the provisions enables prosecutions and the increase in lodgements demonstrates growing awareness of the offences. Table 4 indicates that matters involving IBA brought before the courts have high conviction rates. The high percentage of guilty pleas by defendants demonstrated in Table 4 further supports the conclusion that the wording of the Act successfully enables prosecution. However, as discussed earlier, the data also

[7]Note: data for 2023 and 2024 has been included for completeness. The Review's analysis is based on the period 2019-2022.

shows considerable attrition between charge, lodgement, and finalisation[8] (see Tables 1 to 3).

Additionally, of the 242 relevant lodgements recorded between 2019 and 2022, 221 were lodged in the Magistrates Court, 16 in the District Court, and 5 in the Children's Court. While caution should be exercised in drawing conclusions from this data alone, the figures do not suggest that the Act is resulting in large numbers of young people entering the court system.

Table 2. All ss 221BD, 221BE and 338B Lodgements in Court between 1 Jan 2019 and 31 December 2024[9], inclusive.

Section	Offence Name	2019	2020	2021	2022	2023	2024	Total
221BD	Without consent distributed an intimate image of another person	28	42	60	76	92	98	**396**
221BE	Failed to comply with rectification order to take reasonable actions to retract, remove, recover, delete, destroy or forfeit intimate images	0	0	1	0	0	0	**1**
338B	Threatened to distribute intimate image	3	17	16	0	0	1	**37**
Total		**31**	**59**	**77**	**76**	**92**	**99**	**434**

Table 3. All ss 221BD, 221BE, and 338B Finalisations between 1 Jan 2019 and 31 December 2024[10], inclusive.

Section	Offence Name	2019	2020	2021	2022	2023	2024	Total
221BD	Without consent distributed an intimate image of another person	16	38	53	61	59	81	**308**
221BE	Failed to comply with rectification order to take reasonable actions to retract, remove, recover, delete, destroy or forfeit intimate images	0	0	1	0	0	0	**1**
338B	Threatened to distribute intimate image	1	9	16	6	3	1	**36**
Total		**17**	**47**	**70**	**67**	**62**	**82**	**345**

[8] "Lodgements" refer to matters initiated in court. "Finalisations" refer to matters that have been completed and result in an outcome (e.g., guilty plea, guilty by court, acquitted, etc.).
[9] See 7.
[10] The initial data requested for this review captured matters reported/lodged/finalised between 1 January 2019 and 31 December 2022. Updated data was provided by WA Police and Court and Tribunal Services in July 2025 for the period 1 January 2019 to 31 December 2024. As displayed in Table 1, WA Police data displays an overall continued and steady increase in reports of the image-based abuse offences across the full timeframe, suggesting growing awareness and reporting. Court lodgements (Table 2) for the distribution offence (s 221BD) also show a steady upward trend, albeit at lower volumes than WA Police reports (likely reflecting expected attrition across the criminal justice process; see Table 6 for attrition rates). However, despite increased WA Police reports for the threat offence (s 338B; n=237), court data indicates only 1 lodgement for this offence between 2022-2024 (Table 2). While the reason for this discrepancy is unclear, it does not appear to reflect a deficiency in the legislative provisions themselves. Further examination and analysis are needed to explain factors or decision-making that may be contributing to the high attrition rate for the threat offence.

Table 4. Percentage Select Methods of Finalisation* - ss 221BD, 221BE, and 338B between 1 Jan 2019 and 31 December 2024[11], inclusive.

Section	Offence Type	Guilty plea	Guilty by court	Guilty ex-parte	Acquitted by court	Withdrawn prosecution	Agreement wrongdoing	Transfer to NCA**
221BD	Distribution offence	75%	1%	0.4%	4%	19%	1%	0.4%
221BE	Failed to comply with takedown order	0%	0%	100%	0%	0%	0%	0%
338B	Threat offence	72%	3%	0%	3%	21%	0%	0%

* To account for duplicate data, table excludes cases where MOF Subgroup listed as transferred from lower/higher court for sentence or trial; ** Transfer to Non-Court Agency

Finding 1

The wording of section 221BD and section 338B sufficiently enables the prosecution of perpetrators distributing or threatening to distribute intimate images without consent.

The operation of the Act meets the objective of criminalising the non-consensual distribution or threatening the non-consensual distribution of intimate images.

5.1.2 Distribution offence

Under section 221BD, the Act prohibits the act of distributing an intimate image of another person without their consent. Under the Act, 'distribute' has been explicitly defined to mean to communicate, exhibit, sell, send, supply, offer, transmit, or to make the image available for access by electronic or other means to a person other than themselves or the depicted person. The Act does not criminalise 'sexting,' that is, a person sending an image of themself to another person with their consent. The Act prohibits the non-consensual distribution to a third party.

While stakeholders provided limited feedback on the Act's definition of 'distributes,' the current drafting explicitly prohibits certain forms of distribution under section 221BC(a) and (b), without providing scope for discretion, which may limit the ability of criminal justice agencies to respond to different factual circumstances. For example, the Act currently prohibits most forms of actual distribution, but depending on the circumstances, it may not extend to physically showing an intimate image to another person. While this form of IBA does not result in widespread availability of the image, it can still cause distress and embarrassment, especially in a school, university, or workplace environment. Some jurisdictions have attempted to combat this issue by including the terms 'show'[12] or 'make available for viewing…'[13] within their definitions; however, evidentiary issues exist, and this behaviour may be challenging to prosecute in practice as it is difficult to prove an image has been shown to another person. Despite this, widening the scope of the provisions may assist in deterring individuals from perpetrating the behaviour, particularly if an education campaign denounces the behaviour as unacceptable.

The Act imposes a maximum penalty of three years' imprisonment for the distribution offence, or imprisonment for 18 months and a fine of $18,000 if tried summarily.

[11] See 7.
[12] See s 27B *Crimes Act 1900* (ACT).
[13] See ibid and s 91N *Crimes Act 1900* (NSW).

These penalties are on par with the highest among other Australian jurisdictions and should act as a strong deterrent. Young people charged with these offences may also be diverted under the *Young Offenders Act 1994* (WA), including by caution or referral to a juvenile justice team.

5.1.3 Takedown orders

The Act introduced sections 221BE(2) and (3), which allow the courts to order a person charged with an intimate image offence to take reasonable actions to remove, destroy, or forfeit to the State any intimate image to which their offence relates, in the form of a rectification ('takedown') order. In practice, these provisions operate such that a court may exercise its discretion to make a rectification order where the prosecution seeks such an order; however, where no such request is made, the court is not required to exercise that discretion.

Overall, stakeholders welcomed the introduction of sections 221BE(2) and (3), noting these provisions provide an important mechanism to support victims by enabling the removal of intimate images and mitigating the ongoing harm caused by their continued availability, whether or not a person is convicted of an offence.

Stakeholders noted that takedown orders can offer meaningful, non-criminal remedies to victims of IBA who prioritise having their images removed or deleted. The Youth Affairs Council of WA (YACWA) noted this particularly applies to young victims of IBA who are more likely to personally know the perpetrator than adult victims and are less likely than adults to want to pursue formal prosecution for this reason.

However, Table 5 demonstrates the low number of takedown orders issued in the courts between 2019 and 2022 (the review period).

Table 5. Rectification orders made between 1 Jan 2019 and 31 December 2024[14], inclusive.

Section	Order Name	2019	2020	2021	2022	2023	2024	Total
221BE	Rectification Order	4	5	1	1	10	15	**36**

Unsurprisingly, most stakeholders could not speak to the effectiveness of these orders in WA given so few had been issued. Of concern, the Women's Legal Service, in consultation with the WA Family and Domestic Violence Legal Workers Network,[15] had "no known matters to refer to" in their submission. The ODPP noted that their case records did not indicate any issues arising with the imposition of takedown orders. Of a total 242 section 221BD and section 338B offences lodged between 2019 and 2022, only 21 were lodged in the District or Children's Courts. No rectification orders were issued in the District or Children's Courts during this period.

Despite the majority of these cases being lodged within the Magistrates Court (221), when asked if takedown orders were being imposed as intended, the consolidated submission from the WA Police noted this was "unknown". In addition, the WA Police commented their belief there is a high level of compliance with any rectification orders made by the court as between 2019 and 2022, they had record of only one

[14] See 7.
[15] The WA Family and Domestic Violence Legal Workers Network is comprised of members of legal assistance services operating in WA.

charge being preferred under section 221BE(6). This charge resulted in the intimate image being deleted from an accused's phone before being returned.

In contrast, concerns were raised by most other stakeholders about the limited ability of the Act to reduce the harm caused by IBA due to the onus it places on the perpetrator to 'takedown' the image. The responses indicated consistent uncertainty regarding the practical application of the orders, with several stakeholders questioning the enforceability of the orders, the rapidity of their imposition, verification of compliance, the handling of already distributed images (especially those already shared online), communication with other individuals who had shared the image, and the remedies available to victims in circumstances where the perpetrator has been unable to remove the image after taking "all reasonable steps". As noted in the discussion paper, most stakeholders acknowledged the ongoing concern that it is near impossible to prove an image has not been copied or published elsewhere, even if deleted from one device in compliance with a takedown order.

The Review did not receive any information regarding the enforceability of takedown orders. It appears there is no formal process to verify compliance, and that the onus is placed on the victim to make a complaint to police if they believe the takedown order has been breached. This action requires the victim to have prior knowledge of the breach process and assumes they have the ability to investigate whether their image has been removed and/or destroyed. This process potentially exposes the victim to additional trauma by having to search for and view their image online.

According to the information made available to the Review, takedown orders are only being issued in a small proportion of cases (7% of s 221BD between 2019-2022) and there is no formal process to verify compliance. This contributes to uncertainty regarding enforcement and may undermine confidence in the effectiveness of the provisions. Responsibility for identifying potential breaches appears to rest with victims, which may place them at further risk of harm.

The Review finds that while the wording of section 221BE should protect victims, it is not operating as intended.

Finding 2

Only a small number of takedown orders are being issued and there is no formal process to enforce them.

The wording of the Act supports the issue of takedown orders but there are concerns with implementation.

To improve the operation of the Act, stakeholders suggested increasing support for victims by investing in the process of tracking, locating, removing and/or destroying the images in question, noting particularly in the case of inter-jurisdictional contexts where the images may be located on international servers. Aboriginal Family Legal Services (AFLS) suggested, *"there is a need for stronger immediate orders; perhaps police, ex-parte orders directed at social media could be a solution."* The need for collaboration between regulatory bodies like the eSafety Commissioner (eSafety) and law enforcement agencies was emphasised by stakeholders.

In 2017, eSafety introduced a complaints portal whereby victims can report IBA and request its removal. They have compliance and enforcement policies which outline a

range of remedial and enforcement options, including removal notices, and have a higher success rate imposing takedown orders due to their civil penalty scheme. The scheme provides for removal of IBA material, even where the identity of the original perpetrator is unknown, by placing the onus on the hosting platform to remove the material. The *Online Safety Act 2021* (Cth) empowers eSafety to give removal notices to the online service providers and the end-users responsible for posting (perpetrators); all of which can be done without a court order. They also prioritise the rapid removal of IBA posted online and have established escalation pathways with major online service providers. eSafety also have powers to obtain basic subscriber information from online service providers where relevant to an investigation. Where appropriate, eSafety will share intelligence with relevant police forces, with Memoranda of Understanding in place to allow information sharing.

eSafety's remedial direction powers also allow them to require a perpetrator to take actions specified by eSafety to reduce the risk of further breaches. This can include deleting all relevant images within their possession or control, recovering, and deleting all relevant images distributed to others, and refraining from posting or threatening to post any further images of the victim. This remedial direction may be used in conjunction with, or as an alternative to, other enforcement or compliance action.

Recommendation 1

WA Police to undertake further work to determine why takedown orders are not being issued.

Recommendation 2

WA Police develop a rectification order protocol that includes procedures relating to requesting takedown orders, enforcing takedown orders, and the breach process. When developing the protocol, WA Police should seek advice from the eSafety Commissioner and consider processes in place for child exploitation material offences.

Recommendation 3

WA Police and the Department of Justice strengthen collaboration across agencies and jurisdictions to combat the perpetration of intimate image abuse and increase capacity to track, locate, and remove image-based abuse material from the internet.

5.1.4 Threat offence

As was highlighted in the discussion paper, threat offences, which victims often experience as omnipresent and ongoing, are associated with the highest reported levels of harm, despite being the lowest reported IBA behaviour. It is believed these differences occur because the credibility of a threat is not subject to the same limitations as other offence types (e.g., time restraints or physical proximity). Threats

may still be viewed as credible even in cases where no image exists (e.g., impossible threats).[16]

Section 5 of the Act amends section 338 of the Criminal Code to include threatening to distribute an intimate image within existing threat provisions (s 338(e)). Depending on the circumstances of the threat, maximum penalties range from 3 to 10 years' imprisonment, or imprisonment for 18 months and a fine of $18,000 if tried summarily.

Stakeholders provided mixed feedback when considering the operation of this section. In general, stakeholders applauded the decision to include this offence within existing threat provisions, noting consideration had been given to the significant harm threats can cause victims. Law enforcement agencies considered the provisions are operating as intended and that the wording of the Act was sufficient to protect victims. Proponents deemed the existing penalties as appropriate and thought they adequately reflected the potential harm to victims.

Other stakeholders expressed concerns that the current threat offence does not adequately cover all scenarios where threats to distribute IBA material occur. For example, the Women's Legal Service noted concerns that the current provisions do not adequately protect victims in the culturally and linguistically diverse (CALD) community. They noted instances where intimate images have been used as the basis for 'dowry abuse.' Victims have been told images would be sent to family members in their home countries as "proof of prostitution" in Australia so that the dowry can be returned unless the victims comply with certain demands. In some circumstances, no images exist but the threats still have the same effect because the victim complies with the demands. This is an example of an impossible threat. They stated the current legislation does not support an effective response to this scenario.

There was a particular emphasis on the need for the Act to explicitly capture threats made with the intent to humiliate, degrade, or exert control over the victim. To that effect, some stakeholders advocated for harsher penalties for the threat offence in general, but specifically in relation to cases involving FDV or where a victim is particularly vulnerable. The AFLS for example, commented, *"[these] instances should be circumstances of aggravation, as well as where intent to harm as opposed to recklessness is proven."*

However, after considering stakeholders' views, comparative jurisdictional analysis, and Hansard, it appears that policy considerations regarding the seriousness of threats, particularly in an FDV context, were considered during drafting of the Act. It seems thought was given to the notion that threats to distribute IBA material usually have more sinister motivations than the act of distribution itself and disproportionately occur in the context of relationship breakdowns and family violence scenarios as a means to coerce, control or manipulate victims.

Section 338 prescribes more serious penalties for offences committed in circumstances of aggravation or racial aggravation. Circumstances of aggravation is defined in section 221 of the Criminal Code to include circumstances in which the offender is in a family relationship with the victim of the offence. Family relationship has the same meaning given in the *Restraining Orders Act 1997* section 4(1).[17] In effect, threats committed in the context of FDV are committed in circumstances of aggravation and are subject to more serious penalties. The existing provisions also

[16] C McGlynn and E Rackley, 'Image-based sexual abuse' (2017) 37(3) *Oxford Journal of Legal Studies* 534-561 < https://doi.org/10.1093/ojls/gqw033>.
[17] *Criminal Code Act Compilation Act 1913* (WA) s 221(2).

encompass threats made on their own (s 338B) and threats aimed at facilitating action (or an omission) on the part of the victim (s 338A), meaning they can be applied to a myriad of scenarios. Section 338C also ensures that both real and 'impossible' threats to distribute are prohibited, signifying an understanding that threats can be omnipresent and damaging, regardless of the existence of images or a perpetrator's ability to distribute them.

Finding 3

The inclusion of the threat offence within existing threat provisions (s 338) is appropriate, and the penalties applicable under this section are proportionate to the harm caused.

5.2 Challenges with the Act

5.2.1 Offence rates and attrition

Compared with national victimisation and perpetration estimates based on previous research and national surveys,[18] the WA Police data demonstrates low numbers of reported offences, indicating the behaviours prohibited by the Act are likely underreported in WA.

Not dissimilar to other sexual offences, high levels of attrition are apparent, as demonstrated in Table 6. Comparatively, between 10 and 20% of sexual offences committed in Australia are reported to the police. Of those cases that are reported, it is estimated that only 30 to 40% result in formal charges being laid, only 50% of those charges are lodged in court, and only 12 to 15% of those receive convictions.[19]

Table 6. Attrition rate for cases reported to WA Police and Court Lodgements – s 221BD and s 338B between 1 Jan 2019 and 31 December 2024[20], inclusive.

Section	Offence Name	2019	2020	2021	2022	2023	2024	Average
221BD	Without consent distributed an intimate image of another person	73%	72%	66%	65%	65%	61%	**67%**
338B	Threatened to distribute intimate image	75%	67%	64%	100%	100%	99%	**84%**

In their feedback, WA Police confirmed they experience consistently high numbers of complaint withdrawals each year, which they noted may indicate gaps in the legal remedies and support provided to victims by the Act. However, as demonstrated in Table 7, the WA Police data indicates that out of all section 221BD(2) and section

[18] N Henry, A Flynn and A Powell, 'Responding to 'Revenge Pornography': Prevalence, Nature, and Impacts' (2019) (Report to the Criminology Research Advisory Council), *Australian Institute of Criminology*. <https://crg.aic.gov.au/reports/1819/08-1516-FinalReport.pdf>, and Claudia Long, 'Coronavirus Shutdown Prompts Spike in Reports of Sextortion to eSafety Commissioner,' *ABC News* (online, 3 June 2020) < https://www.abc.net.au/news/2020-06-03/spike-reports-esafety-commissioner-coronavirus-shutdown/12314442>, and Australian Bureau of Statistics, *Personal Safety Survey, Australia (2021-2022)* (Report, 2023).
[19] Law Reform Commission of Western Australia, *Final Report – Project 113: Sexual Offences* (Report, 2024) https://www.wa.gov.au/government/announcements/final-report-project-113-sexual-offences; and Australian Institute of Criminology, *Sexual Offending in Australia* (Australian Government, 2021) https://www.aic.gov.au/statistics/sexual-offending-australia.
[20] See 7.

338B(b) offence outcomes reported, cases marked as 'Insufficient Evidence' and 'Uncleared'[21] were often higher, indicating issues may lie elsewhere. Interestingly, offenders were only processed[22] in 31% of reported cases during the review period.

Table 7. Outcomes for offences reported to WAPOL – s 221BD(2), s 221BE and s 338B(b) between 01 January 2019 and 31 December 2024, inclusive.[23]

Offence Outcome	2019	2020	2021	2022	2023	2024	Total	%
Complaint Withdrawn[24]	22	36	29	50	52	32	**221**	15%
Insufficient Evidence	27	57	62	81	95	121	**443**	29%
Offender Processed	42	66	73	82	107	127	**497**	33%
Unable to proceed / charge	11	16	18	25	22	14	**106**	7%
Uncleared	14	27	41	60	50	38	**230**	15%
Under investigation	0	0	1	2	1	8	**12**	1%
Grand Total	**116**	**202**	**224**	**300**	**327**	**340**	**1509**	-

Finding 4

Image-based abuse is underreported in Western Australia and reports of intimate image abuse to WA Police experience high attrition rates.

5.2.2 Penalties

Sections 5.1.2 and 5.1.4 of this report outline the penalties applicable for each offence within the Act. As briefly discussed in section 5.1.1, the data indicates that IBA offences brought before the courts have high conviction rates, but it should be noted that IBA offences are routinely charged and brought to court grouped with other offences. Table 8 demonstrates the percentage of court outcomes for cases involving IBA in WA during the specified period. The most common sentencing outcomes for the distribution offence (s 221BD) were fines (39%) and community-based dispositions (25%). Imprisonment was imposed in 11% of cases.

Comparatively, the most common sentencing outcomes for the threat offence (s 338B) were fines (31%) and imprisonment (23%). Community-based dispositions were imposed in 19% of cases. Stakeholders expressed general satisfaction with the penalties listed in the Act.

[21] Outcome applied when it has been determined that no further lines of inquiry exist, or a management decision has been made not to investigate the matter further.
[22] Outcome applied to an offence when an offender is processed for the offence. This includes cautions, referrals, and infringement notices.
[23] See 7.
[24] Outcome is applied when the victim indicates they no longer support an investigation or charge.

Table 8. Percentage Select Court Outcomes Type* - ss 221BD, 221BE, and 338B between 1 Jan 2019 and 31 December 2022, inclusive (including updated data request for 2023 and 2024). [25]

Section	Offence Name	Acquitted	Fine	Community order**	Suspended Imprisonment***	Dismissed#	Prison	Referred to NCA##
221BD	Distribution offence	5% (4%)	39% (35%)	25% (22%)	8% (7%)	12% (19%)	11% (12%)	1% (1%)
221BE	Failed to takedown	-	100% (100%)	-	-	-	-	-
338B	Threat offence	4% (3%)	31% (28%)	19% (21%)	8% (7%)	15% (21%)	23% (21%)	-

Note: percentages shown without brackets relate to the Review period (2019-2022). Percentages shown in brackets incorporate updated court data for 2023-2024.

* to account for duplicate data, table excludes cases where MOF Subgroup listed as transferred from lower/higher court for sentence or trial. Table includes where MOF SubGroup listed as 'charge proved,' 'charge unproven,' and 'non-adjudicated finalisation'.

** includes Community Based Orders, Intensive Supervision Orders, and Youth Community Based Order

*** includes full, partial, and conditional Suspended Imprisonment Orders, and Juvenile Conditional Release Orders

includes Discontinued, Dismissed, Dismissed (s 33(2) YOA), and Dismissed for Want of Prosecution (s 25)

Referred to Non-Court Agency (i.e., a Juvenile Justice Team)

However, a need for a broader spectrum of responses with both more and less severe consequences was also repeatedly raised. For instance, several stakeholders commented on the lack of aggravating circumstances, particularly in cases involving FDV, victim vulnerability, serious cases with significant harm, or where "highly malicious" intent was evident. Comments highlighted that aggravated circumstances for the offence of distributing an intimate image are needed to account for the ongoing hurt, shame, worry, and broader mental health impacts felt by vulnerable victims, particularly those experiencing IBA in an FDV context. The AFLS, for example, discussed that a perpetrator of family violence may simply receive a fine as a penalty for IBA, which may create more worry and anxiety for the victim, not act as a deterrent for the perpetrator, and place the victim at more risk of harm.

At the other end of the spectrum, stakeholders noted that many victims, especially young people, may be more likely to report IBA behaviour if the first layer of consequence was not criminal, rather a civil remedy that ensured they had a say. Many victims simply want the IBA to stop and often do not wish for the perpetrator to be prosecuted, especially in instances where that person is their friend, partner, or ex-partner. For this reason, stakeholders believe that victims would find it preferable to separate takedown orders from criminal prosecution. This sentiment is backed by the research literature; studies conducted with young victims[26] and police officers[27] have found that teenage victims of IBA are generally not interested in engaging with

[25] See 7.
[26] Alexa Dodge and Emily Lockhart, 'Young People Just Resolve it in their own Group: Young People's Perspectives on Responses to Non-Consensual Intimate Image Distribution' (2022) 22(3) *Youth Justice* 304-319. < https://doi.org/10.1177/14732254211030570>.
[27] E.g., Alexa Dodge and Dale Spencer, 'Online Sexual Violence, Child Pornography or Something Else Entirely? Police Response to Non-Consensual Intimate Image Sharing Among Youth' (2018) 27(5) *Social & Legal Studies* 636-657. <https://doi.org/10.1177/0964663917724866>.

the criminal justice system and would prefer alternative support to have their images expediently removed.

Finding 5

The current penalties for the offences in the Act are sufficient.

Recommendation 4

The Department of Justice to undertake further policy work on introducing circumstances of aggravation for all image-based abuse offences.

5.3 Challenges in Implementation

5.3.1 Barriers to reporting

While some behaviours may go unreported because victims are not aware they have occurred or that IBA is a criminal offence, the feedback suggests there is a general reluctance from victims to report IBA-related offences.

Stakeholders identified various barriers deterring victims from making IBA-related complaints, including safety concerns, social repercussions, discomfort speaking with police officers, feelings of shame, concerns about victim blaming, and uncertainty about the prosecution process. The AFLS, for example, explained that their clients *"feel much shame in [reporting these offences] and are unlikely to do so unless they are supported by an organisation such as AFLS."* Legal providers indicated that many of their clients had not had their reports *"taken seriously,"* and they had continually observed a *"failure of the system,"* as consideration was not given to the extensive impact the behaviour was having on victims' health and wellbeing.

Some stakeholders spoke of concerns in relation to reports from victims that they had been intimidated and dissuaded by police officers when reporting IBA-related offences. For example, stakeholders discussed the lack of support and victim-blaming attitudes their clients had faced attempting to report IBA, which led to them withdrawing their complaints. Further, stakeholders described scenarios where police officers had caused victims to feel intimidated and dissuaded from proceeding because of the emphasis the officers had placed on victims needing to be "prepared for cross-examination." Interestingly, between 2019-2022, in 81% of section 221BD and 77% of section 338B cases, perpetrators pled guilty, indicating that a majority of victims will not have to face cross-examination.

Moreover, several stakeholders did note that some victims feel significant levels of anxiety over the potential exposure of their images during the court process, particularly in relation to trials. The ODPP explained they try to work around this issue on a case-by-case basis by requesting closed courts or by seeking arrangements with the defence to blur images shown in court; however, there is no guarantee for a victim deciding to proceed with a report that these arrangements will be made.

The Review also notes that courts have powers under section 171 of the *Criminal Procedure Act 2004* to make orders restricting publication of proceedings or information likely to identify a victim. However, stakeholders continued to express

concern about the potential exposure of intimate images during court proceedings and the impact this may have on reporting decisions.

Additionally, stakeholders called for provisions to better protect vulnerable groups who are particularly at risk of IBA, noting the barriers faced by victims to engaging with the criminal justice system or seeking support are often compounded by the same vulnerabilities. The context of the culture, community and individual characteristics should be considered in any discussion of victims' experiences of the offending and the barriers to help-seeking. These differences add further layers of complexity to how IBA is perpetrated and experienced, the impact it has on victims and how systems respond to the offending. One conceptual lens for considering contextual differences is intersectionality, which considers how different forms of inequality operate together: it is *"a way of thinking about identity and its relationship to power."*[28] Intersectionality means examining any combination of social identities through which people experience oppression or discrimination, both individually and systemically (e.g. race, class, disability, sexuality, parental status and health).[29]

During consultation, some stakeholders noted specific complexities in pursuing legal avenues for persons with disabilities. Further, IBA has emerged as a common element in FDV cases. Stakeholders suggested that the Act may not meet the needs of this group, as evidenced by a low number of reports and high attrition rates. The WA Police made the below comments and drew inference that the Act does not comprehensively meet the needs of this vulnerable group:

> *"…nearly 50% of reported complaints made since the commencement of the Act have been family violence related. However, of this total number of complaints to the year ended 31 December 2023, almost 50% were withdrawn by the complainant and only 25% (123 suspects) were charged."*

Suggestions were made to define 'vulnerable people' and to create harsher penalties, or circumstances of aggravation for behaviour perpetrated against them. However, the highly contextual nature of a victim's experience raises challenges in developing an effective definition of 'vulnerable group.'

The Women's Legal Service summarised the commentary, stating *"prosecution is dependent on the victim-survivor making a complaint in the first place, which is the key barrier to the successful use of this legislation.*"

At the time of writing, the Department of Justice, through the Office of the Commissioner for Victims of Crime (OCVoC) is currently finalising, *Improving experiences of victim survivors: Review of criminal justice responses to sexual offending* (OCVoC Review), which considers barriers to reporting, and how reporting sexual offences can be made safer and more accessible for victims. One of the initiatives explored in the OCVoC Review is Safe2Say, an online reporting tool created by the police's Sex Assault Squad, which launched to the public in August 2023. The OCVoC Review heard that Safe2Say provides a private, safe, and less confronting reporting pathway, with an option for anonymity and the ability to connect directly with specialist officers. Victims, service providers, and other stakeholders consulted during the OCVoC Review saw Safe2Say as a welcome addition to WA's reporting options as it not only offers victims an alternative reporting option that

[28] Kimberlé Crenshaw, 'Why Intersectionality Can't Wait,' *The Washington Post* (Washington, DC, 24 September 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/.
[29] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies' (1989) 1 *University of Chicago Legal Forum* 139–167.

aligns with best practice, but also the opportunity to provide information about an offence without having to make a formal report to the police.

Given its relative recency, uptake of Safe2Say is still limited so it is difficult to assess its effectiveness in mitigating barriers to reporting sexual offences. However, following a formal evaluation of the platform, it may be beneficial to further explore whether implementing Safe2Say or a similar model for IBA offences will aid in reducing barriers to reporting by increasing access to a safe, specialist and less confronting reporting mechanism.

Finding 6

Victims experience barriers to reporting offences, which may limit the effective operation of the Act.

5.3.2 Young people

The vulnerability of young people was highlighted in the feedback, with most stakeholders commenting that IBA is a significant issue in this population cohort.

While specific data relating to this cohort was not made available to the Review, stakeholder feedback indicated young people are engaging in digital sexual practices at high levels and are therefore disproportionately impacted by IBA. Studies conducted overseas found that 'middle adolescents' (aged 14 to 18 years) were the most likely to share explicit images of other people without their consent,[30] and that 25% of young people who had received intimate images had shared them with at least one other person without consent.[31] There is also anecdotal indication that young people are beginning to use generative AI technology to produce intimate images of other young people for bullying and 'other purposes'.[32]

Previous stakeholder consultation with young people revealed a variety of pressures and concerns related to engaging in 'sexting', including pressure to send photos of themselves, fear of shame, retribution and a loss of friends if they do not engage in the behaviour, as well as reluctance to involve authorities due to fear of the images being further publicly exposed.[33] Additionally, concerns were raised about young people's potential prosecution under child exploitation material laws if they create images of themselves and later become victims of IBA. Stakeholders commented that many young people are deterred from seeking help and reporting the non-consensual distribution of their images for this reason.

Further, the research literature indicates that many young people avoid reporting incidences of IBA to police due to fears of parental and peer victim blaming and shaming.[34] Studies indicate young people's digital sexual practices, including

[30] Ricardo Barroso et al, 'Abusive Sexting in Adolescence: Prevalence and Characteristics of Abusers and Victims' (2021) 12 *Frontiers in Psychology* <https://doi.org/10.3389/fpsyg.2021.610474>.
[31] Donald Strassberg et al, 'Sexting by High School Students: An Exploratory and Descriptive Study' (2013) 42 *Archives of Sexual Behavior* 15-21.<https://doi.org/10.1007/s10508-012-9969-8>.
[32] Claudia Long, 'First reports of children using AI to bully their peers using sexually explicit generated images, eSafety Commissioner says,' *ABC News* (online, 16 August 2023) <https://www.abc.net.au/news/2023-08-16/esafety-commisioner-warns-ai-safety-must-improve/102733628>.
[33] Commissioner for Children and Young People, *Girls' Wellbeing: Insights from the 2021 Speaking Out Survey* (Report, August 2022). <ccyp-girls-wellbeing-report-i-eport-2022-final-web-version.pdf>.
[34] Alexa Dodge and Emily Lockhart, 'Young People Just Resolve it in their own Group: Young People's Perspectives on Responses to Non-Consensual Intimate Image Distribution' (2022) 22(3) *Youth Justice* 304-319. <https://doi.org/10.1177/14732254211030570>.

consensual image sharing, are often treated as abnormal, disappointing and shameful.[35] Research in Australia highlights how these practices are sometimes dismissed as abnormal or deviant, particularly when considered in the context of traditional gender expectations and norms.[36] This is consistent with findings from international studies which report that young women are frequently judged more harshly and are disproportionately affected by the cultural double standards that surround digital sexual activities.[37] Such attitudes are thought to contribute to a lack of understanding and acceptance of digital sexual practices, which inadvertently creates an environment that discourages young people from reporting victimisation.

5.3.3 Other challenges

Stakeholders confirmed that stopping further distribution of images and proving the behaviours occurred are also significant challenges to enforcement and raised questions about accountability and the management of these issues.

All stakeholders spoke of issues, challenges, and obstacles they had encountered with the application of the Act. Legal practitioners discussed difficulties they were aware of with technology, including issues obtaining evidence from certain social media applications. The ODPP for example, referred to difficulties obtaining evidence directly from Snapchat, where some images are automatically deleted after the receiver has viewed them. Stakeholders had also encountered issues where the distributor had 'unsent' incriminating messages on Messenger prior to the seizure of their device, meaning the WA Police were unable to identify and interview the recipient, and the State were unable to proceed with prosecution. The ODPP also queried whether difficulties might arise in a case where the distributor and the receiver remove evidence from their respective devices, especially in circumstances where hostility exists towards the victim. While the ability to obtain evidence via search warrants exists, it adds a layer of complexity to the investigation.

eSafety explained that their experience responding to IBA complaints has shown that perpetrators typically take steps to obfuscate their identity, which can make enforcement action challenging. They also discussed that the nature, extent, and quality of information collected and stored by some online service providers varies, which can cause issues. eSafety encounter some services that are unable or unwilling to proceed with removal notices, despite eSafety having the power to issue them. For example, eSafety explained that automatic scraping and websites operated by 'bots' represent key challenges, especially when there is no human moderation. Along with other stakeholders, eSafety also noted that IBA material is invariably hosted on platforms outside of Australia and is sometimes posted by perpetrators located overseas. While the *Online Safety Act 2021* (Cth) and other legislation can apply to perpetrators overseas, there are difficulties in taking formal action across jurisdictions. Intimate images posted to pornography sites, particularly 'hack/leak/exposed' sites were reported as some of the most difficult to remove, usually because the sites do not have contact points and/or disguise their true hosting information. While these comments do not specifically relate to the

[35] Australian Institute of Criminology, 'Warning Messages to Prevent Illegal Sharing of Sexual Images: Results of a Randomised Controlled Experiment' (2022) 647 *Trends & Issues in Crime and Criminal Justice* <https://www.aic.gov.au/publications/tandi/tandi647>.
[36] ibid.
[37] Yara Barrense-Dias and Christina Akre, 'Opinions of Adolescents on Prevention Related to Sexting: A Q-Methodology Study' (2020) 17 *Sexuality Research and Social Policy* 753-764. https://link.springer.com/article/10.1007/s13178-020-00431-3; and Murray Lee, Thomas Crofts, Alyce McGovern and Sanja Milivojevic, 'Sexting Among Young People: Perceptions and Practices' (2015) 508 *Trends & Issues in Crime and Criminal Justice*. <https://doi.org/10.52922/ti160409>.

enforcement of WA's legislation, WA law enforcement agencies are likely to encounter many of the same difficulties.

5.3.4 Education

There was a mixed response among the stakeholders as to the effectiveness of previous education and media campaigns targeting intimate image abuse and the introduction of the Act. Some stakeholders acknowledged the impact of raising awareness in the community, noting that most people are aware the behaviour is unacceptable. Some stakeholders were confident that previous media campaigns had raised awareness for both victims and perpetrators, but others were more sceptical, noting a lack of awareness themselves about the campaigns.

Some concerns were raised about the inadequacy of media campaigns and educational initiatives, particularly in reaching young people effectively. The feedback considered that education campaigns often play a part in normalising victim blaming attitudes. For example, the Women's Legal Service noted that, *"single sex girls' schools focus on preventing photos being taken to avoid victimisation, which is a form of victim-blaming. Single sex boys' schools focus on preventing perpetration."*

This is consistent with findings in the research literature which emphasise that educational and legal responses to digital sexual practices in general often fail to recognise 'consensual' sexting as a normative part of sexual expression and can instead frame it as harmful and deviant.[38]

Stakeholder suggestions for reform included targeting the contemporary reality of people's engagement in digital sexual practices, with emphasis placed on the need to safeguard people's rights in a rapidly evolving digital landscape. There was consensus among stakeholders on the need for increased investment in education and preventative initiatives, including protective behaviours and the risks associated with digital sexual practices, which could empower individuals and reduce the prevalence of IBA.

Stakeholders generally agreed a need exists for age-appropriate information about the Act to be publicly available and accessible to assist individuals to understand how and when to take legal action, and to inform them about available supports. Emphasis was also placed on the importance of education initiatives that reflect the diversity of the community, including children and young people, individuals with disabilities, and members of the LGBTQIA+ and CALD communities. Recommendations included making educational materials available in accessible formats and embedding IBA education into existing school curriculums.

eSafety's website was recognised as an essential resource for providing assistance and information about IBA, state and territory-specific advice, and information about relevant subsections of the Criminal Code. Stakeholders suggested consulting eSafety's programs and initiatives, which are aimed at raising awareness and promoting online safety.

While education was considered by stakeholders to be the most effective solution to IBA, the Review finds that campaigns and educational initiatives have not been effective in targeting young people or improving understanding of the Act.

[38] See 34.

Finding 7

Media campaigns and educational initiatives have not effectively targeted young people or improved understanding of the Act and image-based offences.

Recommendation 5

The WA Government develop age-appropriate information and education about intimate image-based abuse, criminal justice responses, and available support services.

5.3.5 Alternative remedies

While there was acknowledgement among the stakeholders that the Act successfully allows for prosecution, there was unanimous feedback that in practice, the Act does not provide adequate legal remedies and protections for victims of IBA. Remedies that assist in removing images were highlighted as important avenues of recourse for victims as they stop the perpetual and constant nature of the abuse that occurs while images remain accessible and/or online. As criminal justice responses by their nature focus on investigation and punishment rather than rapid rectification, they alone may be ill-suited to respond to the needs of many victims.

Some stakeholders proposed a process involving police "takedown and desist orders," which would require the perpetrator to take down the image, desist from further distribution, and undergo an education seminar if appropriate. Should this order be ignored, higher level criminal charges could then be imposed. It is a similar process to that contained in the *Restraining Orders Act 1997* (WA) in that a civil order is granted by the court but breaching that order results in criminal charges. Stakeholders suggested that similarly higher-level penalties could apply if another order was sought against the same perpetrator. Stakeholders also suggested developing a civil penalty scheme as an alternative reporting mechanism for victims who may not want a criminal justice response, but simply want their images removed and the harassment to stop. It was noted that such a scheme could offer a less intimidating, more victim-centred approach to addressing IBA.

Through their scheme, eSafety prioritise the rapid removal of live IBA on the basis that once the image is posted online, it becomes difficult to maintain control of its distribution. To avoid delay in the first instance, it is standard practice that eSafety requests online service providers remove IBA material or alerts them to profiles which are being misused. They have well established escalation pathways with major online service providers, which they find results in faster removal of material and better outcomes for victims, compared to formal regulatory action.

Alternative remedies, like eSafety's service, offer practical advantages for victims, often providing a more effective and timelier response than the criminal justice system. However, eSafety's emphasis and success with rapid, informal removal processes also means that enforcement and penalty actions are comparatively rare, which may not sit well with all victims. As noted above, a criminal justice response may be preferred when the behaviour is deemed serious or the perpetrator poses an ongoing threat, or if the offence is part of an ongoing pattern of behaviour.

When considering the needs of victims, agency and choice are primary considerations. Victims also require information that is tailored to their needs to allow them to make informed decisions.

The OCVoC Review explores in more detail the need to provide coordinated information and support mechanisms for victims, including victim advocate models. The OCVoC Review discusses the benefits a case-management approach of support can offer, including having a consistent, central point of contact for victims throughout the criminal justice process. The OCVoC Review also considers the benefits alternative justice options (such as restorative justice) may have for victims of sexual offending. As has been noted above, consideration should be given to those IBA victims who would prefer to engage with a model that recognises harm and stops the offending behaviour, rather than one that focuses on a punitive criminal justice response.

In light of this, it is recommended that a dedicated referral or contact point is established which can advise victims about the available reporting options, to ensure they have agency and choice in their decision-making. This service should work in collaboration with community organisations to provide victims with consistent information (e.g., Headspace, SECCA, Ishar). Accessible and easy to read publications should be developed in collaboration with these agencies for wider distribution (e.g., by the WA Police, the Department of Justice).

Recommendation 6

The Department of Justice develop a contact and referral point for victims of image-based abuse to receive information about criminal justice or alternative responses, and to receive referrals for support. In developing a contact point, the Department of Justice should consider collaborating with non-government support organisations.

6 Legislative Amendments and Enhancements

Understandings of IBA, along with the technology that facilitates it, have evolved quickly. At the time of the Act's drafting, IBA was thought of as a technological crime consisting of acts like 'sexting,' and discussions were focused on the use of technology to facilitate 'revenge pornography,' a term which denotes a scope much narrower than the issues that exist today. More recently however, these behaviours have been understood as sexual offences and a means of exerting control.

6.1 Definitions

The Act took a wide approach to what it defined as intimate image abuse, denouncing all non-consensual distribution of intimate images, regardless of the motivation of the perpetrator, the method they used to distribute the image, or whether the image was created or altered (e.g., it encompasses 'morph porn' or 'deepfake porn').

In general, stakeholder feedback commended the Act for its forward-thinking approach and largely agreed the definitions were sufficient for prosecution. However, suggestion was made to amend definitions to explicitly capture specific forms of images or emerging trends. For example, comments noted that other jurisdictions explicitly cite synthetic images and videos created using generative AI technology, which ensures they are treated similarly to images of actual individuals. However, overall stakeholders supported the broadness of the definitions, agreeing they allow the Act to capture various forms of IBA as well as improvements in technology that

may facilitate the behaviour. Of note, WA Police agreed with these sentiments, stating that internal consultation deemed the current provisions do cover *"the emerging artificial intelligence trend and any other technology facilitated images being produced."*

6.1.1 Definition of 'intimate image'

Unlike other Australian jurisdictions at the time, WA extended its definition of an 'intimate image' to include the breasts of female, transgender and intersex persons, providing protection and recourse to a wider range of victims. The current Act also does not require a sexual element, allowing instead for the protection of victims who are captured 'engaged in a private act' in circumstances they would usually be afforded privacy (see below). The Act also used the term 'image,' which includes "an image in any form," and remains undefined to allow the term to take its ordinary meaning, which may evolve depending on contemporary understanding.

Western Australia's definition of intimate image

s 221BA
engaged in a private act means –

a) in a state of undress; or
b) using the toilet, showering or bathing; or
c) engaged in a sexual act;

Intimate image, of a person –

a) means a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy –
   (i) 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
   (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 any of the things mentioned in paragraph (a).

Definitions of an intimate image can vary considerably according to community standards. For example, photographs of a Muslim woman without her hijab, or a Sikh person without their turban, could be considered intimate images in some circumstances. The discussion paper highlighted that creating and distributing (or threatening to distribute) these types of images can be a culturally specific tactic used to humiliate, threaten, and control individuals, usually within an FDV context. The current definition of intimate image does not explicitly capture this form of IBA.

Some stakeholders suggested the rationale underpinning the current provisions could already extend to religious attire. As set out in section 221BA, a person is *"engaged in a private act"* where they are:

a) in a state of undress; or
b) using the toilet, showering, or bathing; or,
c) engaged in a sexual act.

While 'state of undress' could be interpreted broadly to include removal of religious or cultural attire, the term is not defined in the Act and its application remains uncertain.

Stakeholder feedback on this issue was generally supportive of broadening the definition to better reflect diverse cultural and religious contexts. Several stakeholders noted that the non-consensual creation or distribution of images of this nature is being used as a tactic to control individuals within FDV contexts. Stakeholders highlighted that this form of harm may not be adequately captured under the current definition.

Some stakeholders suggested aligning the definitions with provisions in the *Online Safety Act 2021* (Cth) (OSA), which expressly recognises images depicting a person without attire of religious or cultural significance. However, others raised concerns regarding the practical application of such an amendment, including potential evidentiary challenges and broader policy implications. It was also suggested that careful consideration would be required to ensure that any amendment appropriately accounts for individuals who may not be aware of the cultural significance of the attire.

Commonwealth's definition of intimate image

Online Safety Act 2021 (Cth)
s 15
Depiction of private parts
(2) Material is an *intimate image* of a person if:

(a) the material consists of a still visual image or moving visual images; and
(b) the material depicts, or appears to depict:
(i) the person's genital area or anal area (whether bare or covered by underwear); or
(ii) if the person is a female person or a transgender or intersex person–either or both of the person's breasts;

in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

Depiction of private activity
(3) Material is an *intimate image* of a person if:

(a) the material consists of a still image or moving visual images; and
(b) the material depicts, or appears to depict, the person:
(i) in a state of undress; or
(ii) using the toilet; or
(iii) showering; or
(iv) having a bath; or
(v) engaged in a sexual act of a kind not ordinarily done in public; or
(vi) engaged in any other like activity;

in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

Depiction of person without attire of religious or cultural significance
(4) Material is an *intimate image* of a person if:

(a) the material consists of a still visual image or moving visual images; and
(b) because of the person's religious or cultural background, the person consistently wears particular attire of religious or cultural significance whenever the person is in public; and
(c) the material depicts, or appears to depict, the person:
(i) without that attire; and

(ii) in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

Interpretive provisions

(5) For the purposes of this section, it is immaterial whether the material has been altered.

(6) For the purposes of this section, if material depicts, or appears to depict, a part of the body of a person, the material is taken to depict the person, or to appear to depict the person, as the case requires.

While the existing definition of an 'intimate image' reflects a progressive approach at the time of drafting, subsequent legislative developments within WA have adopted broader and more inclusive approaches to gender. During legislative work undertaken by the Department of Justice, including consideration of the *Births, Deaths and Marriages Registration Amendment (Sex or Gender Changes) Act 2024*, it was observed that the current wording in section 221BA—referring to a *"female person, or a transgender or intersex person identifying as female"*—may be narrower than more contemporary definitions. This framing may inadvertently exclude individuals who identify as female but do not fall within the categories of transgender or intersex persons. It also raises questions about consistency across legislation, where similar concepts are defined more broadly in other Acts. Further, some stakeholders noted that key terms such as 'transgender' and 'intersex persons' are not defined in the Act, which may contribute to uncertainty in interpretation. This suggests there may be value in reviewing the definition of 'intimate image' to ensure it remains inclusive, reflects contemporary drafting practice, and captures all persons intended to be protected.

Some concerns were also raised regarding the definition of 'engaged in a private act,' which is currently limited to three specific circumstances. For example, the ODPP noted that the definition, *"[does] not extend the offence provisions to cover images of sexual poses or depictions of a person in a sexual context."* Suggestions were made to align the definition with broader language, similar to that used in section 15(3)(b) of the OSA, which extends its definition to cover these circumstances as well as *"…any other like activity".*

Suggestions were also made to broaden the provisions in the Act to capture images that may be considered humiliating or degrading, particularly where the images are used to target individuals based on their race, culture, queer identity, or physical appearance (e.g., fat shaming). However, non-intimate images of this kind fall outside the intended scope of this Review and the current legislative framework and may be better addressed through other legal or policy responses, including those relating to cyberbullying, discrimination or hate speech.

Finding 8

The current definition of 'intimate image' supports prosecution of the offences in the Act and is broad enough to capture evolving technology trends, but the definition may not adequately capture all circumstances where image-based abuse may occur.

Recommendation 7

The Department of Justice to undertake further policy work on amending the definition of 'engaged in a private act' and related definitional provisions to:

- include diverse cultural understandings of 'state of undress';
- contemplate circumstances of a private act beyond the three currently listed in section 221BA of the Act; and
- consider whether the definition of 'intimate image' appropriately captures all persons intended to be protected by the provisions.

6.1.2 Definition of consent

Stakeholders were asked to consider whether the Act's definition of consent was adequate in comparison to other Australian jurisdictions.

Some stakeholders were satisfied with the current definition, highlighting it aligns with recommendations from the Australian Law Reform Commission and the NSW Law Reform Commission.[39] The feedback noted the definition reflects a model of affirmative consent and thought had been given to the importance of ongoing consent, and the rights of individuals to change their minds. As with other definitions included in the Act, many stakeholders agreed that the definition of consent was appropriately broad and applauded the fact it does not limit the grounds on which a lack of consent might be established (s 221BB(7)). Additionally, the WA Police confirmed the definition of consent in section 221BB of the Act is adequate, with the ODPP noting they had not yet experienced any difficulty applying the definition.

Western Australia's meaning of consent

s 221BB Term used: consent

(1) In this Chapter, a reference to ***consent*** is a reference to consent freely and voluntarily given.

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

(3) 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.

(4) A person who consents to the distribution of an intimate image of themselves to or by a particular person or in a particular way is not, only because of that fact, to be regarded as having consented to the distribution of the image or any other image to or by another person or in another way.

(5) A person who distributes an intimate image of themselves is not, only because of that fact, to be regarded as having consented to any other distribution of the image or any other image.

(6) A person under 16 years is incapable of consenting to the distribution of an intimate image.

[39] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response Final Report – Volume 1* (Report, October 2010).

(7) This 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.

In contrast, other stakeholders noted the definition of consent was too vague and lacked specificity when compared to other jurisdictions. A recommendation was made to align the definition of consent with section 53P(1) of the *Crimes Act 1958* (Vic) to ensure closer alignment to the affirmative model of consent. That is, so it explicitly covers situations where consent is not freely or voluntarily given, such as through force, threat, intimidation, deceit, or fraudulent means. Emphasis was also placed on the importance of including provisions to address coercive control—including where coercion is involved in the creation or providing of images—as well as the inappropriate exchange of intimate images for money, goods, and/or services. Stakeholders also raised concerns about the capacity of some victims to give consent and suggested further clarity around how consent should be given, proven, and understood in cases where evidence of consent is lacking.

Victoria's meaning of consent

Crimes Act 1958 (Vic)

s 53P Meaning of *consent*

(1) Consent, in relation to the production or distribution of an intimate image (II), means free and voluntary agreement.
(2) A person does not consent to the production of an II just because they consented to the production of a different II (including an II produced on a different occasion or in a different way).

Example – Consenting to a photograph being taken but not a video being recorded.

(3) A person does not consent to the distribution of an II just because they—
  (a) consented to the distribution of that II—
    (i) on a different occasion; or
    (ii) in a different way;
    Example – Consenting to a photograph being emailed to another person but not uploaded to a social media website.
  (b) consented to the distribution of a different II; or
  (c) consented to the production of that II or a different II; or
  (d) distributed that II or a different II; or
  (e) in the case of distribution of an II to a particular person, consented to the distribution of that II to a different person.

s 53Q Circumstances in which a person does not consent

Circumstances in which a person does not consent to the production or distribution (P or D) of an II include, but are not limited to, the following—

  (a) the person does not say or do anything to indicate consent to the P or D of the II;
  (b) the person agrees to the P or D of the II because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else, regardless of—
    (i) when the force, harm or conduct giving rise to the fear occurs; and
    (ii) whether it is, or is a result of, a single incident or part of an ongoing pattern;
  (c) the person agrees to the P or D of the II because of coercion or intimidation—
    (i) regardless of when the coercion or intimidation occurs; and
    (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;

(d) the person agrees to the P or D of the II because the person is overborne by the abuse of a relationship of authority or trust;
(e) the person is asleep or unconscious;
(f) the person is so affected by alcohol or another drug as to be incapable of consenting to the P or D of the II;
(g) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the P or D of the II.
Note – this circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.

6.2 Categorisation of offences

The offence of distributing an intimate image is currently contained in Chapter XXVA — Intimate Images, which is located in 'Part IV Acts injurious to the public in general' in the Criminal Code. While this placement accords with the initial perception of IBA as a technological offence, attitudes towards IBA have shifted.

Image-based abuse has historically been framed in public discourse as 'revenge porn,' a term which has been criticised for minimising the harm experienced by victims and obscuring the broader range of behaviours captured by this conduct. Instead of a focus on revenge porn and blaming victims for producing the images in the first place, broader societal and technological developments[40] have shifted contemporary understandings away from victim-blaming, instead recognising IBA as a form of sexual offending that is facilitated by technology. This shift reflects an increased recognition that the harm arising from IBA is not limited to the act of distribution, but includes violations of privacy, autonomy, and dignity. It also acknowledges that these offences can often occur in the context of coercion, control, and other forms of interpersonal violence, including FDV.

This understanding is consistent with that of the Law Reform Commission of WA (LRCWA), who implied as much in their 'Project 113 Sexual Offences' report.[41] While IBA was not specifically included within the scope of their report, the LRCWA included 'intimate image offences' as a subdivision in their discussion about a new sexual offences part of the Criminal Code.[42] Additionally, the Australian Bureau of Statistics' Australian and New Zealand Standard Offence Classification (ANZSOC) framework classifies IBA behaviour within Division 03 (Sexual assault and related offences). This framework is used nationally for classifying criminal behaviour in the production and analysis of crime and justice statistics, including by the Court and Tribunal Services division of the Department of Justice.

Relocating the offence of distributing an intimate image (Chapter XXVA) to Chapter XXXI of the Criminal Code — 'Sexual offences' would align IBA offences with other sexual offences, providing a clearer legal framework for prosecution and ensuring consistent application of relevant legal principles, including the definition of consent. Further, integrating IBA offences within Chapter XXXI may enable specialised investigative procedures and enhanced reporting mechanisms (e.g., Safe2Say). Investigation by a specialised police team is likely to facilitate improvements in the effectiveness of investigations, as well as support for victims. Victims of IBA would

[40] Examples of relevant developments include celebrity iCloud hacking incidents, the #MeToo movement, the COVID-19 pandemic, and the emergence of AI and deepfake technology.
[41] Law Reform Commission of Western Australia, *Project 113 Sexual Offences* (Report – October 2024). <https://www.wa.gov.au/media/46342/download?inline>
[42] Ibid. See section 13.20.

also be entitled to the same anonymity protections afforded to sexual offence victims under section 36C of the *Evidence Act 1906*.[43]

Currently, there are two provisions in the Criminal Code which list circumstances of aggravation. Section 221 applies to all offences in Part V of the Criminal Code (including Chapter XXXI), and covers offences committed in the context of a family relationship, when a child was present, where the victim is aged 60 or older, and where the conduct has breached a restraining order. The second, section 319, sets out additional circumstances that apply only to offences in Chapter XXXI, including offences committed where the offender was armed (or pretending to be), is in company with other person/s, does bodily harm to the victim, threatens to kill the victim, where the victim is over 13 and under 16 years old, or where the offender does an act which is likely to seriously and substantially degrade or humiliate the victim.

Aligning IBA offences within Chapter XXXI would facilitate the application of these circumstances of aggravation to IBA behaviours. This would be significant for victims of FDV, victims who are particularly vulnerable, and victims who have been substantially degraded or humiliated by the actions of the perpetrator. This provision could also be extended to cover circumstances where the perpetrator intends to 'out' the victim (e.g., their sexual orientation, or as a sex worker), or when the behaviour is a racially motivated hate crime. By extending these aggravating factors to certain IBA cases, the legislation can better address the gravity of such offences and provide enhanced protection to those impacted. The relocation may not need to extend to offences involving threats to perpetrate IBA behaviour, as many of these protections are already afforded to victims under section 338.

Relocation under Chapter XXXI will also mean that recommendations (if and when implemented) from the 'Project 113 Sexual Offences' report from the LRCWA will apply to IBA offences. Among other things, this includes several changes regarding consent, including its definition, communication of consent, negative indicators of consent, circumstances in which there is no consent and withdrawal of consent, which will be particularly significant for IBA victims with a disability, those who are deemed incapable of understanding what they are consenting to, or who have been coerced or pressured into participating in an activity. This also includes recommendations referring to enacting 'obtaining sexual acts by fraud' as an offence, reform to broaden the scope of aggravated offences, as well as significant protections for sexual offences involving 'vulnerable persons.'

Relocating IBA offences under Chapter XXXI will reaffirm to the community that these behaviours are abhorrent and will be taken seriously by law enforcement agencies. It will align legal responses with contemporary community understandings and expectations and will bring WA in line with some other Australian jurisdictions.[44]

Recommendation 8

The Department of Justice undertake further policy work on categorising image-based abuse offences as sexual offences within the Criminal Code.

[43] or s 381 of the *Evidence Bill 2024.*
[44] See *Crimes Act 1958* (Vic).

6.3 New offences

6.3.1 Producing and procuring intimate images without consent

While the amendments made by the Act specifically address conduct involving the distribution or threatened distribution of intimate images without consent, they do not expressly address other forms of IBA. The current legislative framework does not clearly capture conduct involving the creation, production, or procurement of intimate images without consent.

The discussion paper and research literature highlight that the taking of intimate images is the most common form of IBA experienced; however, considerable overlap between the different forms of IBA is often reported, likely because the person distributing the images is also the one who created or procured them. These behaviours may also cause harm independently of any subsequent distribution. In particular, the creation or procurement of intimate images without consent can constitute a violation of privacy, autonomy, and dignity, even where the image is not further disseminated.

When asked whether provisions should be included in the Act to prohibit the production or procurement of intimate images without consent, stakeholders condemned the behaviours, describing them as *"abhorrent,"* and discussed the considerable harm they cause to victims. A vast majority of stakeholders supported explicitly including these provisions within the Act; however, positions varied on whether some actions may already be addressed in existing legislation.

There was some discussion that covert filming and photography of a person in a public place may already constitute an offence under section 203 of the Criminal Code (Indecent acts in public), as was found by the Court of Appeal in *Wright v McMurchy* [2012] WASCA 257. The ODPP, among others, noted there were issues with this. First, that an indecent act is not defined, meaning the application to a covert recording may be open to legal challenges. Secondly, the provisions require the act to be committed in a public place, thus all recordings in a private space fall outside of its scope.

One stakeholder opposed to amendments argued that recording an intimate image without consent is already covered by the *Surveillance Devices Act 1998* (WA) (Surveillance Devices Act) and stated to also include provisions in the current Act would be *"duplicitous and cause confusion."* However, while covert recordings of a 'private activity' without consent in a private space may be captured under section 6 of the Surveillance Devices Act, the scope of 'private activity'[45] may not fully align with some instances of IBA (e.g., 'upskirting' and 'downblousing'), which frequently occur in public spaces.

While some of this conduct may be prosecuted under general Criminal Code offences, these provisions operate outside the Act's framework and do not comprehensively capture the range of non-consensual creation of intimate images. It is because of this ambiguity that many stakeholders suggested there was a need for the current Act to include provisions explicitly prohibiting these behaviours to capture all covert recordings of intimate images without consent, regardless of where they were captured.

Stakeholders generally agreed that procuring and obtaining intimate images without consent should be prohibited. The ODPP noted an offence of procuring an intimate image without consent may address scenarios where no threat is used but images

[45] Defined in s 3 of the *Surveillance Devices Act 1998*.

are obtained from the victim via deceit.[46] If an intimate image was procured by threat or coercion, however, this conduct would be covered by existing provisions. The discussion paper also considered that an offence of procurement could address circumstances where a perpetrator obtains a victim's intimate images from their personal device or online storage account without their consent,[47] which currently falls outside of the provisions of the Act. If making an amendment of this kind, stakeholders suggested careful consideration of certain elements including the common law principle of mens rea and the definition of 'procurement,' to avoid inadvertently criminalising individuals who receive images without consent or solicitation.

Stakeholders also raised concerns about the potential for AI-generated characters and digitally manipulated material to contravene existing legislation, including circumstances where attribution to an identifiable individual may be difficult or not possible. At the time of writing, this issue is particularly pertinent; on 1 May 2024, the National Cabinet announced a new focus on prohibiting deepfake pornography and AI-created offensive sexual content to help counter gendered violence issues.[48]

International reporting has drawn attention to online environments that actively promote the creation, solicitation and exchange of non-consensual sexual imagery, including through 'nudify' applications, custom deepfake requests, and forum- or Telegram-based communities.[49] While the scale and prevalence of this conduct are difficult to quantify, such reporting indicates that non-consensual production and procurement of intimate images is being encouraged and normalised online, even in the absence of distribution.[50] These concerns reflect broader apprehension that the harm associated with IBA is not confined to distribution alone.[51] The non-consensual creation, recording or digital fabrication of intimate images can itself constitute a serious violation of sexual autonomy and privacy, regardless of whether the material is subsequently shared.[52]

While the Act provides avenues for prosecution of IBA offences in some circumstances, the Review finds the lack of specific provisions related to production

[46] For example, "by pretending to be someone else online which would violate the victim's consent."
[47] For example, a perpetrator (A) distributing a victim's (B) intimate image to themselves (A) from the victim's (B) device without consent, or a perpetrator (A) accessing and saving the victim's (B) intimate images from their (B) iCloud account without consent (regardless of whether the victim's password had been consensually shared with the perpetrator).
[48] National Cabinet, 1 May 2024, *'Meeting of National Cabinet on gender-based violence',* <https://www.pm.gov.au/media/meeting-national-cabinet-gender-based-violence>
[49] Julie Inman Grant, 'Addressing Deepfake Image-Based Abuse' (Speech, Senate Standing Committee on Legal and Constitutional Affairs' inquiry on the *Criminal Code Amendment (Deepfake Sexual Material) Bill 2024*, 24 July 2024); and Adam Smith, 'Deepfake Porn Tools Bypass Safeguards to Hide in Apple App Store', *Context* (online, 31 July 2024) <https://www.context.news/big-tech/deepfake-porn-tools-bypass-safeguards-to-hide-in-apple-app-store>.
[50] Eric Szeto et al., 'This Canadian Pharmacist is Key Figure Behind World's Most Notorious Deepfake Porn Site,' *CBC* (online, 17 May 2025) < https://www.cbc.ca/news/canada/mrdeepfakes-porn-website-key-figure-1.7527626>; and Justin McCurry, 'South Korea Battles Surge of Deepfake Pornography After Thousands Found to be Spreading Images', *The Guardian* (online, 28 August 2024) <https://www.theguardian.com/world/article/2024/aug/28/south-korea-deepfake-porn-law-crackdown>.
[51] Nicola Henry and Gemma Beard, 'Image-Based Sexual Abuse Perpetration: A Scoping Review' (2024) 25(5) *Trauma, Violence & Abuse, 3981-3998;* Asher Flynn, 'Legal Loopholes Don't Help Victims of Sexualised Deepfakes Abuse', *Monash Lens: Acting Against Gender-Based Violence*, (Webpage, April 18, 2024) <https://lens.monash.edu/legal-loopholes-dont-help-victims-of-sexualised-deepfakes-abuse/>; and Anastasia Powell and Asher Flynn, 'Reports of 'Revenge Porn' Skyrocketed During Lockdown, We Must Stop Blaming Victims For It', *The Conversation,* (Webpage, June 3, 2020) < https://theconversation.com/reports-of-revenge-porn-skyrocketed-during-lockdown-we-must-stop-blaming-victims-for-it-139659>.
[52] Ministry of Justice (UK), 'Government cracks down on 'deepfakes' creation' (Press release, April 16, 2024); Clare McGlynn, 'Deepfake Porn: Why we Need to Make it a Crime to Create It, Not Just Share It', *The Conversation*, (Webpage, April 9, 2024) <https://theconversation.com/deepfake-porn-why-we-need-to-make-it-a-crime-to-create-it-not-just-share-it-227177>.

and procurement of intimate images represents a gap in WA's IBA legislation. Additionally, while WA's definition of 'intimate image' is sufficiently broad to capture improvements in technology that may facilitate IBA, adding a new offence that encapsulates procuring an image may assist in addressing conduct facilitated by advances in technology, including scenarios where an individual has instructed AI (or similar) to create, capture or record images.

Considering this, the Review recommends creating a new offence (or offences) criminalising the production and procurement of intimate images without consent. Enacting an offence of this kind would bring WA in line with other jurisdictions in Australia and New Zealand[53] who already include provisions relating to the production, recording, filming, and/or capturing of intimate images without consent.

Should the Act be amended to include these provisions, the offence/s should be broad enough to include the capturing, recording, production, creation, and procuring of any intimate images of a victim (or that resemble a victim) without consent. They should include both visual and sound recording and should not require specific perpetrator motivation or intent. Examples of behaviours that should be captured include, recording a private act or an intimate image in private or public, upskirting, downblousing, covert recording using wearable or concealed technologies, deepfake images and pornography, obtaining images from a personal device or online storage account, and programming artificial intelligence to create an image or recording that meets this description. While some of these behaviours may be currently addressed through general criminal or privacy-based offences, they are not comprehensively or coherently captured within WA's image-based abuse framework.

Existing threat provisions should be amended to include this behaviour, and circumstances of aggravation should apply. Additionally, any amendments to this effect should also be of comparable culpability to the distribution offence to reflect the seriousness of the harm caused by non-consensual creation of intimate images and its frequent role as a precursor to distribution and coercive control.

Finding 9

The Act does not capture behaviours related to the creation, production, and procurement of intimate images without consent which is a gap in WA's image-based abuse legislation.

Recommendation 9

The Department of Justice undertake further policy work on criminalising the creation, production, and procurement of intimate images without consent. The policy work should consider:

- emerging technology trends
- the application of the existing threat provisions contained in section 338 to the new offences
- circumstances of aggravation.

[53] See for example, *Crimes Act 1900* (NSW), *Criminal Code Act 1899* (QLD), *Summary Offences Act 1953* (SA), *Police Offences Act* 1935 (Tas), *Crimes Act* 1958 (Vic), and Crimes *Act 1961* (New Zealand).

6.3.2 Cyberflashing or sending an unsolicited intimate image to another person

In addition to creating and distributing intimate images of other people, the act of sending unsolicited intimate images to another person has increased considerably over the last decade. This includes, for example, sending 'dick pics' and pornographic images without consent, often to strangers through messages, online dating platforms, or through proximity-based transmission services (e.g., Bluetooth, or AirDrop), a behaviour now referred to as 'cyberflashing.'

Among feedback from stakeholders, cyberflashing was highlighted as a concerning behaviour that needs addressing because of the impact it has on victims, particularly those who are young, vulnerable, or in a position of lower power due to employment or social status. It was noted that this behaviour is of particular concern among young females; a survey conducted by the Commissioner for Children and Young People[54] found that almost half (46%) of female students in years 7 to 9, and 61% of females in years 10 to 12 had been sent unwanted sexual content. A smaller proportion of male students had also been sent unwanted sexual content (30% in years 7 to 9, and 31% in years 10 to 12), indicating a significant issue across the cohort.

Similar consensus has been reached in the research literature, with studies conducted overseas indicating high prevalence rates of cyberflashing, with females (particularly younger females) being disproportionately impacted. A study conducted in the United States of America (USA) and the United Kingdom (UK) found, of the almost 50% of women who had ever been sent an image of a penis, 90% had been sent at least one unsolicited 'dick pic'. Researchers estimated that at least 41% of all millennial women have experienced this phenomenon,[55] with much of it occurring in public spaces, with images being sent by unknown men through proximity-based transmission services, like AirDrop.[56]

Most stakeholders agreed cyberflashing needs to be dealt with through legislative measures and suggested updating the Act to include provisions addressing the behaviour. The Department of Communities argued that receipt of an intimate image is a sexual activity under the Act, therefore, *"if [an image] is forced upon an individual without prior agreement between participants (affirmative consent) being obtained, it is a criminal act and should be made a criminal offence under the Act."*

Some also likened the behaviour to indecent exposure and suggested because the consequences of receiving unsolicited content online are similar to in-person exposure, similar penalties should apply. The AFLS stated, there is *"no logic to not having comparable sanctions in relation to indecent acts [committed] online."* While exposure in a public place is prohibited,[57] stakeholders noted that cyberflashing falls into another category and may not be addressed appropriately by existing legislation.

One stakeholder suggested that an offence criminalising this behaviour should sit within separate legislation specifically targeting cyberflashing, commenting that it is a distinct crime type that does not fit within the initial aims of the current Act. They

[54] See 33.
[55] Matthew Smith, 'Four in Ten Female Millennials have been sent an Unsolicited Penis Photo' *YouGov UK* (online, 16 February 2018). <https://yougov.com/en-gb/articles/20179-four-ten-female-millennials-been-sent-dick-pic>, and A Marcotte et al, 'Women's and Men's Reactions to Receiving Unsolicited Genital Images from Men' (2020) 58(4) *The Journal of Sex Research* 512-521. <10.1080/00224499.2020.1779171>.
[56] C McGlynn, 'Cyberflashing: Consent, Reform and the Criminal Law' (2022) 86(5) *The Journal of Criminal Law* 336-352. <https://doi.org/10.1177/00220183211073644>.
[57] 'Indecent acts in public,' *Criminal Code* s 203.

suggested separate legislation may be better suited to address the nuances of cyberflashing and provide further clarity on the issue.

The Review recommends consideration be given to criminalising cyberflashing behaviours, an offence which would be the first of its kind in Australia. Similar provisions were introduced by the *Online Safety Act 2023* (UK); however, the UK offence includes a requirement to prove intent or motivation, which is inconsistent with the current IBA offences in WA.

Given their recency in the UK, the effectiveness of these laws has not been fully established, but the provisions provide victims with legal recourse and may act as a general deterrent by sending the message the behaviour is unacceptable and punishable by law. The Review considers that further policy work is needed to determine whether an offence of 'cyberflashing' fits within the framework of intimate images in the Criminal Code.

Finding 10

The Act does not include provisions to address distribution of an intimate image to another person without their consent ('cyberflashing').

Recommendation 10
The Department of Justice undertake further policy work on criminalising the distribution of an intimate image to another person without their consent ('cyberflashing').

6.3.3 Additional emerging issues for consideration

During consultation and analysis, some stakeholders also identified challenges relating to the ongoing availability and possession of intimate images in circumstances not clearly captured by the current legislative framework.

This includes situations where intimate images may have been distributed prior to the commencement of the Act, or through unknown or un-prosecutable sources, but remain accessible online. In such cases, victims may experience ongoing harm but have limited avenues to seek removal or engage the criminal justice system where no current act of distribution can be established.

Related issues arise in circumstances where a person originally obtained an intimate image with consent but continues to retain the image after that consent has been withdrawn. While such conduct may not involve distribution, it may nevertheless be experienced by victims as harmful or coercive, particularly where it is connected to patterns of controlling or abusive behaviour.

The Office of the Commissioner for Victims of Crime (OCVoC) is aware anecdotally that these issues continue to cause harm in the community. Victims have raised concerns directly with the OCVoC regarding the ongoing accessibility of intimate images and the absence of clear legal avenues to address continued possession after consent has been withdrawn.

Additionally, there are early indications that technology-facilitated abuse may continue to evolve with the increasing availability of discreet wearable recording technologies, including smart glasses and similar devices. While the harms arising

from non-consensual recording are not new and have already been addressed in this Review, the hands-free and less conspicuous nature of these technologies may reduce opportunities for victims or bystanders to detect recording behaviour.[58] This may present challenges for prevention, detection, investigation and reporting. Future awareness and education initiatives may benefit from considering emerging recording technologies and the risks they present.

As these matters were not within the formal scope of this Review, they have not been the subject of detailed consultation or analysis. However, they illustrate broader challenges associated with regulating image-based abuse in a rapidly evolving technological environment and may warrant further policy consideration.

7 Conclusion

When WA's intimate image laws were first introduced, they were understood to relate to emerging technological issues such as sexting and revenge pornography. However, this Review and the research literature now understand this behaviour to be more complex. IBA is a concerning emerging behaviour which is often associated with more serious offending, including sexual and family violence. Overall, while the Act is comprehensive and captures a wide range of IBA behaviours, there are areas where it may fall short or require refinement to effectively combat evolving forms of abuse in a digital landscape.

The provisions introduced by the *Criminal Law Amendment (Intimate Images) Act 2019* made considerable progress in addressing certain aspects of IBA. The comments provided by stakeholders and the data made available to the Review demonstrate the above amendments have facilitated the prosecution of persons charged with distributing or threatening to distribute intimate images without consent. Concerns were, however, noted about the imposition and enforcement of takedown orders (or lack thereof).

The data made available to the Review demonstrates low numbers of reported and prosecuted IBA offences, just over half of which were prosecuted as a sole offence. One implication from this is that IBA offending is often not detected or reported until other offending has occurred, likely because victims may not recognise that criminal remedies are available to them, or the behaviours that have been perpetrated are not yet criminalised (e.g., producing or capturing intimate images without consent). However, this may also be due to the considerable barriers to reporting that victims experience, limitations in evidence gathering, or the overall dissatisfaction victims feel towards the legal remedies available to them.

Creating new offences will bring WA in line with many other Australian and international jurisdictions, which already prohibit the intentional or reckless creation or production of intimate images without consent. Legislative reform explicitly prohibiting the procurement of images without consent, as well as cyberflashing, would be nation-leading and aid in future-proofing safeguards for victims against emerging technologies.

As with most legislation, the Act's operation and effectiveness will likely be impacted without rigorous education and preventative initiatives, alerting the community to the prohibitions, their relevant penalties, and safe digital sexual practices. Once an intimate image is posted online, it becomes almost impossible to guarantee complete

[58] Zahra Takhshid, 'Wearable AI, Bystander Notice, and the Question of Privacy Frictions' (2024) 104 *Boston University Law Review* 1087-1106.

removal; thus, deterring would-be perpetrators from committing the behaviour is the most effective way to reduce the harm suffered by victims.

The Review has found that the Act is operating as intended for the most part but is likely not being implemented effectively at an operational level. Providing victims with a dedicated information and referral point, as well as relocating IBA-related offences to Chapter XXXI of the Criminal Code, may combat many of the concerns raised by stakeholders within this Review.

The rapid pace of technological change means that IBA behaviours will likely continue to evolve over time. As with all legislation, ongoing evaluation and amendments may be necessary to ensure the Act's ongoing operation and effectiveness, and it may be worthwhile to conduct another review in five years.

Appendix A

Stakeholders Who Made a Submission to the Review

1. Commissioner for Children and Young People
2. Children's Court WA
3. Office of the Commissioner for Victims of Crime (Victim-offender Mediation Unit; DoJ)
4. eSafety Commissioner
5. Aboriginal Family Legal Services
6. Women's Legal Service WA
7. Western Australia Police Force
8. Youth Affairs Council of WA
9. Department of Communities
10. Office of the Public Advocate (DoJ)
11. Department of Education
12. District Court WA
13. Court and Tribunal Services (DoJ)
14. Office of the Director of Public Prosecutions

Appendix B

Stakeholders Invited to Make a Submission

1. Aboriginal Legal Service WA
2. Aboriginal Justice Advisory Committee
3. Council of Aboriginal Social Services
4. Ethnic Communities Council WA
5. Multicultural Communities Council of WA
6. Multicultural Services Centre WA
7. Multicultural Women's Advocacy & Support
8. Office of Multicultural Interests (Dept of Local Government, Sport & Cultural Industries)
9. Chief Judge of the District Court
10. Chief Magistrate of Magistrates Court
11. President of the Children's Court
12. Department of Communities
13. Office for Prevention of Family and Domestic Violence
14. Women's Interest Team
15. Ministerial Advisory Council on Disability
16. Office of the Public Advocate
17. SECCA (Sexuality, Education, Counselling and Consultancy Agency)
18. Corrective Services Commissioner
19. Court and Tribunal Services (Department of Justice)
20. Office of the Commissioner for Victims of Crime
21. Stopping Family Violence
22. Department of Education
23. Department of Health
24. Department of Local Government, Sport and Cultural Industries
25. Aboriginal Family Legal Services
26. Women’s Legal Service WA
27. Community Legal WA
28. Law Access
29. Legal Aid
30. Youth Legal Service
31. Living Proud / Qlife

32. Rainbow Migrants Trust
33. WA AIDS Council / WAAC
34. Minister for Police / Corrective Services – Hon. Paul Papalia
35. Minister for Prevention of FDV – Hon. Sabine Winton
36. Minister for Women's Interest – Hon. Sue Ellery
37. eSafety Commissioner
38. Western Australia Council of Social Services
39. WA Police - Commissioner
40. WA Police - Family and Domestic Violence division
41. WA Police - Police Prosecution
42. WA Police - Technology Crime
43. WA Police - Major Crime
44. WA Police - Sex Crime
45. WA Police - State Crime
46. Office of the Director of Public Prosecutions
47. Sexual Assault Resource Centre
48. Centre for Women's Safety and Wellbeing
49. Ministerial Youth Advisory Council
50. Youth Affairs Council of WA
51. Child and Adolescent Mental Health Services
52. Commissioner for Children and Young People
53. Headspace
54. Youth Focus
55. Relationships and Sexuality Education Advisory Group