

Western Australia's New Intimate Image Laws Frequently Asked Questions

What do the new intimate image laws do?

The new intimate image laws (which will come into effect following the commencement of the *Criminal Law Amendment (Intimate Images) Act 2018* (WA) on 15 April 2019) amend the *Criminal Code* (WA) to do three things:

1. create a new offence against distributing an intimate image of a person without their consent;
2. empower courts to make a rectification or 'take down' order in relation to the image; and
3. criminalise the **threat** to distribute an intimate image.

When can someone be charged under the new intimate image laws?

The new laws come into effect on 15 APRIL 2019.

What is defined as an 'intimate image'?

The new laws have made it a crime to distribute an intimate image without the consent of the person in the image. An 'intimate image' can include:

- an image of the person naked, partially naked, or in their underwear; and
- an image of a person engaged in a private act, such as using the toilet, showering or bathing.

It can be still or moving (such as photo or a video) and also includes edited images – for example, where someone's face is superimposed or photo-shopped onto another person's body.

Under the new law, an 'intimate image' does not include images of people in circumstances in which they would not reasonably expect to be afforded privacy; for example, an image of a person in their bathers at the beach, or a model in underwear on a catwalk.

What is meant by 'distribute'?

The new laws have carefully defined 'distribute' to capture the range of ways in which images can be displayed and/or distributed. This includes one to one sharing, posting on social media (or through the regular mail), uploading to websites, or photocopying images and then displaying it where others can see.

Distribution has a broad meaning and does not refer only to digital or electronic images and the use of social media.



What is meant by ‘consent’?

Under the new laws, it is a crime to distribute the intimate image of a person unless that person has given their consent freely and voluntarily. Consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit or any fraudulent means.

A person who gives consent to the distribution of a particular intimate image on one occasion does not automatically consent to that image or any other image being distributed on other occasions – nor do they automatically consent to it being distributed by any other person. Under the new WA laws, a person who is under 16 years of age **cannot consent** to the distribution of an intimate image. It should be noted that under Commonwealth laws, it is illegal to distribute an intimate image of a person **under 18 years of age**.

Can a person be charged with the new offence for sharing an intimate image of themselves?

No, a person cannot be charged with the new offence for sending an intimate image of themselves. The new offence relates only to sharing an intimate image of someone else without their consent.

However, if a person under the age of 18 creates or shares an intimate image of themselves, they could still be charged with other existing offences under Commonwealth Criminal Code relating to child pornography. So the message to young people is simply: it is against the law to take, keep, send or ask for an intimate image of a person under 18 (including yourself).

Can a young person be charged with a criminal offence if they share an intimate image of someone else?

Yes, any person over the age of 10 can be charged if they commit a criminal offence in WA. They can be charged with the new intimate image offence if they share an intimate image of someone else who **does not consent** or **cannot consent** due to being under 16. It is also possible to be charged under existing Commonwealth laws if you take, keep, send, or ask for an intimate image of a person who is under the age of 18 – with or without consent.

Where a young person under 18 commits any of these offences, WA police have discretion to issue a caution or refer the matter to the Juvenile Justice Team instead of proceeding with criminal charges.

What is the penalty if you commit the offence?

The new offence is an ‘either-way’ offence, which means it can be tried summarily (in the Magistrates Court) or on indictment (in the District Court).

The maximum penalty on indictment is imprisonment for three years. The summary conviction penalty is a maximum imprisonment term of 18 months and a maximum fine of \$18,000.

The full range of sentencing options are also available to the court, such as a fine, community order, or suspended sentence.

Do the new laws make ‘sexting’ illegal?

Sexting refers to sending, receiving, or forwarding sexually explicit messages, photographs, or images, usually between mobile phones, of oneself to others.

The new laws do not make sexting illegal. It will not be an offence to send an intimate image of yourself; it will only be an offence to send an image of **another person**.

However, under existing Commonwealth laws it is an offence to take, keep, send, or ask for an intimate image of a person who is under the age of 18 – including an image of yourself.

It is also important to note that if you harass someone by repeatedly sending them unsolicited intimate images, you may be charged under another existing Commonwealth offence: using a carriage service to menace, harass or cause offence.

Can a person be charged with the new intimate image offence for sharing an intimate image of their own child?

A person who distributes an intimate image in circumstances that a reasonable person would consider socially acceptable will have a defence to the new intimate image offence.

For example, if a person takes a photo of their young child naked in the bath and shares it with family members, they are unlikely to be charged with the new offence as this would be considered acceptable by a reasonable person.

Are there any other circumstances where it would be considered acceptable to distribute an intimate image of a person who does not consent or is not old enough to consent?

There are a number of defences and exclusions aimed at protecting conduct that is considered reasonable and socially acceptable or in the public interest, for example, a distribution:

- for a genuine scientific, educational or medical purpose;
- for the purpose of legal proceedings;
- for a media activity purpose; or
- which a reasonable person would consider acceptable having regard to a range of circumstantial factors.

There are also a number of exclusions or exceptions, for example, where the distribution occurs in the course of:

- Law enforcement duties;
- Performing a function under another law; or
- In the administration of justice.

Will it be an offence to threaten to send an intimate image?

Yes. Under WA law, it is an offence to threaten to hurt, harm or cause a detriment to another person.

The new law adds a new category of threat offence, making it a crime to threaten to distribute an intimate image of another person. The maximum penalty is imprisonment for 18 months and a fine of up to \$18,000.

A person can be charged with this threat offence even if they do not actually have the ability to distribute the intimate image or the image does not actually exist.

If the threat is made with the intention of gaining a benefit, causing a detriment, or compelling a person to do something against their will, the penalty is up to 7 years imprisonment.

Can the court order a person to remove an intimate image from the internet?

If a person is charged under the new WA laws with distributing an intimate image, the court can order that person to remove, retract, recover, delete, destroy or forfeit that image, within a specified period of time.

Failing to comply with the court order can result in sentences of up to 12 months imprisonment and a fine of \$12,000.

How do I report intimate image abuse to the police? (criminal complaint)

Intimate image offences should be reported by calling the police on 131 444 or by attending your local police station.

What happens if the person distributing or threatening to distribute the image is not in WA?

Similar laws apply in other states and under Commonwealth legislation.

Report the matter to WA police. They will deal with the report in accordance with the National Cybercrime Investigation Protocols.

Making a complaint to the Commonwealth eSafety Commissioner (non-criminal complaint)

The Commonwealth eSafety Commissioner can order removal of an intimate image from social media, the internet, or any other electronic service if it was posted without consent. They can issue a removal notice to the person who posted the image or to the provider of the service. The penalty for failing to comply with a removal notice is a fine of up to \$105,000 for an individual and up to \$525,000 for a corporation.

The eSafety Commissioner also has an online complaints portal for reporting non-consensual image sharing.

The eSafety Commissioner also has relationships with international bodies and social media partners such as Facebook, Instagram and Snapchat and can assist with the removal of content hosted outside Australia.

For more information about the functions of the eSafety Commissioner visit www.esafety.gov.au.

Will a person convicted of an intimate image offence under the new laws go on the Sex Offender Register?

No. A person convicted of an intimate image offence under the new laws will not become a reportable offender or go on the Sex Offender Register.

However there are many other offences under WA and Commonwealth laws relating to intimate images of young people that can result in inclusion on the Sex Offender Register.

Will a person convicted of an intimate image offence under the new laws be prevented from getting a 'Working with Children' clearance?

The new offence will be listed in Schedule 2 of the Working with Children (*Criminal Record Checking*) Act 2004 (WA). This means that if a person is convicted of distributing an intimate image – and the image was of a child under the age of 18 – then they will not be granted a working with children's permit, unless particular or exceptional circumstances apply.

I have a question that hasn't been answered here. Who can I contact?

Questions about the new laws can be directed to:
The Office of the Commissioner for Victims of Crime
Department of Justice
GPO Box F317
PERTH WA 6841
Or via email at cvoc@justice.wa.gov.au.



Further Information

Young People and Intimate Image Laws

Young people are not exempt from the new offence. Any person over the age of 10 can be charged if they commit a criminal offence in WA, including the new intimate image offence.

There are also many other offences under WA and Commonwealth law relating to intimate images of young people.

The key messages for young people are simply:

- It is against the law to take, keep, send or ask for an intimate image of a person under 18;
- It is against the law to share an intimate image of a person of any age without their consent.

Sentencing young people for intimate image abuse.

The new laws avoid unduly criminalising young offenders (i.e. those who offend before reaching the age of 18) by preserving the diversionary options available under the *Young Offenders Act 1994* (WA) including the use of cautions and referral to a Juvenile Justice Team where appropriate.

For example:

Cautioning

- Police will be able to issue cautions in relation to the new offences – either orally or in writing.
- A caution is to be preferred against laying a charge, unless there is a history of previous offences and the seriousness of the offence would make it inappropriate to issue a caution.
- A police officer may retain property relating to the offence, such as a mobile phone, for up to 48 hours.

Juvenile Justice Team

- Police may also refer a young person who is alleged to have committed one of the new offences to the Juvenile Justice Team, rather than laying a charge.
- The Juvenile Justice Team process is focussed on a restorative justice model, and a referral can only be made if the young person accepts responsibility for what has happened.
- The Juvenile Justice Team process involves the family, the victim and professional support in the development of an 'action plan' for

the young person which is then monitored.

This might involve an apology to the victim, repairing or replacing damaged property, attending counselling, or providing some form of compensation to the victim.

- Child Exploitation Material offences between young people are currently handled in this manner.
- If a charge has proceeded to court, the court may also refer the matter to the Juvenile Justice Team.

Court sentencing and related matters

A court sentencing a juvenile offender for any offence must have regard to:

- The general principles of juvenile justice described in section 7 of the *Young Offenders Act 1994* (WA);
- The age of the offender (with younger age providing greater mitigation); and
- The fact that rehabilitation is aided by the involvement and support of family, and opportunities to engage in employment and education.