

Appendix A

Discussion questions

Question	Yes/No	Additional Comments
1. Does the Act sufficiently enable prosecution of perpetrators of IBA?	No	Providing strict liability for offence is a positive, but provisions need to be broader to capture all potential perpetrators. There should also be easier avenues for making complaint and ways to prove the offence. In circumstances where there is family violence involved, this can be even more complicated. For example, a perpetrator of family violence may receive a fine as a penalty for IBA, which may create even more worry, anxiety and hurt for the victim. We have observed a failure of the system take victims in these circumstances seriously and see the impact on victims' health and wellbeing. Consideration should be given to harsh penalties where there is proven intent.
2. Have victim-survivors found the legal remedies and support provided by the Act to be sufficient?	No	<p>The legislation must be victim focused and start with the lens of the victim survivor of these crimes, who to our knowledge have not found the legal remedies and support provided by the Act to be sufficient. There are no aggravating circumstances for where perpetration occurs in the context of FDV – see Cth CC Act s.474.</p> <p>We also consider that penalties must also take into account the true and ongoing hurt, shame, worry, humiliation and broader impact on mental health of the choice of this behaviour by the offender.</p>
3. From a law enforcement perspective, are there challenges or obstacles being encountered when enforcing the Act?	Yes	<p>Initial challenges relate to reporting of offences in the first place; our clients particularly feel much shame in doing so and are unlikely to do so unless they are supported by an organisation such as AFLS. The same applies to other cohorts of vulnerable people. This needs to be specifically addressed.</p> <p>When offences are reported, proving the offence and stopping further distribution of material are significant challenges when enforcing the Act. Where is the accountability and who manages it?</p>
4. Are court rectification (“take down”) orders being imposed as intended?	No	There is a need for stronger immediate orders; perhaps police, ex-parte orders directed at social media could be a solution. There needs to be a proper process once an order is made through the courts.
5. Are the take down orders effective in achieving the removal or destruction of the intimate image/s?	No	This is very difficult to implement and enforce. Who checks? Is there a process for this, or for preventing further distribution? This seems virtually impossible once images are published on social media, which makes a focus on prevention exceedingly important. Again accountability and how is it to be managed?

6. Considering the harm associated with these offences, are the existing provisions for threat offences adequate in their application to threats to distribute an intimate image?	No	Penalties should be much harsher, especially when committed in the context of FDV or in circumstances where the victim is particularly vulnerable (both instances should be circumstances of aggravation, as well as where intent to harm as opposed to recklessness is proven). Should there be a register for perpetrators as there is for sexual offending?
7. Have the public media campaigns and education initiatives sufficiently raised awareness of the Act and preventing IBA?	No	We are not aware of any media campaigns. Since prevention is probably one measure by which outcomes may be improved in this area, this is lamentable. Preventative education, complete with the 'big stick' of harsher penalties, should be forefront. This could also serve as information gathering opportunities, given the increasing complexity of technology and AI and potential for these offences becoming more prevalent. Public campaigns around protective measures for victims could also be important – see answer to Q15.
8. Are the current definitions in Section 221BA (particularly for 'intimate image' and 'image') sufficient to enable effective operation of the Act?	No	There should be more subjectivity – e.g. where the image/production is humiliating or degrading to the victim (see SA legislation). Point is made in the readings about cultural differences making an image that does not shame one person highly shaming to another.
9. Should Western Australia amend its definition of an intimate image to include provisions relating to religious attire, similar to those included in the Online Safety Act 2021 (Cth)?	Yes	Yes – see above. This is very relevant to our clients and should also be wide enough to cover images that 'make fun' of other cultures or LGBTQ in a manner that individuals may consider intimate and may be humiliating or degrading.
10. Does the Act adequately respond to the needs of vulnerable groups?	No	See above – not sufficiently to protect the groups in previous Q.9.
11. Should there be provisions included in the Act to include the production or procurement of intimate images without consent?	Yes	Should be comparable culpability.
12. Appendix D demonstrates differences in the meaning of 'consent' across jurisdictions. Is the current definition of	No	S.221B is too vague. Other jurisdictions prescribe specific circumstances as grounds where consent cannot be given, such as physical and mental impairment. See also s.53Q of Victorian legislation, which contains a comprehensive range of provisions.

consent in Section 221BB adequate?		It is also important to have some sort of provisions within the legislation which deal with coercive control and where people are coerced into creating/providing images in the first place.
13. Should there be provisions included in the Act to criminalise 'cyberflashing'?	Yes	Given that the <i>WA Criminal Code</i> s.203 prescribes a fine of \$9,000 or imprisonment for 9 months for indecent acts in public, there is no logic to not having comparable sanctions in relation to indecent acts online – such as posting indecent images, videos or material with a potential to cause distress owing to its inappropriate nature.
14. Does the Act respond to current and expected forms of technology-facilitated abuse effectively?	No	<p>While it is difficult to encompass new and emerging technologies, efforts need to be made to have the broadest definition of technologies within the Act – to allow such rapid and changing tech and the use of tech to be encompassed.</p> <p>It could make a start with respect to image distribution and cyber-flashing with the amendments indicated. The requisite technological and IT expertise needs to be engaged with respect to predicting and counteracting emerging channels for this type of abuse.</p>
15. Are there emerging challenges or trends related to IBA that the Act has not sufficiently addressed?	Yes	<p>As above. There are also many emerging challenges. For instance, what if an AI generated character has been subtly programmed to contravene the legislation? Finding a human to prosecute under those circumstances could be exceedingly difficult.</p> <p>Along with preventative initiatives, there is a need also for education in protective behaviours, as it will be simply impossible to catch and prosecute all perpetrators. There is also likely a need for enhancement of screening mechanisms in available technology that delete unwelcome material before it can be viewed.</p>