

Recording and sharing intimate images without consent

By Liz Snell

The author wishes to acknowledge the contributions of her WLS colleagues to this area of law reform.



Liz Snell is the Law Reform & Policy Co-ordinator at Women's Legal Service NSW.

The *Crimes Amendment (Intimate Images) Act 2017 (NSW)*, which will amend the *Crimes Act 1900 (NSW)*, is important legislation that criminalises one aspect of technology-facilitated stalking and abuse, that is, the non-consensual recording and/or sharing of intimate images. It was introduced on 24 May 2017, a few days after the Law Crime and Community Safety Council agreed to the National Statement of Principles relating to the criminalisation of the non-consensual sharing of intimate images ('**National Principles**'). It received assent on 27 June. At the time of writing, the Act is yet to be proclaimed.

In introducing the Bill, the NSW Attorney General, the Hon Mark Speakman SC MP, acknowledged that 'Parliamentary inquiries in both New South Wales and at the Commonwealth level ... have highlighted the prevalence of this behaviour in the context of domestic violence ... [which] the Government ... strongly condemns' (24 May 2017).

Language matters – why we should call it image-based abuse

The sharing of intimate images without consent is often referred to as 'revenge porn'. Although this term is attention grabbing, it presumes only one motivation and, as academics argue, it ignores the key issue – that it is abuse. This is well articulated by Australian academic Dr Nicola Henry: 'This isn't just about "revenge porn" – images are being used to control, abuse and humiliate people in ways that go well beyond the "relationship gone sour" scenario.' Research by Dr Henry and others published in May 2017 found that one in five Australians has experienced image-based abuse and that it causes high levels of psychological distress. (Henry, N., Powell, A. Flynn, A. (2017) *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse*. A Summary Report. Melbourne: RMIT University).

Prior to the introduction of the new law, the inadequacy of criminal sanctions in NSW was reflected in provisions such as 'publishing indecent articles'. Language such as 'indecent' misplaces focus on the image rather than the use of the image to control, abuse and humiliate people (*Crimes Act 1900 (NSW)*, s 578C ('**Crimes Act**')). Unlawful filming offences are limited to a specific purpose 'of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification' (*Crimes Act*, ss 91K-L). No such limitation applies

Snapshot

- New offences in NSW include intentionally recording and/or distributing an intimate image without consent, threatening to record and/or distribute an intimate image without consent and contravening an order such as a take down order.
- Where a threat to share an image is made, there is no requirement to prove the image exists.
- Consistent and uniform legislation should be enacted in each Australian State and Territory and mirror any enacted Commonwealth offence.

to the new offences of recording or distributing an intimate image without consent.

New offences

There are four new offences:

- i. intentionally recording an intimate image of another person without consent (s 91P);
- ii. intentionally distributing an intimate image of another person without consent (s 91Q);
- iii. threatening to record and/or distribute an intimate image of another person without consent (s 91R); and
- iv. contravening an order such as failing to take reasonable steps to take down

or destroy an intimate image recorded or distributed without consent (s 91S).

The first three offences are indictable offences and have a maximum penalty of 100 penalty units or imprisonment for three years, or both. The fourth offence is a summary offence with a maximum penalty of 50 penalty units or imprisonment for two years, or both.

A threat to record or distribute an intimate image without consent requires an intention 'to cause the other person to fear that the threat will be carried out', though the prosecution is not required to prove actual fear. A 'threat' includes an 'explicit or implicit' threat 'made by any conduct' (s 91R(3)). There is no requirement that an image actually exists in a 'threat to distribute' offence (s 91R(4)). This is important as the mere threat is sufficient to cause fear, anxiety, a sense of powerlessness and a feeling of being trapped in a relationship categorised by domestic violence.

Application of the law to children and young people

In his second reading speech, the Attorney General makes clear that the new offences apply to 'images of another person' and so will not criminalise young people recording or sharing intimate images of 'their own body'.

A person under 16 years of age cannot provide consent to record or distribute an intimate image (s 91O(7)(a)). A prosecution of a person under the age of 16 years for any of the three new indictable offences cannot commence without the approval of the Director of Public Prosecutions (s 91P(2), s 91Q(2) & s 91R(6)).

Definition of intimate image

Section 91N provides definitions. 'Intimate image' is a still or moving image, whether or not altered, 'of a person's private parts, or altered to appear to show a person's private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy'. Given the ease with which images can be doctored in the digital era it is important to include altered images.

'Private parts' means:

- a person's genital area or anal area, whether bare or covered by underwear; or
- the breasts of a female person, or transgender or intersex person identifying as female.

'Engaged in a private act' means:

- in a state of undress; or
- using the toilet, showering or bathing; or
- engaged in a sexual act not ordinarily done in public; or
- engaged in any like activity.

Women's Legal Service NSW ('WLS') argues that 'intimate image' should include an image that reveals a person in a way that is inconsistent with their cultural context, for example, an image of a person being depicted without a head covering where a head covering is of cultural or religious importance.

Definition of 'distribute'

'Distribute' has been widely defined and is intended to capture emerging technologies. It includes to: '(a) send, supply, exhibit, transmit or communicate to another person; or (b) make available for viewing or access by another person, whether in person or by electronic, digital or other means.'

Consent

Section 91O defines consent. Consent must be 'freely and voluntarily' given and can be expressed or implied. Similar to the definition of consent in relation to sexual assault offences, a person cannot consent if they are under 16 years of age or otherwise do not have the 'capacity to consent'; if they are 'unconscious or asleep'; if they consented due to 'threats of force or terror' or because they were being 'unlawfully detained'.

Consent to record or distribute an image 'on a particular occasion' of itself alone does not constitute consent to record or distribute 'that or any other image on another occasion'. Similarly, consent to distribute an image to a 'particular person or in a particular way' of itself alone does not constitute consent to distribute 'that or any other image to another person in another way'. Additionally, the fact a person distributes an image of him/herself of itself alone does not mean consent has been given for 'any other distribution of the image.' The new offences of recording and distributing an intimate image without consent require knowledge that the person did not consent or recklessness as to consent.

Exceptions

Under s 91T, some exceptions to the new offences of recording and distributing an intimate image without consent include: if

this is done for a 'genuine medical or scientific purpose' or 'by a law enforcement officer for a genuine law enforcement purpose' or 'required by a court or otherwise reasonably necessary to be done for the purpose of legal proceedings'. Another exception includes if 'a reasonable person would consider the conduct of the accused acceptable' subject to a number of factors.

Accessing victim support

The three new indictable offences will also be included as 'personal violence offences' in the *Crimes (Domestic and Personal Violence) Act*. This means eligibility under the NSW Victims Support scheme will be enlivened.

Working with Children Check

When a person applies for a Working with Children Check and has a conviction as an adult for recording, distributing or threatening to record or distribute an intimate image of a child a risk assessment will be required (cl 1(4A) Schedule 1 of the *Child Protection (Working with Children) Act 2012 (NSW)*).

Next steps

Last year, at the inaugural COAG National Summit on Reducing Violence against Women and their Children, the Government announced funding to develop a national online complaints mechanism to 'help counter the effects of sharing intimate material without consent'.

The Department of Communications and the Arts recently released a discussion paper entitled: *Civil penalties regime for non-consensual sharing of intimate images*. This paper sought views on a proposed civil penalty regime and the expansion of the powers of the eSafety Commissioner.

Uniform criminal legislation consistent with the National Principles should also be enacted in each Australian State and Territory and mirror any enacted Commonwealth offence.

One of the many issues identified for urgent action at the technology-facilitated abuse roundtable at the COAG Summit was the need for speedy removal of intimate images shared without consent. This is also what many WLS clients request.

WLS advocates for robust policy and practice reform including:

- criminal sanctions as outlined in section 91S;
- positive obligation powers in the *Crimes Domestic and Personal Violence Act 2007 (NSW)* to enable take down orders to be made during apprehended violence order proceedings;
- an accessible civil remedy that could be administered by the Office of the eSafety Commissioner;
- the establishment of uniform State, Territory and Federal statutory causes of action for serious invasions of privacy.

Resources are also required for police and frontline worker training and for a place where victims/survivors can go to get technical support as well as access to practical and legal support.

The introduction of the *Crimes Amendment (Intimate Images) Act 2017 (NSW)* is an important development in the new landscape of responding to sexual and domestic and family violence in the digital age. **LSJ**