

28 October 2016

Ms Natasha Mann  
A/Executive Director  
Justice Strategy and Policy  
NSW Department of Justice  
GPO Box 6, Sydney NSW 2001

By email: [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au)

Dear Ms Mann,

### **The sharing of intimate images without consent - 'revenge porn'**

1. Women's Legal Service NSW (WLS NSW) thanks the Department of Justice for the opportunity to comment on *the sharing of intimate images without consent - 'revenge porn' discussion paper*.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

### **Definition of "intimate image"**

*Question 1a: What images should be captured by the new offence/s?*

*Question 1b: Should the definition include images which are "intimate" but not sexual, including by reference to cultural context?*

3. We submit "intimate images" should include images revealing private parts, such as genitals, anal region of the person or the breast of a female or transgender or intersex person who identifies as female as well as images of people in undergarments.
4. We now live in a digital age where electronic devices have built in editing functions as well as the wide availability of Apps, software and programs for images to be altered and edited with incredible ease. A layperson now has at their fingertips the ability to edit an image and make it look convincing and real as if professionally done. "Intimate images"



Women's Legal Service NSW  
PO BOX 206 Lidcombe NSW 1825  
Admin (02) 8745 6900  
Fax (02) 9749 4433

[www.wlsnsw.org.au](http://www.wlsnsw.org.au)  
Women's Legal Resources Ltd.  
ACN 002 387 699  
ABN 88 002 387 699



should therefore include images that may have been doctored, for example, a victim's head photo-shopped onto an image of a naked woman.

5. "Intimate images" should also include images that reveal 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 to the person.

### **Definition of "distribution"**

*Question 2a: How should "distribution" be defined in the new offence/s?*

*Question 2b: Should "distribution" include the sharing and showing of images?*

6. We agree with the Office of the Director of Public Prosecutions NSW that "distribution" should be given "a wide definition to incorporate traditional and new technologies loosely caught by the concept of "social media" and to capture emerging technologies".<sup>1</sup>
7. One of the reasons for the need for a Commonwealth offence as well as mirror state and territory criminal offences, as outlined in submissions to the NSW Legislative Council inquiry into remedies for serious invasions of privacy, is due to the constitutional limitations such that the Commonwealth can make laws relating to carriage service providers and postal services but is unable to address person-to-person sharing of intimate images or leaving an intimate image at someone's doorstep, for example.
8. "Distribution" should also include the sharing and showing of images.

### **Taking or recording an intimate image without consent**

*Question 3a: Should the new offence/s include not only the sharing but also the taking/recording of an intimate image without consent?*

9. Separate consent should be required for the taking/recording of the intimate image and the sharing of the intimate image. See below for further comments regarding consent to share intimate images.
10. There should be separate offences for the taking of the intimate image without consent and the sharing of the intimate image without consent.

**Question 3b: Should existing NSW offences such as sections 91K and 91L of the *Crimes Act 1900* be amended to apply when images are taken for purposes other than sexual gratification or sexual arousal?**

11. We believe consent is the core issue. Absence of consent should be sufficient to establish the offence.

---

<sup>1</sup> ODPP NSW, *Submission to the Legal and Constitutional Affairs References Committee on the Phenomenon colloquially referred to as 'revenge porn'*, January 2016 at 4.

12. We therefore recommend the repealing of “for the purposes of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification” in s91K: Filming a person engaged in a private act and s91L: Filming a person’s private parts of the *Crimes Act 1900 (NSW)*.
13. However, amendments to s 91K and s91L of the *Crimes Act 1900* of themselves will be insufficient to adequately respond to the non-consensual sharing of intimate images. This is because, for example, it is limited to filming; does not make reference to cultural context; does not criminalise distribution or threats to distribute.

### **Fault element**

*Question 4a: How should the fault element be defined in a new offence of sharing an intimate image without consent?*

*Question 4b: Should the offence include an element of recklessness as to whether consent was given?*

14. Absence of consent should be sufficient to establish the offence.
15. We agree with the Senate Committee recommendation that the offences should include a fault element of knowingly or recklessly taking/recording an intimate image without consent; and knowingly or recklessly sharing an intimate image without consent.<sup>2</sup>

### **Consent**

*Question 5a: Should consent be defined for the purposes of the new offence/s?*

*Question 5b: Should there be a requirement for consent to the sharing of intimate images to be explicit?*

16. Consent should be defined for the purposes of the new offence/s. Consent should be given freely and voluntarily. Consideration should be given to defining consent as it is defined in s61HA of the *Crimes Act 1900* ie consent in relation to sexual assault offences. It should be explicitly stated in legislation that consent to make the image of itself does not include consent to distribute an image. Separate consent is required for the sharing of the intimate image.
17. We agree with the Office of the NSW Director of Public Prosecutions that there be explicit and expressed consent for the sharing of that particular intimate image at that particular time and the onus should be on the offender to prove such consent was given.<sup>3</sup>

---

<sup>2</sup> Legal and Constitutional Affairs References Committee, *Phenomenon colloquially referred to as 'revenge porn'*, Recommendation 2, 25 February 2016.

<sup>3</sup> ODPP NSW, *Submission to the Legal and Constitutional Affairs References Committee on the Phenomenon colloquially referred to as 'revenge porn'*, January 2016 at 4.

*Question 5c: Should consent to having intimate images shared during the course of a relationship be considered to have terminated upon the conclusion of that relationship?*

18. Yes, consent to having intimate images shared during the course of a relationship should be considered to have terminated upon the conclusion of that relationship.

### Threats to share intimate images

*Question 6a: Should the new offence include threats to share intimate images?*

19. Yes, the new offence should include threats to share intimate images.
20. There should be no requirement of proof that an image actually exists when a threat to share is made, as the mere threat is sufficient to cause fear, anxiety, a sense of powerlessness and a feeling of being trapped in a relationship categorized by domestic violence.

*Question 6b: How should the fault element of an offence of threatening to share an intimate image be defined? Should the offence include an element of recklessness?*

21. The fault element should include a reasonable belief that the threat will be carried out.
22. The other element should be the absence of consent to share the intimate image.
23. We support the offence including an element of recklessness as it relates to consent.
24. Consistent with the Senate Committee recommendation there should be no requirement of proof that an image actually exists when a threat to share is made.<sup>4</sup>

*Question 6c: Should "threats" be defined to include both explicit and implicit threats made by any conduct?*

25. Yes, "threats" should be defined to include both explicit and implicit threats made by any conduct.

*Question 6d: Should the offence apply irrespective of whether the intimate images actually exist?*

26. As outlined above at paragraphs 20 and 24 the offence should apply irrespective of whether the intimate images actually exist.

### Application of offence/s to children and young people

*Question 7a: Should the new offence/s apply to images of children?*

27. Yes the new offence/s should apply to images of children.

---

<sup>4</sup> Legal and Constitutional Affairs References Committee, *Phenomenon colloquially referred to as 'revenge porn'*, Recommendation 2, 25 February 2016.

**Question 7b: How should the issue of consent be dealt with in relation to images of children?**

28. We recommend consistency in the approach to consent. Given generally a person 16 years and older can consent to sexual intercourse we submit they should be able to consent to the taking and sharing of an intimate image, provided consent is freely and voluntarily given.
29. When considering penalties given there is a requirement of consent for the making/recording of the intimate image and each instance of sharing the intimate image there should be a higher penalty in circumstances where there is absence of consent for both. As there is a separate offence for sharing intimate images without consent this would equally apply to third parties distributing intimate images they receive.
30. Consistent with the *Convention on the Rights of the Child* ('CROC'), children should be treated differently to adults under criminal laws.<sup>5</sup> The treatment of children who come into conflict with the law must take into account the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.<sup>6</sup> This does not mean there should be no consequences for children, for example, who share intimate images of another person without their consent but the consequences should be based on principles underpinned by CROC.

**Question 7c: Should the legislation distinguish between cases where both parties are minors and cases where the offender is over 18 years and the victim is not?**

31. The legislation should distinguish between cases where both parties are minors and cases where the offender is over 18 years and the victim is not.
32. The power differential should also be considered.

**Question 7d: Should a conviction for the new offence/s be considered relevant for obtaining a working with children check?**

33. We note the Discussion Paper states: "In Victoria when a person applies for a Working with Children Check and has a conviction for the offences of distributing an image (section 41DA) or threatening to distribute an intimate image (section 41DB), they must be risk assessed under the *Working with Children Checks Acts (Vic)*".
34. We would support something similar in NSW.

**Appropriate penalties**

**Question 8a: What penalty should the new offence/s carry?**

35. It is important that there are consequences for the taking/recording and sharing of intimate images without consent and threats to share intimate images without consent, including penalties. Given the abuse of trust involved in such acts and that it can be used

<sup>5</sup> *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990, Articles 37 & 40.

<sup>6</sup> *Ibid*, Article 40.

by the perpetrator as a means of coercion and control of the victim/survivor it is vital that perpetrators are held accountable.

36. Aggravating factors are well established in criminal law. These should be considered when developing penalties for the making/recording of intimate images without consent; the sharing of intimate images without consent; and the threat to share intimate images.
37. We recommend there be a legislative provision such that the second and any subsequent making/recording of an intimate image or sharing or threatening to share an intimate image without consent offences carry a higher maximum penalty than the first offence. This increase in penalty should occur regardless of whether the offence is perpetrated against the same person or a different person.
38. These new offences should also be included in the definition of a "personal violence offence" in the *Crimes (Domestic and Personal Violence) Act 2007*.

***Question 8b: Should the Court be able to order an individual convicted of an offence to take down/remove the images in question? Should a breach of such an order amount to a further offence? What penalty should a breach offence carry?***

39. It is essential that a quick, cheap and accessible remedy be available for the immediate take down/removal of intimate images shared without consent.
40. Such a remedy should be available in a variety of circumstances, and courts should be given the power to make:
  - 40.1 An order that an individual convicted of an offence is to take down/remove all intimate images shared without consent upon a guilty plea or finding of guilt;
  - 40.2 An order that an individual take down/remove all intimate images shared without consent as part of apprehended violence order proceedings;
  - 40.3 An order to take down/remove all intimate images shared without consent on its own.
41. Given the time it can take to obtain a finding of guilt it is insufficient for courts to only have the power to make a take down order upon guilty plea or finding of guilt. This is why it is important the court has the power to make such an order in a variety of circumstances.
42. A time in which to comply with the order must also be included in the order.
43. We recommend that upon a plea of guilty or a finding of guilt of a non-consensual sharing of an intimate image offence the defendant be given a period of time (we suggest no more than three weeks) in which s/he must take action to remove images shared without consent. The matter should then return to court for sentencing. Actions taken to remove the images shared without consent should be relevant to sentencing. At sentencing the victim/survivor should be able to state whether they believe the

defendant has removed all images. If the victim/survivor has found images which have not been removed, they should provide a list of these, including details of where the images are located to the Court.

44. A failure to comply with an order must be enforceable. Failure to take down/remove the images should result in a breach of an order and similar to a breach of an apprehended violence order should amount to a further offence.
45. Where there is a breach of an order and a dispute about compliance evidence of compliance should include:
  - 45.1 The defendant posting an apology, unless the person the subject of the images taken and/or shared without consent does not want an apology;
  - 45.2 Where the internet intermediary has not removed the images, evidence of repeated requests by the defendant to sites and internet intermediaries to remove the material.
46. It is important that the perpetrator is held to account and is responsible for requesting intimate images shared without consent be removed from all sites and platforms and the perpetrator takes all steps possible for the take down/removal of such images.
47. Some victims/survivors may find it empowering to also be able to take action by contacting telecommunications services, sites, platforms and internet intermediaries to request images shared without consent be removed immediately. Victims/survivors should be supported in this process, for example, by being equipped with certification that can be provided to the sites, platforms and internet intermediaries to ensure immediate removal of the images. A copy of the order should be sufficient to require the telecommunications service, site, platform or internet intermediary to remove the image.
48. We note that s19(2) of the *Harmful Digital Communications Act 2015 (NZ)* empowers the court to make orders against an online content host, including orders such as take down or disable public access to material that has been posted or sent; that the identify of the author of an anonymous or pseudonymous communication be released to the court; and correction orders. We support the power to take such action.
49. Section 21 of the *Harmful Digital Communications Act 2015 (NZ)* provides it is an offence not to comply with an order without reasonable excuse. The penalty for a natural person is imprisonment for a term not exceeding 6 months or a fine not exceeding \$5,000. The penalty for a body corporate is a fine not exceeding \$20,000.
50. We support sanctions for non-compliance.

## Defences

### *Question 9: Should the new offence include one or more statutory defences?*

51. We do not see the need for statutory defences.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,  
**Women's Legal Service NSW**

**Janet Loughman**  
**Principal Solicitor**