



Justice

## **Discussion Paper**

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

**September 2016**



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# 1. Introduction

The non-consensual sharing of intimate images, colloquially referred to as ‘revenge porn’, involves sharing intimate or sexual images of a person without their consent. This behaviour can cause considerable harm to victims and often occurs in the context of domestic violence and abuse.<sup>1</sup> Images may be obtained with or without the consent of the victim, are associated with a range of motivations and can be distributed by various means.<sup>2</sup> Technological advancements have contributed to a rise in the non-consensual sharing of images, particularly with the use of mobile phones as recording devices and the widespread use of social media.<sup>3</sup>

While the term ‘revenge porn’ is commonly used, this paper uses the term ‘non-consensual sharing of intimate images’ to reflect that this behaviour involves a variety of motives and that not all intimate images can be described as pornography.<sup>4</sup>

The NSW Government is currently considering possible legislative measures to adequately address this concerning and harmful behaviour. This discussion paper seeks feedback on the form of new criminal offences to specifically address the non-consensual sharing of intimate images in NSW. The Department of Justice invites interested individuals and organisations to respond to the issues raised in this discussion paper.

Submissions should be sent to: Justice Strategy and Policy, NSW Department of Justice, GPO Box 6, Sydney NSW 2001, or [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au) by **Friday 21 October 2016**.

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<sup>1</sup> NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, p 21

<sup>2</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as ‘revenge porn’*, February 2016, p 2

<sup>3</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as ‘revenge porn’*, February 2016, p 3; NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, p 19

<sup>4</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as ‘revenge porn’*, Report released February 2016, p 1

## 2. Background

### What is the non-consensual sharing of intimate images?

The non-consensual sharing of intimate images involves the distribution of intimate or sexual images of another person without their consent. It can encompass a range of behaviours and may include 'images obtained (consensually or otherwise) in an intimate relationship; photographs or videos of sexual assault/s; images obtained from the use of hidden devices to record another person; stolen images from the Cloud or a person's computer or other device; and pornographic or sexually explicit images that have been photo-shopped, showing the victim's face.'<sup>5</sup>

The non-consensual sharing of intimate images often involves ex-partners seeking revenge, however it can also involve acquaintances or strangers. Images may be shared for a range of reasons including to coerce, control, blackmail, humiliate or harass another person, or for sexual gratification, fun, social notoriety or financial gain. What constitutes an 'intimate image' can vary according to community standards.<sup>6</sup> It has been observed that this behaviour often occurs in the context of domestic violence and abuse and can have a severe impact on victims, including causing extreme fear and mental harm.<sup>7</sup>

It has been suggested that the defining qualities of this behaviour are that 'the image was taken and/or distributed *without a person's expressed consent*, the image was used or misappropriated in a way that a reasonable person would understand to be *a violation of that person's privacy*, or the image was used or misappropriated in a way that a person would understand might *cause fear, apprehension, or mental harm to the victim*.'<sup>8</sup>

The purpose of this discussion paper is to define the scope and form of a new offence (or offences) directed at this behaviour.

### Currently no specific offence in NSW

NSW does not currently have an offence specifically directed at the non-consensual sharing of intimate images, although there are a number of existing offences which may apply depending upon the specific circumstances of the individual case. The relevant offences are located in the *Crimes Act 1900* (NSW), the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), the *Surveillance Devices Act 2007* (NSW) and the *Criminal Code Act 1995* (Cth) (see **Annexure A** for a list of relevant offences).

### Parliamentary Inquiry into Remedies for the Serious Invasion of Privacy in NSW

The NSW Legislative Council Standing Committee on Law and Justice (Legislative Council Committee) recently conducted an inquiry in relation to remedies for serious invasion of privacy in NSW. The Report, *Remedies for the serious invasion of privacy in NSW*, was released on 3 March 2016.

A major concern for the Legislative Council Committee was the failure of the criminal law to cover the sharing of intimate images without the subject's consent. A number of inquiry participants expressed support for a new criminal offence for distributing intimate images without consent, or threatening to do so.<sup>9</sup>

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<sup>5</sup> Drs Henry, Flynn and Powell, *Submission 9*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 2

<sup>6</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 2

<sup>7</sup> NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, p 21

<sup>8</sup> Drs Henry, Flynn and Powell, *Submission 13*, NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, p 2

<sup>9</sup> NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, p 39

Evidence to the Legislative Council Committee highlighted that existing offences do not comprehensively and reliably apply to the non-consensual sharing of an intimate image. Existing offences fail to account for this behaviour in different ways.<sup>10</sup> For example, some offences do not target the act of *distributing* an image without consent, some do not sufficiently encompass the harm caused by that distribution, some do not contemplate the way technology may be used and others do not account for images which may be 'intimate' but do not fall within the definition of 'indecent'.

As the remit for the inquiry was to consider the adequacy of existing remedies for serious invasions of privacy rather than the introduction of new criminal offences, the Legislative Council Committee did not make specific recommendations on this issue. However, the Legislative Council Committee suggested the NSW Government consider the recent recommendations of the Commonwealth Senate Legal and Constitutional Affairs References Committee (Senate Committee) to introduce offences directed at this behaviour.<sup>11</sup>

## Commonwealth Senate Legal and Constitutional Affairs References Committee

The Senate Committee released its report the *Phenomenon colloquially referred to as 'revenge porn'* on 25 February 2016.

The Senate Committee observed that the non-consensual sharing of intimate images is a growing problem in Australia which has the potential to cause considerable harm to victims. It also expressed concern about the limited capacity of the criminal law to cover this type of behaviour and that submissions to the inquiry expressed overwhelming support for legislative change.<sup>12</sup>

The Senate Committee received evidence about the shortcomings of existing Commonwealth criminal offences, particularly the offence of 'using a carriage service to menace, harass or cause offence' under section 474.17 of the *Criminal Code Act 1995* (Cth). For example, it heard that this offence does not properly account for images which are shared non-consensually and may not cover images which are intimate but do not fall within the definition of 'offensive'. As the offence relates to the misuse of a telecommunications service, it would not extend to non-online conduct such as distributing hard copy images.<sup>13</sup>

In light of these observations, the following recommendations were made:

### Recommendation 2

Taking into account the definitional issues discussed in this report, the committee recommends that the Commonwealth government legislate, to the extent of its constitutional power and in conjunction with state and territory legislation, offences for:

- knowingly or recklessly recording an intimate image without consent
- knowingly or recklessly sharing intimate images without consent, and
- threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.

### Recommendation 3

The committee recommends that the states and territories enact legislation with offences the same or substantially similar to those outlined in Recommendation 2, taking into account relevant offences enacted by the Commonwealth government.

The report has been tabled in Parliament, however the Commonwealth government is yet to respond. Other jurisdictions are already legislating in this area.

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<sup>10</sup> NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, pp 19, 34 - 40

<sup>11</sup> NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, p 40

<sup>12</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, pp 49 - 51

<sup>13</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 29

### 3. Legislative reform in other Australian jurisdictions

South Australia and Victoria have already introduced specific offences to address the non-consensual sharing of intimate images. In doing so, they have recognised that existing laws in their jurisdictions provided limited protection against this behaviour.<sup>14</sup> The Northern Territory and Western Australia have also announced an intention to legislate in this area.

#### South Australia

The *Summary Offences (Filming Offences) Amendment Act 2013* (SA) inserted a new offence of 'distribution of an invasive image without consent' under section 26C of the *Summary Offences Act 1953* (SA) (see **Annexure B**).

On 9 March 2016 the South Australian Government introduced the Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (the Bill). The Bill is currently before Parliament. Relevantly, the Bill will amend the current offence of distribution of an invasive image<sup>15</sup> so that it applies to images depicting a minor and create a new offence of threatening to distribute an invasive image or image obtained from indecent filming (see **Annexure B**).<sup>16</sup> The Bill will also make a number of amendments to the definitions which apply to those offences.<sup>17</sup>

#### Victoria

The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) introduced new offences of 'distributing an intimate image without consent' and 'threatening to distribute an intimate image without consent'. The offences are located in sections 41DA and 41DB of the *Summary Offences Act 1966* (Vic) (see **Annexure C**).

#### Northern Territory

In March 2016, the then Northern Territory Attorney General announced an intention to introduce a new offence targeting non-consensual sharing of intimate images in recognition of the harm which can be caused by this type of behaviour and in response to the work of the Senate Committee. The issue was referred to the Northern Territory Law Reform Council, which is due to report by November 2016.

#### Western Australia

On 11 September 2016, the Western Australian Attorney General announced that he will introduce the Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016 (WA). The Bill targets 'revenge porn' behaviour through the use of Family Violence Restraining Orders (FVRO), which would empower the court to restrain a person from distributing or publishing intimate images of a person. A breach of an FVRO will be a criminal offence punishable by up to two years imprisonment.<sup>18</sup> A copy of the Bill has not yet been released.

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<sup>14</sup> Summary Offences (Filming Offences) Amendment Bill 2013 (SA), Second Reading Speech, 7 February 2013; *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014* (Vic), Second Reading Speech, 21 August 2014

<sup>15</sup> *Summary Offences Act 1953* (SA), section 26C

<sup>16</sup> Summary Offences (Filming Offences) Amendment Bill 2013 (SA), proposed section 26DA

<sup>17</sup> The definitions are located in section 26A of the *Summary Offences Act 1953* (SA)

<sup>18</sup> Western Australia Attorney General's Office, Media Statement, 'Major shake-up of WA's family violence laws', 11 September 2016, accessible at: <https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/09/Major-shake-up-of-WAs-family-violence-laws.aspx>

## 4. Framing new offences for NSW

This section of the discussion paper seeks feedback on how an offence (or offences) to specifically address the non-consensual sharing of intimate images should best be framed.

### Definition of 'intimate image'

#### Discussion Question 1:

- a) What images should be captured by the new offence/s?
- b) Should the definition include images which are 'intimate' but not sexual, including by reference to cultural context?

There is a need to clearly define the types of subject matter captured by the offence/s and to clarify whether it includes material which is 'intimate' but not of a strictly sexual nature. For example the Senate Committee heard evidence that:

- The sharing of an image which is intimate can be equally as damaging and traumatic for a victim as the sharing of an image which is sexual.<sup>19</sup>
- What might be considered sexual, personal or intimate may differ according to cultural contexts.<sup>20</sup>
- There is a need to ensure legislation is flexible to account for the sharing of images which is harmful, but not so broad as to include images which are socially acceptable such as an image of two adults kissing or an image of an adult sunbathing in swimwear.<sup>21</sup>

Victoria and South Australia have taken the following approaches:

#### Victoria

- '**Intimate image**' is defined as a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or context that is sexual; or (c) the genital or anal region of a person or, in the case of a female, the breasts.<sup>22</sup>
- The offences require the distribution of the intimate image to be contrary to '**community standards of acceptable conduct**', which is defined as including standards of conduct having regard to:
  - the nature and content of the image
  - the circumstances in which the image was captured and distributed
  - the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image
  - the degree to which the distribution of the image affects privacy of a person depicted in the image.<sup>23</sup>
- This is intended to ensure 'that the offences do not unjustifiably interfere with individual privacy and freedom of expression, while at the same time targeting exploitative, harmful and non-consensual behaviour'.<sup>24</sup> In the absence of the 'community standards' element, the offence

<sup>19</sup> Attorney General's Department (Cth), *Submission 28*, and Women's Legal Services NSW, *Submission 2*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 4

<sup>20</sup> Attorney General's Department (Cth), *Submission 28*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 4; Safe Steps, *Submission 29*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p3

<sup>21</sup> Drs Henry, Flynn and Powell, *Submission 9*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 5

<sup>22</sup> *Summary Offences Act 1966* (Vic), section 40

<sup>23</sup> *Summary Offences Act 1996* (Vic), section 40

<sup>24</sup> *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014* (Vic), Second Reading Speech, 21 August 2014

'might capture activities which are generally considered to be socially acceptable, such as a parent sending family members and friends a photograph of their nude newborn baby'.<sup>25</sup>

### **South Australia**

- **'Invasive image'** is defined as a moving or still image of a person (a) engaged in a private act; or (b) in a state of undress such that the person's bare genital or anal region is visible. Private act is defined as (a) a sexual act of a kind not ordinarily done in public; or (b) using a toilet.<sup>26</sup>
- The definition does not currently include reference to community standards. However, the Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA) now seeks to amend the definition of an 'invasive image' to provide that an image of a person that falls within the **'standards of morality, decency and propriety generally accepted by reasonable adults in the community'** will not be considered an invasive image. The Explanatory Paper for the Bill states that the definition was amended 'in order to prevent the criminalisation of the distribution of innocent images of minors'.<sup>27</sup> The Bill will also amend the definition to include images of a female's breasts.

The definition of 'invasive image' under the South Australian legislation is arguably broader than the definition of 'intimate image' in the Victorian legislation as it extends beyond sexual and body part images to include the private act of using a toilet. Neither definition includes reference to images which may be 'intimate' (but not sexual) according to cultural context.

### **Definition of 'distribution'**

#### **Discussion Question 2:**

- a) **How should 'distribution' be defined in the new offence/s?**
- b) **Should 'distribution' include the sharing and showing of images?**

A key aspect of an offence of non-consensual sharing of intimate images is the act of distributing the images. The Senate Committee highlighted the need to clearly define what 'distribution' means. In particular, evidence to the Senate Committee suggested that the definition should account for images shared through the use of technology as well as physically, for example sharing a hard copy or showing an image on a screen to another person.<sup>28</sup>

Victoria and South Australia have taken the following approaches:

#### **Victoria**

- **'Distribute'** is defined as including publishing, exhibiting, communicating, sending, supplying or transmitting to any person, whether a particular person or not, and 'to make available for access by any other person'.<sup>29</sup>

#### **South Australia**

- **'Distribute'** is defined as communicating, exhibiting, sending, supplying, uploading, transmitting or making available for access by another. It does not include distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider.<sup>30</sup>

<sup>25</sup> Criminal Law Review, Department of Justice and Regulation Victoria, *Victoria's New Sexual Offence Laws: An Introduction*, June 2015, p 30

<sup>26</sup> *Summary Offences Act 1953* (SA), section 26A

<sup>27</sup> Revenge Porn Explanatory Paper: *Summary Offences (Filming and Sexting Offences) Amendment Bill 2015* (SA), accessible at: <http://www.agd.sa.gov.au/initiatives/proposed-sexting-offence-laws>

<sup>28</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, Report released February 2016, p 32

<sup>29</sup> *Summary Offences Act 1996* (Vic), section 40

<sup>30</sup> *Summary Offences Act 1953* (SA), section 26A

The definitions of 'distribute' in both jurisdictions are very similar. The primary difference is the exception provided for internet/carriage service providers in the South Australian legislation. Evidence to the Senate Committee suggested that it is not clear whether the definitions in either jurisdiction would include 'showing' or 'sharing' images.<sup>31</sup>

## Taking or recording an intimate image without consent

### Discussion Question 3:

- a) Should the new offence/s include not only the sharing but also the taking/recording of an intimate image without consent?
- b) 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?

The Senate Committee recommended that all jurisdictions introduce offences for **knowingly or recklessly recording**, or **threatening to take**, an intimate image without consent, although there is little discussion of this issue in the report. Such an offence would have the potential to cover situations similar to the recently publicised incident of a patient who had her genitalia photographed by a nurse while undergoing a medical procedure, where it was unclear whether the image was shown to anyone but the patient was greatly distressed by the fact of its existence.<sup>32</sup>

In NSW, the taking and recording of an intimate image without consent is partially covered by offences in the *Crimes Act 1900*, including filming a person engaged in a private act under section 91K and filming a person's private parts under section 91L. However, for conduct to amount to an offence under these sections the filming must be for the purposes of obtaining sexual arousal or sexual gratification. These offences would not apply to the filming of private acts or private parts for other purposes, such as for revenge, to humiliate or to embarrass.

Victoria and South Australia do not have offences specifically directed at the taking or recording of intimate/invasive images without consent. However, like NSW, these jurisdictions have other offences which would cover some of this type of conduct.<sup>33</sup>

## Fault element

### Discussion Question 4:

- a) How should the fault element be defined in a new offence of sharing an intimate image without consent?
- b) Should the offence include an element of recklessness as to whether consent was given?

An offence addressing the non-consensual sharing of intimate images requires consideration of a fault element, namely the intent of the defendant. The Senate Committee recommended that the offence should include a fault element of **knowingly or recklessly sharing an intimate image without consent**. Submissions to the Senate Committee raised the following arguments:

- Offences should not include a fault element of intending to cause harm, as this fails to acknowledge the range of motivations for 'revenge porn' behaviour and may create a 'loophole' whereby offenders can claim that no harm was intended.<sup>34</sup>

<sup>31</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, Report released February 2016, p 32

<sup>32</sup> Scott, S. 'Sydney nurse who took explicit photo of patient while under anaesthetic still practising in NSW', 6 November 2015, accessible at: <http://www.abc.net.au/news/2015-11-06/sydney-nurse-takes-explicit-photo-of-patient/6916174>

<sup>33</sup> For example, visually capturing genital or anal region under section 41 B of the *Summary Offences Act 1966* (Vic) and indecent filming under section 26D of the *Summary Offences Act 1953* (SA)

<sup>34</sup> Ms Martin, Policy/Research Officer, Sexual Assault Support Service (SASS), *Commonwealth Senate Legal and Constitutional Affairs References Committee Hansard*, 18 February 2016, p 4

- Recklessness as to whether consent was given should be included as an element of the offence in order to address the difficulty of proving whether or not a victim consented to the sharing of images, especially in the context of relationships where consent had initially been given to the taking or recording of the image.<sup>35</sup>

Victoria and South Australia have taken the following approaches:

### **Victoria**

- The Victorian offence applies if a person **intentionally** distributes an intimate image of another person and the distribution is contrary to community standards of acceptable conduct. The offence does not apply if the adult depicted expressly or impliedly consents to the distribution.<sup>36</sup>

### **South Australia**

- The South Australian offence applies if a person distributes an intimate image of another person while **knowing or having reason to believe** that the other person did not consent to the distribution.<sup>37</sup>

Each jurisdiction approaches the fault element differently. The South Australian offence has a fault element similar to the model recommended by the Senate Committee, which links the offender's conduct to their knowledge of the victim's lack of consent. In contrast, the Victorian offence does not expressly include knowledge of the victim's lack of consent as part of the fault element. Neither offence includes an element of recklessness.

## **Consent**

### **Discussion Question 5:**

- Should consent be defined for the purposes of the new offence/s?**
- Should there be a requirement for consent to the sharing of intimate images to be explicit?**
- Should consent to having intimate images shared during the course of a relationship be considered to have terminated upon the conclusion of that relationship?**

The Senate Committee was of the view that clarity on the issue of consent was vital in a new offence directed at the non-consensual sharing of intimate images. The issue was repeatedly raised during the course of the inquiry and there was concern that 'any ambiguity in this area may favour the perpetrator'.<sup>38</sup> Submissions to the Senate Committee highlighted the following issues:

- Adults may consent to having their images taken in the context of a loving relationship but it does not mean that they automatically consent to those images being shared with others. Separate consent should be required for the distribution of images.<sup>39</sup>
- Consent for intimate images to be shared should be explicit or express and specific to the particular image, at the particular time and the manner used.<sup>40</sup>
- Consent for intimate images to be disseminated during the course of a relationship should be taken to have terminated upon the conclusion of that relationship.<sup>41</sup>

<sup>35</sup> Commonwealth Director of Public Prosecutions, *Submission 3*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 5

<sup>36</sup> *Summary Offences Act 1996* (Vic), section 41DA

<sup>37</sup> *Summary Offences Act 1953* (SA), section 26C

<sup>38</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, Report released February 2016, p 33

<sup>39</sup> Ms Martin, Sexual Assault Support Service Inc (SASS), *Commonwealth Senate Legal and Constitutional Affairs References Committee Hansard*, 18 February 2016, p 5

<sup>40</sup> Office of the Director of Public Prosecutions NSW, *Submission 24*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 4

<sup>41</sup> Ms Wright, National Criminal Law Committee, Law Council of Australia, *Commonwealth Senate Legal and Constitutional Affairs References Committee Hansard*, 18 February 2016, p 39

Victoria and South Australia have taken the following approaches:

### **Victoria**

- ‘Consent’ is defined under the legislation as ‘free agreement’.<sup>42</sup> The legislation also specifies that the offence of distribution of an intimate image does not apply if the person depicted in the image is an adult and has expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to the distribution of the image and the manner in which it was distributed.<sup>43</sup>

### **South Australia**

- ‘Consent’ is not defined for the purposes of the South Australian offence. The legislation provides that a person commits an offence if they distribute an invasive image knowing or having reason to believe that the person depicted does not consent to the particular distribution of the image or does not consent to the distribution of the image generally.<sup>44</sup>

The Victorian approach to consent is broader than the approach suggested in submissions to the Senate Committee as it allows for consent to be implied as well as express. The South Australian offence does not have a specific requirement that consent must be express, however both jurisdictions provide that consent must be specific to the particular distribution of the image. Neither offence specifies that consent given during the course of a relationship should be taken to have terminated upon the conclusion of that relationship.

## **Threats to share intimate images**

### **Discussion Question 6:**

- a) Should the new offence include threats to share intimate images?**
- b) 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?**
- c) Should ‘threats’ be defined to include both explicit and implicit threats made by any conduct?**
- d) Should the offence apply irrespective of whether the intimate images actually exist?**

The Senate Committee recommended that legislative action addressing the non-consensual sharing of intimate images should include an offence of **threatening to take and/or share intimate images without consent**.<sup>45</sup> Submissions to the Senate Committee highlighted that threats to distribute intimate images can be just as harmful as the actual distribution of the images and can act as a tool of coercion, blackmail and domestic violence.<sup>46</sup> The Senate Committee recommended that this offence should apply irrespective of whether the intimate image/s, in relation to which threats are made, actually exist.

Victoria and South Australia have taken the following approaches:

### **Victoria**

- Under the Victorian legislation, a person (A) commits an offence if A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and the distribution of the image would be contrary to community standards of acceptable conduct; and A **intends that B will believe, or believes that B will probably believe**, that A will carry out the threat.<sup>47</sup>
- A threat may be made by any conduct and may be explicit or implicit.

<sup>42</sup> *Summary Offences Act 1996* (Vic), section 40

<sup>43</sup> *Summary Offences Act 1996* (Vic), section 41DA(3)

<sup>44</sup> *Summary Offences Act 1953* (SA), section 26C

<sup>45</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as ‘revenge porn’*, Report released February 2016, p 52

<sup>46</sup> Ms Loughman, Women’s Legal Services NSW, *Commonwealth Senate Legal and Constitutional Affairs References Committee Hansard*, 18 February 2016, p 28

<sup>47</sup> *Summary Offences Act 1953*, section 41DB

## South Australia

- South Australia does not currently have an offence addressing threats to distribute intimate images. However, the Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 seeks to amend the *Summary Offences Act 1953* (SA) to insert a new offence of threatening to distribute an invasive image.<sup>48</sup> A person commits an offence if they threaten to distribute an invasive image; and they **intend to arouse a fear** that the threat will be, or is likely to be, carried out, or are **recklessly indifferent as to whether such a fear is aroused**.
- A threat may be directly or indirectly communicated by words or conduct and may be explicit or implicit.

The main difference between the offences in each jurisdiction relates to the fault element. The South Australian fault element is based on arousing a fear that a threat will be carried out, whereas the Victorian fault element is based on engendering a belief that the threat will be carried out. In contrast to the Victorian offence, the South Australian offence also includes an element of reckless indifference as to whether a fear is aroused. Neither jurisdiction specifies whether the offences apply irrespective of whether the images actually exist, as recommended by the Senate Committee.

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

### Discussion Question 7:

- a) Should the new offence/s apply to images of children?
- b) How should the issue of consent be dealt with in relation to images of children?
- c) 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?
- d) Should a conviction for the new offence/s be considered relevant for obtaining a working with children check?

An offence targeting the non-consensual sharing of intimate images may overlap with existing NSW offences targeting child pornography, if applied to all ages. In NSW, sharing an intimate image of a person below the age of 16 without their consent may be covered by the offence of distributing child abuse material under the *Crimes Act 1900*, depending on the content of the image.<sup>49</sup>

The Senate Committee did not make any specific recommendations about how an offence should apply to young people. However, it suggested that consideration should be given to issues raised during the inquiry including that:

- legislation should ensure that the actions of minors are dealt with appropriately and not under child pornography offences<sup>50</sup>
- cases where both parties are minors should be distinguished from cases where the offender is over the age of 18 years and the victim is not.<sup>51</sup>

Victoria and South Australia have taken the following approaches:

### Victoria

- The Victorian offence does not apply if the person depicted in the image consented to the distribution, however the person must be over the age of 18 for this exception to apply.<sup>52</sup> The offence therefore applies to all images of children aged under 18, regardless of whether they consented to the distribution of the image.

<sup>48</sup> Summary Offences (Filming and Sexting Offences) Amendment Bill 2015, proposed section 26DA

<sup>49</sup> *Crimes Act 1900* (NSW), section 91H(2)

<sup>50</sup> Electronic Frontiers Australia, *Submission 3*, Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 3

<sup>51</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, Report released February 2016, pp 37, 51

<sup>52</sup> *Summary Offences Act 1996* (Vic), section 41DA

## South Australia

- An 'invasive image' is currently defined as not including an image of a person under, or apparently under, the age of 16 years.<sup>53</sup> The rationale for not including images of persons below the age of 16 in the offence was not to intrude on the child exploitation offences under the *Criminal Law Consolidation Act 1935* (SA). However, the Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA) now seeks to amend this definition to include young people in the offence. The amendment aims to reflect changing social and technological trends and the fact that young people are capable of engaging in harmful 'revenge porn' behaviour, as well as consensual behaviour.<sup>54</sup> A decision on whether to lay a charge for distributing an invasive image under the *Summary Offences Act 1953* (SA) or under the child exploitation offences under the *Criminal Law Consolidation Act 1935* (SA) would be at the discretion of police and prosecutors.<sup>55</sup>
- The South Australian legislation provides that consent will not be effective for the purposes of the offence if it is given by a person who is under 16 years of age or mentally incapacitated, or obtained from a person by duress or deception.<sup>56</sup>

If the South Australian amendments come into effect, the offences in both jurisdictions will apply to images of minors. Both jurisdictions provide that a minor depicted in an image cannot give consent for the purpose of the offences. Neither jurisdiction has legislated to distinguish between cases where both parties are minors and cases where the offender is an adult and the victim is a minor. Child pornography/exploitation offences will continue to apply to images of children in both jurisdictions.

### Working with children checks

If new offences are created to target the non-consensual sharing of intimate images, consideration should be given to whether a conviction for these offences should be relevant for obtaining a working with children check (WWCC).

Currently, when a person applies for a WWCC and that person has a conviction for an offence listed in Schedule 1 of the *Child Protection (Working with Children) Act 2012*, the Office of the Children Guardian must conduct a risk assessment of the person before granting a WWCC. If a person has a conviction for an offence listed in Schedule 2 of the *Child Protection (Working with Children) Act 2012*, that person is automatically disqualified from obtaining a WWCC.

In Victoria, when a person applies for a WWCC and has a conviction for the offences of distributing an intimate image (section 41DA) or threatening to distribute an intimate image (section 41DB), they must be risk assessed under the *Working with Children Checks Act 2005* (Vic).<sup>57</sup>

South Australia has recently released the Child Safety (Prohibited Persons) Bill 2016 (SA) for public consultation which will significantly reform the South Australian WWCC system. South Australia will be considering what offences will be relevant for WWCCs as part of this consultation process.<sup>58</sup>

### Sexting

It should be noted that the issue of 'sexting' by children will be considered as part of the review of child sexual assault offences (the Review) which the Department of Justice is conducting over the course of 2016 and 2017.

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<sup>53</sup> *Summary Offences Act 1953* (SA), section 26A

<sup>54</sup> Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA), Second Reading Speech, 18 May 2016

<sup>55</sup> Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA), Second Reading Speech, 18 May 2016

<sup>56</sup> *Summary Offences Act 1953* (SA), section 26E

<sup>57</sup> *Working with Children Checks Act 2005* (Vic), section 13 and Schedule 2

<sup>58</sup> Child Safety (Prohibited Persons) Bill 2016 SA and Fact Sheet, available at: <http://www.agd.sa.gov.au/initiatives/child-protection-reform#overlay-context=initiatives/child-protection-reform>

'Sexting' refers to the consensual creating, sharing, sending or posting of sexually explicit messages or images via the internet, mobile phones or other electronic devices. As 'sexting' involves consensual behaviour, it is a distinct from the non-consensual sharing of intimate images.

The Review will consider whether legislative change is needed to address the fact that 'sexting' by children may constitute the offence of producing, disseminating or possessing child abuse material under section 91H of the *Crimes Act 1900*.

## Appropriate penalties

### Discussion Question 8:

- a) What penalty should the new offence/s carry?
- b) 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?

The Senate Committee did not make any recommendations about appropriate penalties, although submissions suggested that the legislation should include an aggravated offence where the victim is a minor.<sup>59</sup> Both Victoria and South Australia have introduced **summary offences** to address the non-consensual distribution of intimate images.

The maximum penalties for offences of distribution of an intimate/invasive image are:

- **Victoria:** Imprisonment for 2 years.<sup>60</sup>
- **South Australia:** Fine of up to \$10,000 or imprisonment for 2 years for an offence involving an image of an adult.<sup>61</sup> The distribution of an invasive image of a minor will carry a fine of up to \$20,000 or imprisonment for 4 years under the proposed amendments in the Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA).

The maximum penalties for offences of threatening to distribute an intimate/invasive image are:

- **Victoria:** Imprisonment for 1 year.<sup>62</sup>
- **South Australia:** Fine of \$5000 or imprisonment for 1 year for offences involving images of adults, and a fine of \$10,000 or imprisonment for 2 years for offences involving images of minors.<sup>63</sup>

The primary distinction between the jurisdictions is that the South Australia legislation provides for an increased maximum penalty for offences involving images of minors.

### Order for an offender to take down/remove images

After a person has been convicted of an offence and a penalty imposed, the images in question may still be publicly accessible online which may continue to cause harm and distress to the victim. In light of this, consideration should also be given to whether the Court should be able to order an individual who has been convicted of an offence to take down/remove the images in question.

If the Court is empowered to make such an order, consideration must also be given to how this order will be enforced. For example, a failure to comply with an order could amount to a further offence.

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<sup>59</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, Report released February 2016, p 37

<sup>60</sup> *Summary Offences Act 1996* (Vic), section 41DA

<sup>61</sup> *Summary Offences Act 1953* (SA), section 26C

<sup>62</sup> *Summary Offences Act 1996* (Vic), section 41DB

<sup>63</sup> *Summary Offences (Filming and Sexting Offences) Amendment Bill 2015* (SA), proposed section 26DA

## Defences

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

Consideration should be given to whether there should be a statutory defence available for the offence of non-consensual sharing of intimate images. The Senate Committee did not make any recommendations on this issue. However, if no specific defence is prescribed in the legislation, the common law defence of honest and reasonable mistake of fact will apply.<sup>64</sup>

Victoria and South Australia have taken the following approaches:

#### **Victoria**

- There are no specific statutory defences available under the Victorian legislation for either distributing an intimate image or threatening to distribute an intimate image. However, as noted above, the provision relating to the distribution of an intimate image is framed as not applying where consent is given by an adult.

#### **South Australia**

- It is a defence to a charge of distributing an invasive image to prove that the conduct constituting the offence was for a purpose connected to law enforcement, or was for a medical, legal or scientific purpose. It is also a defence if an image was filmed by a licensed investigation agent and occurred in the course obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit.<sup>65</sup>
- The legislation also provides that an offence will not be committed by law enforcement personnel and legal practitioners (or their agents) acting in the course of law enforcement or legal proceedings, or medical practitioners (or their agents) acting in the course of medical practice or for genuine educational or research purposes.<sup>66</sup>
- For the proposed offence of threatening to distribute an invasive image, it will be a defence to prove that the person filmed consented to the distribution of the image and the person had not, at the time of the alleged offence, withdrawn consent to the distribution of the image.<sup>67</sup>

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<sup>64</sup> *Proudman v Dayman* [1941] HCA 28

<sup>65</sup> *Summary Offences Act 1953* (SA), section 26C

<sup>66</sup> *Summary Offences Act 1953* (SA), section 26E

<sup>67</sup> *Summary Offences (Filming and Sexting Offences) Amendment Bill 2015* (SA), proposed section 26DA

## **Annexure A – Current Legislation in NSW**

There are a range of existing criminal offences available in NSW which may be applicable to situations of technology facilitated abuse.

### ***Crimes Act 1900***

The *Crimes Act 1900* contains a number of offences which may be relevant to the non-consensual sharing of intimate images. These include:

- sending documents containing threats (s31)
- voyeurism (s91J)
- filming a person engaged in a private act for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification (s91K)
- filming a person's private parts for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification (s91L)
- installing a device to facilitate observation or filming (s91M)
- blackmail (s249K), and
- publishing indecent articles (s578C).

### ***Crimes (Domestic and Personal Violence) Act 2007***

Section 13(1) provides for an offence of stalking or intimidation with intent to cause fear of physical or mental harm. The offence has broad application to a range of offending behaviours, including:

- conduct amounting to harassment or molestation of a person, or
- an approach made to the person by any means (including by telephone, telephone text messaging, e-mailing and other technologically assisted means) that causes the person to fear for his or her safety.<sup>68</sup>

### ***Surveillance Devices Act 2007***

Surveillance devices may also be used in the context of technology facilitated abuse. The relevant offences are:

- prohibition on installation, use and maintenance of listening devices (s7)
- installation, use and monitoring of optical surveillance devices without consent (s8)
- prohibition on installation, use and maintenance of tracking devices (s9)
- prohibition on installation, use and maintenance of data surveillance devices (s10)
- prohibition on communication or publication of private conversations or recording of activities (s11)
- possession of record of private conversation or activity (s12)
- manufacture, supply and possession of listening and other devices for unlawful use (s13), and
- communication and publication of information from the use of a data surveillance device (s14).

### ***Criminal Code Act 1995 (Cth)***

Part 10.6 provides for the criminalisation of conduct relating to the misuse of telecommunications services. In particular, it provides for an offence of 'using a carriage service to menace, harass or cause offence' under section 474.17.

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<sup>68</sup> *Crimes (Domestic and Personal Violence) Act 2007*, section 7

## Annexure B – South Australian Legislation

### Summary Offences Act 1953 (SA)

#### 26A Interpretation

In this Part—

**carriage service provider** has the same meaning as in section 87 of the Telecommunications Act 1997 of the Commonwealth;

**distribute** includes—

- a) communicate, exhibit, send, supply, upload or transmit; and
- b) make available for access by another,

but does not include distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider;

**film** means take moving or still images by any means;

**humiliating or degrading act**, in relation to a person, means—

- a) an assault or other act of violence against the person; or
- b) an act that reasonable adult members of the community would consider to be humiliating or degrading to such a person (but does not include an act that reasonable adult members of the community would consider to cause only minor or moderate embarrassment);

**humiliating or degrading filming** means filming images of another person while the other person is being subjected to, or compelled to engage in, a humiliating or degrading act, but does not include filming images of a person who consents to being subjected to, or engaging in, a humiliating or degrading act and consents to the filming of the act;

**indecent filming** means filming of—

- a) another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy; or
- b) another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or
- c) another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed;

**internet content host** has the same meaning as in Schedule 5 of the Broadcasting Services Act 1992 of the Commonwealth;

**internet service provider** has the same meaning as in Schedule 5 of the Broadcasting Services Act 1992 of the Commonwealth;

**invasive image** means a moving or still image of a person—

- a) engaged in a private act; or
- b) in a state of undress such that the person's bare genital or anal region is visible,

but does not include an image of a person under, or apparently under, the age of 16 years or an image of a person who is in a public place;

**law enforcement personnel** means police officers or officers of a law enforcement agency;

**private act** means—

- a) a sexual act of a kind not ordinarily done in public; or
- b) using a toilet;

**private region of a person** means the person's genital or anal region when covered by underwear or bare.

### **26C Distribution of invasive image**

1) A person who distributes an invasive image of another person, knowing or having reason to believe that the other person—

- a) does not consent to that particular distribution of the image; or
- b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally,

is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

2) It is a defence to a charge of an offence against this section to prove—

- a) that the conduct constituting the offence—
  - i. was for a purpose connected to law enforcement; or
  - ii. was for a medical, legal or scientific purpose; or
- b) that the image was filmed by a licensed investigation agent within the meaning of the Security and Investigation Agents Act 1995 and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit and the distribution of the image was for a purpose connected with that claim.

### **26E—General provisions**

1) An apparent consent will not be an effective consent for the purposes of this Part if—

- a) given by a person who is under 16 years of age or mentally incapacitated; or
- b) obtained from a person by duress or deception.

2) The following persons do not commit an offence against this Part:

- a) law enforcement personnel and legal practitioners, or their agents, acting in the course of law enforcement or legal proceedings;
- b) medical practitioners, or their agents, acting in the course of medical practice or for genuine educational or research purposes.

3) If a court finds a person guilty of an offence against this Part, the court may order the forfeiture of anything that has been seized and consists of, or contains a record of, moving or still images taken in the course of the commission of the offence, or consists of equipment used for the commission of the offence.

4) A court making an order for forfeiture of any equipment or item under subsection (3) may, if it thinks fit, allow the offender or any other person an opportunity to retrieve (in accordance with any directions of the court) specified records, or other material, not involved in the commission of the offence from the equipment or item before it is so forfeited.

## Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA)

### 26DA Threat to distribute invasive image or image obtained from indecent filming

- 1) A person who—
  - a) threatens to distribute an invasive image of a person; and
  - b) intends to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is around,is guilty of an offence.

#### Maximum penalty:

- a) if the person filmed was a minor—\$10 000 or imprisonment for 2 years;
- b) in any other case—\$5 000 or imprisonment for 1 years.

- 2) A person who—
  - a) threatens to distribute an image obtained by indecent filming of a person; and
  - b) intends that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused,is guilty of an offence.

#### Maximum penalty:

- a) if the person filmed was a minor—\$10 000 or imprisonment for 2 years;
- b) in any other case—\$5 000 or imprisonment for 1 years.

- 3) It is a defence to a charge of an offence against subsection (1) or (2) to prove—
  - a) that—
    - i. the person filmed or consented to that particular distribution of the image the subject of the filming; or
    - ii. the person consented to distribution of the image the subject of the filming generally; and
  - b) that the person had not, at the time of the alleged offence, withdrawn consent to the distribution of the image.
- 4) This section applies to a threat directly or indirectly communicated by words (written or spoken) or by conduct, or partially by words and partially by conduct, and may be explicit or implicit.

## Annexure C – Victorian Legislation

### Summary Offences Act 1966 (Vic)

#### 40 Definitions

In this Division—

**child** means a person under the age of 18 years;

**community standards of acceptable conduct**, in relation to the distribution of an intimate image, includes standards of conduct having regard to the following—

- a) the nature and content of the image;
- b) the circumstances in which the image was captured;
- c) the circumstances in which the image was distributed;
- d) the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image;
- e) the degree to which the distribution of the image affects the privacy of a person depicted in the image;

**consent** means free agreement;

**device** means device of any kind capable of being used to observe a person's genital or anal region including—

- a) a mirror; and
- b) a tool when used to make an aperture; and
- c) a ladder—

but does not include spectacles, contact lenses or a similar device when used by a person with impaired sight to overcome that impairment;

**distribute** includes—

- a) publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not; and
- b) make available for access by any other person, whether by a particular person or not;

**genital or anal region**, in relation to a person, means the person's genital or anal region whether bare or covered by underwear;

**intimate image** means a moving or still image that depicts—

- a) a person engaged in sexual activity; or
- b) a person in a manner or context that is sexual; or
- c) the genital or anal region of a person or, in the case of a female, the breasts;

**law enforcement officer** means—

- a) a police officer or a member of the police force or police service of any other State or of the Northern Territory; or
- b) a member of the Australian Federal Police; or
- c) a member of staff of the Australian Crime Commission established by the Australian Crime Commission Act 2002 of the Commonwealth;

**place** includes land, premises and a vehicle;

**visually capture**, in relation to a person's genital or anal region, means capture moving or still images of that region by a camera or any other means in such a way that a recording is made of those images or those images are otherwise capable of being distributed.

#### **41DA Distribution of intimate image**

- 1) A person (A) commits an offence if—
  - a) A intentionally distributes an intimate image of another person (B) to a person other than B; and
  - b) the distribution of the image is contrary to community standards of acceptable conduct.

#### **Example**

A person (A) posts a photograph of another person (B) on a social media website without B's express or implied consent and the photograph depicts B engaged in sexual activity.

- 2) A person who commits an offence against subsection (1) is liable to level 7 imprisonment (2 years maximum).
- 3) Subsection (1) does not apply to A if—
  - a) B is not a minor; and
  - b) B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to—
    - i. the distribution of the intimate image; and
    - ii. the manner in which the intimate image was distributed.

#### **41DB Threat to distribute intimate image**

- 1) A person (A) commits an offence if—
  - a) A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and
  - b) the distribution of the image would be contrary to community standards of acceptable conduct; and
  - c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.
- 2) A person who commits an offence against subsection (1) is liable to level 8 imprisonment (1 year maximum).
- 3) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit.