Advocate for Children and Young People

acyp.

ACYP Submission on The sharing of intimate images without consent – 'revenge porn'

About ACYP

The Advocate for Children and Young People (ACYP) welcomes the opportunity to provide comments on the proposed creation of an offence to address the non-consensual sharing of intimate images.

Established under the *Advocate for Children and Young People Act 2014*, ACYP is an independent statutory appointment overseen by the Parliamentary Joint Committee on Children and Young People. ACYP advocates for and promotes the safety, welfare and well-being of children and young people aged 0-24 years and promotes their participation in decisions that affect their lives. Our activities include:

- making recommendations to Parliament, and government and non-government agencies on legislation, policies, practices and services that affect children and young people;
- promoting children and young people's participation in activities and decision-making about issues that affect their lives;
- conducting research into children's issues and monitoring children's well-being;
- holding inquiries into important issues relating to children and young people; and
- providing information to help children and young people.

Further information about ACYP's work can be found at: www.acyp.nsw.gov.au.

Background

Keeping children and young people safe from harm—including harm resulting from 'revenge pornography'—requires laws, policies, educational resources and stakeholders to be informed by the experiences and views of children and young people. ACYP and its precursor, the Commission for Children and Young People (Commission), have engaged in a number of consultation and research activities of relevance to the present discussion and to the broader issues of safety, sexuality and respect online and in relationships.

In October 2015, the NSW Parliamentary Joint Committee on Children and Young People established an Inquiry into the Sexualisation of Children and Young People (Inquiry), with particular reference to possible measure that ACYP could take to assist children and young people to navigate the cultural environment successfully. ACYP's submission and testimony were based on a substantial literature review of research concerning the impact on children and young people of growing up in a sexualised culture, as well as an examination of the measures available to educate and assist children, young people and parents to deal with these issues.

ACYP has also recently completed extensive consultation on the development of the NSW Strategic Plan for Children and Young People (Plan). The themes and directions of the Plan are based on ACYP's face-to-face consultations with more than 4,000 children and young people across the state, who identified the issues of safety and respect as particularly important. The Plan includes a number of indicators to measure the NSW Government's progress on these issues, including increased participation by children and young people in respectful relationships education programs.

Complementing these consultations, ACYP commissioned Galaxy Research to undertake online polling among children and young people 12-24 years to test the six themes of the strategic plan and gauge attitudes on related issues including youth culture, online safety and privacy.

Leading up to these activities, the Commission contributed funds to a significant qualitative and quantitative research project, *Sexting and Young People*, which was published as a book in 2015.[1] The study documented young people's perceptions and practices of sexting; analysed the public and media discourse around sexting; and examined the existing legal frameworks and sanctions around sexting in order to develop recommendations for appropriate and effective legislative responses.

ACYP will continue to build on our work in this area to identify the factors contributing to problems with safety and/or respect and to ensure that children and young people have access to resources which help them to develop the skills and support networks required to have a safe and positive experience online and in their relationships. Our upcoming Future of Relationships seminar will explore some of these themes. We would be happy to work with Justice and other agencies to facilitate further consultation with children and young people to inform the NSW policy framework.

Overview

We understand that the present discussion is focussed on the non-consensual distribution of intimate images and that the Department of Justice will be conducting a broader review of the offences pertaining to child sexual assault and 'sexting' over the course of 2016 and 2017. However, we have found it difficult to consider the issue of non-consensual distribution involving children and young people in isolation from these other topics. We therefore outline our broad position in relation to the range of behaviours relating to the distribution of intimate images of young people before addressing the specific discussion questions.

1. Consensual sexting

Research indicates that consensual sexting is commonplace among children and young people. The *Sexting and Young People* study found that, of those aged 13-15, 38% had sent a sexual picture or video and 62% had received one; of those aged 16-18, 50% had sent a sexual picture or video and 70% had received one; and of those aged 19 years and older, 59% had sent a sexual picture or video and 68% had received one.[2] It also revealed that the majority of these images are exchanged

[1] Crofts, T, Lee, M, McGovern, A & Milivojevic, S. (2015). *Sexting and young people.* Palgrave Macmillan, London.
[2] Ibid at p 110.

consensually, within committed relationships, and without peer pressure, coercion or negative consequences.[3] Young people do not feel that this activity should be against the law,[4] and we agree.

While it is important to provide young people with education about the potential risks of consensual sexting and what to do in the event that these risks are realised, it does not make sense to criminalise behaviour that is commonplace. Where there are concerns about the potential for harm in particular circumstances (for example, in a situation involving a 10 year old child who is displaying a developmentally inappropriate interest in sex) ACYP is of the view that a response focussed on the child's well-being and access to relevant support services will generally be a more appropriate way to address these concerns than a criminal justice response.

2. Non-consensual distribution of intimate images

The *Sexting and Young People* study found that of those who had received a sexual picture or video, 16-20% had shown it to someone else in person; 4-6% had shared it online; and 4-8% had forwarded it to someone else by MMS or email.[5] Though relatively uncommon, children and young people identify this behaviour as harmful and are of the view that it should be against the law.[6] We agree, and therefore support the proposal to introduce a new offence.

We believe there should be a range of penalties available that correspond to the wide array of situations that may be captured by the offence, with lesser penalties for younger offenders, those who act without malice and those who take steps to mitigate harm to the victim upon realising the consequences of their actions (for example, by voluntarily removing images that they have posted online). The offence should be covered by the *Young Offenders Act* so that diversionary options such as warnings, cautions and youth justice conferences are available for juvenile offenders. Youth justice conferences, in particular, may provide a safe space for an apology to the victim and an avenue to connect young offenders to relevant educational programs about respectful relationships.

We note that police, conference convenors and other stakeholders will need training to ensure that young victims are linked with appropriate support services; advised about potential ways to take down the images or mitigate the risk of further distribution; and not subjected to blame or re-traumatisation through the reporting process.

3. Child abuse material

The production and distribution of child abuse material is a categorically different issue to the behaviours discussed above, and this is the clear view of children and young people themselves.[7] Child abuse material laws are intended to address the sexual exploitation and abuse of children that

[3] Ibid at p 114-16, 121-25, 135.
[4] Ibid at p 150, 158-60.
[5] Ibid at p 125-26.
[6] Ibid at 188; Tallon, K, Choi, A, Keeley, M, Elliott, J and Maher, D, *New Voices/New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour*, National Children's and Youth Law Centre and Legal Aid New South Wales, 2012, p 36.
[7] Crofts, et al, above n 1, at p 158-60, 181-84.

occurs in the creation, possession and dissemination of child pornography.[8] However, the definition of child abuse material includes all 'offensive' images of children posing in a sexual manner or displaying their private parts, regardless of whether there is an element of abuse or exploitation in the production or use of the image.[9] There is no defence for 'selfies' or photos taken in the context of normal peer relationships.

Consequently, until the current legal framework is amended, child abuse material offences will continue to apply to consensual sexting and to non-consensual distribution of intimate images of those under the age of 16. This is likely to create confusion among children and young people, police and the community about how the new and existing offences are to operate. While there are many questions arising from this overlap, one particularly important question is whether victims of non-consensual distribution who are under the age of 16 will be able to come forward to report the offence without the risk of being charged with the production of child abuse material themselves.

In determining how the new offence/s will apply to children and young people, the central issue will be consent. We discuss this in more detail in our response to question 7 below. Briefly, however, our view is that a consistent legislative and educational approach to consent—across all aspects of sexual relationships, including the sharing and distribution of intimate images—is the best way to ensure that young people understand what is expected of them. Accordingly, we believe that the factors which negate consent in the context of physical sexual activity[10] should also negate consent in this context. That said, we are not convinced that the law should apply a static age of consent to the sharing of intimate images, given the evolving capacities of young people. Other factors, such as the maturity of the parties, the power dynamics of the relationship, and the content or context of the image, will also be relevant.

We suggest that the development of any new offence/s should occur in conjunction with the broader review of laws that apply to child sexual assault and child abuse material to promote consistency and to reduce the risk of confusion and unintentional consequences. We also recommend consultation with children and young people in the development of the offence/s and the creation of educational materials designed to promote lawful, ethical and safe relationships.

Questions for 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?

ACYP agrees that young people can be harmed when images they expected to remain private are shared without permission, regardless of whether or not these images are overtly sexual in nature.

[8] NSW Department of Justice and Attorney General (2009), *Report of the Child Pornography Working Party*, at p 22, 42.
[9] *Crimes Act 1900* (NSW) s 91FB(1).
[10] *Crimes Act 1900* (NSW) s 61HA(4)-(6).

We would therefore support an offence built around the concept of 'intimate' images, rather than one limited to 'sexual' images.

While the 'revenge pornography' discussion has focused largely on explicit nudity and sexual content, we note that some of the non-consensual recording offences in NSW and elsewhere have broader definitions of the type of material that may be considered 'private', 'intimate' or 'invasive' in this context.[11] For example, section 91I of the *Crimes Act 1900* (NSW) defines images of 'private parts' to include those that are bare as well as those covered by underwear,[12] and 'private acts' to extend beyond sexual contexts and encompass being in a state of undress, using the toilet, bathing or engaging in similar activities in circumstances where a reasonable person would expect to be afforded privacy.[13] In the ACT, the intimate observations or visual data offence extends to images of the breasts of a female, transgender or intersex person who identifies as female, whether covered by underwear or bare.[14] These definitions may offer guidance about the nature of content that the community expects to remain private or within the confines of an intimate relationship.

ACYP also agrees that the offence should account for diverse contexts and concepts of intimacy, bearing in mind that notions of intimacy can vary greatly both between and within cultures, and are highly dependent on the circumstances. As the *Sexting and Young People* study found, "Images are not static or fixed in meaning. They are context specific, and open to alternative readings and interpretations….an image sent to an intimate can be read as a romantic and sexy present. Yet, this same image when forwarded to unintended parties may be read (or decoded) very differently; it may be seen as pornographic, embarrassing, exploitative, or even trivial."[15]

One way to try to account for this variation without creating an overly broad definition of 'intimate image' could be to include the cultural and personal contexts of the victim as factors in determining whether an alleged offender's distribution violates 'community standards'. This is the approach Victoria has taken in criminalising the non-consensual distribution of intimate images contrary to community standards of acceptable conduct, which are to be determined with regard to the relevant circumstances of the depicted person.[16]

Alternatively, the offence/s could contemplate the alleged offender's intent to harm a victim, and include the cultural and personal contexts of the victim as factors relevant to establishing this intent. For example, the offence could provide that the offender has the requisite intent if they ought to have understood in all the particular circumstances—including the cultural and personal contexts of the victim—that their conduct would be likely to cause the victim harm. This might help cover the situation where a private photo of a person is shared with the understanding that it will greatly

[11] See eg, *Crimes Act 1900* (NSW) s 91I; *Summary Offences Act 1953* (SA) s 26A; *Criminal Code 1899* (Qld) ss 207A, 227B(2); *Police Offences Act 1935* (Tas) s 13B(2); *Crimes Act 1900* (ACT) s 61B.
[12] *Crimes Act 1900* (NSW) s 91I(1).
[13] *Crimes Act 1900* (NSW) s 91I(2).
[14] *Crimes Act 1900* (ACT) s 61B(10).
[15] Crofts, et al, above n 1, at p 171.
[16] *Summary Offences Act 1966* (Vic) s 40 ("'community standards of acceptable conduct', in relation to the distribution of an intimate image, includes standards of conduct having regard to the following—…(d) the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image").

upset the particular person but would not necessarily offend general community standards. The Victorian *Crimes Act* takes a similar approach to stalking.[17] We say more about how the new offence/s might address the intention of the offender in our response to discussion question 4 below.

To inform the drafting of the offence/s, ACYP encourages direct consultation with young people from a variety of cultural backgrounds about the nature of intimate material being exchanged and the types of content that are most likely to give rise to harm if shared without permission. We would be happy to assist with these activities. We also suggest consultation with police and community services in Victoria, South Australia and other jurisdictions where non-consensual distribution offences have already been enacted about the nature of incidents that have come to their attention and any definitional gaps or other issues that they have identified in implementing these offences.

Question 2

a) How should 'distribution' be defined in the new offence/s?

ACYP encourages consultation with young people about the ways in which intimate images are typically shared and how the offence can be drafted to ensure that it covers emerging technologies and practices. It may also be helpful to look at the way that 'distribution' has been defined in relation to child abuse material (or 'child pornography') offences, given that these provisions are meant to have a broad and flexible application.

b) Should 'distribution' include the sharing and showing of images?

We agree with the Senate Committee that the definition of 'distribution' should account for the sharing of images both with and without the assistance of technology. The *Sexting and Young People* research found that showing a sexual picture or video to someone else in person was actually far more common than sharing it online or forwarding it by MMS or email.[18] The impact this has on the victim will depend on the context, but there is certainly capacity to cause serious harm without circulating an image online (for example, by posting it on flyers around the victim's school or community).[19] Moreover, both scenarios allow for a third person to re-distribute the images electronically by simply taking a photo and sending it to others.

Another way that an intimate image may be shared is by leaving it in a place where it is likely to be found by others. This type of behaviour can amount to stalking in Victoria,[20] and we suggest that it could be included in the definition of 'distribution' in any new offence/s. We note that the online

[17] *Crimes Act 1958* (Vic) s 21A(3).
[18] Crofts, et al, above n 1, at p 125-26.
[19] A similar public shaming via posters was reported in Auckland, New Zealand. Croffey, A. *Woman shames Tinder ex who 'tricked' her into bed with warning posters.* Sydney Morning Herald. 29 January 2016. Available at: http://www.smh.com.au/lifestyle/life/woman-shames-tinder-ex-who-tricked-her-into-bed-with-warning-posters-20160128-gmgjw8.html.
[20] *Crimes Act 1958* (Vic) s 21A(2)(e).

equivalent of leaving something where it can be found by others—making an image available for access—is captured in the Victorian and South Australian laws.[21]

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 the 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?**

At least six Australian states and territories have offences concerning non-consensual filming,[22] but NSW is the only one which stipulates a particular purpose for doing so.[23] ACYP is of the view that the law should apply to the non-consensual taking/recording of intimate images for reasons beyond sexual arousal or gratification.

Research shows that intimate images are captured and subsequently shared for a variety of reasons beyond sexual arousal or gratification, including revenge, coercion, intimidation, control, blackmail, monetary gain, social status and 'fun'.[24] Recent news reports about a pornography-sharing site where boys were swapping intimate images of girls from a number of Australian schools without the girls' consent noted the mixed motives of participants and the negative and objectifying attitudes to females which fed into these motives, with one commentator pointing out, "The thrill is not just that they might see the girl who sits next to them in maths class, it's also that they can put in an order for [someone to get them an intimate image of] the girl from maths class. What these boys are really getting off on is the sense of power they feel over these girls, and the idea that they can own and obtain them like objects."[25] In this type of environment, shaped by increased access to gender-stereotyped pornography at younger ages,[26] it can be difficult to untangle a distinct motive of sexual gratification from the more general desire for amusement, prestige or power.

Given the variety and complexity of reasons for capturing an intimate image without consent, the broader social trends and attitudes affecting this behaviour, and the difficulty in proving an alleged offender's state of mind, ACYP does not believe that the relevant provisions should be limited to filming for a particular purpose. We do not necessarily have a view as to whether the new offence/s should extend to the taking of an intimate image or whether the existing offences should be

---

[21] *Summary Offences Act 1953* (SA) s 26A; *Summary Offences Act 1966* (Vic) s 40.
[22] *Crimes Act 1900* (NSW) s 91K-91L; *Summary Offences Act 1966* (Vic) s 41B; *Summary Offences Act 1953* (SA) s 26B; *Criminal Code 1899* (Qld) s 227A; *Police Offences Act 1935* (Tas) s 13A; *Crimes Act 1900* (ACT) s 61B.
[23] *Crimes Act 1900* (NSW) s 91K-91L.
[24] Henry, N. and Powell, A. *Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law*. Social & Legal Studies August 2016 25: 397-418, 400.
[25] Funnell, N. *Exclusive: Students from 71 Australian schools targeted by sick pornography ring*. News.com.au. 17 August 2016. Available at: http://www.news.com.au/lifestyle/real-life/news-life/students-from-70-australian-schools-targeted-by-sick-pornography-ring/news-story/53288536e0ce3bba7955e92c7f7fa8da
[26] The Office of the Advocate for Children and Young People, Submission to the NSW Parliamentary Joint Committee on Children and Young People Inquiry into the Sexualisation of Children and Young People at p 5-6.

amended, as long as there is a law covering non-consensual recording of intimate images regardless of whether it can be proven that the alleged offender did so for sexual arousal or gratification.

Question 4

a) How should the fault element be defined in a new offence of sharing an intimate image without consent?

There are several components of the offence/s which may include a fault element.

(i) The act of distributing the image

ACYP is of the view that the offence should only capture the intentional act of distributing an intimate image, and not the accidental sharing of files (for example, if someone who uses a cloud sharing tool is unaware that their default settings allow other users to access their images, or if someone sends an email to the wrong recipient). This is the approach taken in Victoria, where an offence is committed when a person intentionally distributes an intimate image of another person.[27]

However, we are also wary of creating difficulties for victims who lack evidence to prove that distribution was intentional. One way to try to achieve an appropriate balance could be to include an affirmative defence for an alleged offender who can show that they did not knowingly share the image. This is similar to the South Australian approach to humiliating or degrading filming, which explicitly places the onus on the defendant to show that their actions were unintentional.[28]

(ii) The harm or offence caused by the distribution

There are generally two ways in which an alleged offender's actions are measured as harmful or offensive in this context.

One approach is to assess the alleged offender's behaviour against community standards. Rather than considering the mental state of the alleged offender, this approach considers how the wider community views that person's actions. Victoria has taken this approach by criminalising the intentional distribution of an intimate image of another person which is contrary to community standards of acceptable conduct.[29]

Under the Victorian provisions, community standards are evaluated by reference to the nature and content of the image; the circumstances in which the image was captured; the circumstances in which the image was distributed; the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image; and the degree to which the distribution of the image affects the privacy of a person depicted in the image.[30] By incorporating the relevant circumstances of and effects on the victim into the concept of community standards, the Victorian offence may capture the distribution of some images which would not typically offend the broader

[27] *Summary Offences Act1966* (Vic) s 41DA(1)(a).
[28] *Summary Offences Act 1953* (SA) s 26B(4)(c).
[29] *Summary Offences Act 1966* (Vic) s 41DA(1); s 41DB(1)(b).
[30] *Summary Offences Act 1966* (Vic) s 40.

community but which the community recognises as creating harmful consequences for a particular person. This is an important aspect of the Victorian legislation and one that ACYP supports.

The other approach is to focus on the offender's recklessness or intent in causing harm to a particular victim. This is the way many jurisdictions address stalking, intimidation and domestic violence offences. For example, in NSW, it is an offence to stalk or intimidate another person with the intention of causing them to fear physical or mental harm.[31] An offender is taken to have the requisite intent if they know that their conduct is likely to cause fear in the other person.[32] As suggested above in our response to discussion question 1, the new offence/s could take this approach by providing that a person who distributes an intimate image commits an offence if they knew or ought to have understood in all the particular circumstances—including the cultural and personal contexts of the victim—that their conduct would be likely to cause the victim harm.

ACYP does not necessarily have a view as to which approach is preferable, as long as there is scope under the new offence/s to consider the particular context of the victim. We do, however, note that rapidly evolving technology and shifting social expectations about how people relate to one another through technology may result in considerable disagreement within the community about the standards of acceptable versus offensive conduct. Again, we urge direct consultation with young people on this topic.

b) Should the offence include an element of recklessness as to whether consent was given?

In relation to consent, there are obvious difficulties in attempting to prove a victim's state of mind, in addition to an alleged offender's understanding thereof. As a result, the consent-driven offences in many jurisdictions include an element of recklessness as to whether or not consent was given, rather than requiring the prosecution to establish an alleged offender's actual knowledge of non-consent in every case. ACYP supports this approach, and acknowledges that both the Victorian and South Australian provisions on non-consensual distribution cover situations where there is reason to believe that the depicted person does not consent to its distribution.[33]

However, we also note that there is divergence as to whether the issue of consent is built into the offence itself or available as a defence/exception to that the offence. This can determine who bears the burden of proving (non-)consent and an alleged offender's recklessness or knowledge thereof.

In South Australia, the lack of consent is an element of the offence. A person who distributes an invasive image of another person, knowing or having reason to believe that the other person does not consent to that particular distribution of the image, is guilty of the offence.[34] In other words, it is up to the prosecution to show that the alleged offender knew or should have understood that the victim did not consent based on the circumstances.

---

[31] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
[32] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(3).
[33] We note that the Commonwealth Senate Legal and Constitutional Affairs References Committee also supports this approach.
[34] *Summary Offences Act 1953* (SA) s 26C(1).

In Victoria, by contrast, the presence of consent provides an exception or defence. In this case, the offence of intentionally distributing an intimate image does not apply if the person depicted in the image is an adult who expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to the act and manner of its distribution.[35] This is also the approach taken by the Tasmanian offence for 'observations or recordings in breach of privacy' and the ACT offence for 'intimate observations or capturing visual data', which explicitly place the onus on the defendant to provide evidence that they had reasonable grounds to believe that the person being filmed consented.[36]

Unlike the Tasmanian and ACT examples, the Victorian legislation on non-consensual distribution is silent as to who bears the burden of proving express or implied consent. But even if the burden remains with the prosecution, the positioning of consent as an exception or defence is significant, as it signals an assumption that a person whose intimate image has been shared by another has probably not consented.

While NSW does not have an offence that covers this behaviour, it does have other consent-driven offences. In these provisions, the victim's lack of consent and the alleged offender's knowledge thereof is generally an element of the offence. For example, the private filming offences are committed when someone films a person for the purpose of sexual arousal or gratification knowing that the person does not consent to being filmed for that purpose.[37] Similarly, a sexual assault is committed when someone has sexual intercourse with a person knowing that the person does not consent.[38] Notably, in the context of sexual assault, an alleged offender's 'knowledge' includes being reckless as to whether the person consents or having no reasonable grounds for believing that the other person consents. [39]

ACYP is of the view that both the definition of consent and the associated fault element should be consistent across all consent-driven offences in NSW and in the best interests of children and young people. The content and rationale for these laws should be taught in respectful relationships and sex education. (We say more about this in relation to discussion question 5 below.)

Question 5

a) Should consent be defined for the purposes of the new offence/s?

Studies show that many young people are confused about what consent means.[40] Consequently, ACYP believes that 'consent' should be defined, and that this definition should be clear and consistent throughout all NSW educational programs and legislative provisions.

The current definition of consent in relation to sexual assault offences, found in section 61HA of the NSW *Crimes Act*, is free and voluntary agreement. This section provides a number of circumstances

[35] *Summary Offences Act 1966* (Vic) s 41DA(3).
[36] *Police Offences Act 1935* (Tas) s 13A(2A); *Crimes Act 1900* (ACT) s 61B(4).
[37] *Crimes Act 1900* (NSW) s 91K-91L.
[38] *Crimes Act 1900* (NSW) s 61I.
[39] *Crimes Act 1900* (NSW) s 61HA(3).
[40] Carmody, M. (2015). *Sex, Ethics, and Young People*. Palgrave Macmillan, New York, p 42-43.

which negate consent, including lack of capacity (because of age or cognitive incapacity); being unconscious or asleep; or consenting because of threats of force.[41] It also outlines some of the grounds on which non-consent can be established, including being substantially intoxicated; being intimidated, coerced or threatened; or being subject to the abuse of authority.[42]

If these circumstances negate consent to sexual intercourse, they should also negate consent to sharing of intimate images.

b) Should there be a requirement for consent to the sharing of intimate images to be explicit?

Studies examining the way that young people negotiate consent in sexual relationships show that subtle nonverbal behaviours are used to signal consent more frequently than explicit verbal behaviours.[43] Research also indicates that these signals tend to be "read according to particular gendered expectations of 'normal' male and female sexual behaviours" and that "[i]deas of what is to be 'expected' in intimate relationships create a backdrop or context where sexual coercion is normalised, and can itself become an expected, naturalised part of intimate relationships".[44]

In developing the new offence/s, it is important to consider that explicit consent is not necessarily the norm in young people's everyday negotiation of relationships, and that even explicit consent must be assessed against this backdrop. These considerations should also inform the development of materials to support educators to engage in challenging and nuanced conversations with children and young people about consent and respect in relationships.

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

ACYP is concerned that the concept of automatic revocation of consent on the conclusion of a relationship may lead to some confusion. Young people may take this to mean that consent given on one occasion during the course of a relationship is effective for all subsequent occasions for the entirety of that relationship. It is important to be clear that consent should never to be assumed, and needs to be given every time someone wants to have sex or share an intimate image.

Question 6

a) Should the new offence include threats to share intimate images?

Yes. ACYP agrees with the submissions to the Senate Committee highlighting that threats to distribute intimate images can be just as harmful as the actual distribution of these images.[45] These

[41] *Crimes Act 1900* (NSW) s 61HA(4).
[42] *Crimes Act 1900* (NSW) s 61HA(6).
[43] Carmody, above n 40, at p 43.
[44] Powell, A. (2007), 'Sexual pressure and young people's negotiation of consent', *Aware Newsletter*, Australian Centre for the Study of Sexual Assault, 14, at p 10.
[45] Eg Women's Legal Services NSW, *Commonwealth Senate Legal and Constitutional Affairs References Committee Hansard*, 18 February 2016, p 28.

submissions, as well as submissions to the Victorian Parliament's Inquiry into Sexting, establish that these threats can be used as tools for blackmail, abuse and coercive sex.[46]

In order for the new offence/s to be effective, people have to feel comfortable making a police report about this behaviour. However, the very reason why these threats can be so damaging is because many children and young people are dismayed by the thought of telling a parent, carer or other adult that they have shared intimate images of themselves with others. As a result, efforts must be made to reduce stigma and provide guidance to stakeholders to ensure that young victims of these threats are adequately supported to seek help.

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?

ACYP does not have a view as to whether the fault element should be based on creating a 'fear' or 'belief' in the victim that a threat will be carried out. However, we do agree that the offence should extend beyond conduct intended to cause this fear or belief and include circumstances where the offender should have known that their actions would be likely to have this result.

c) Should 'threats' be defined to include both explicit and implicit threats made by any conduct?

Yes. There are many ways for an offender to communicate this type of threat without stating it explicitly. Anecdotally, we understand that sending an ex-partner a link to a 'revenge pornography' website, or even a seemingly innocuous message about going through some interesting old photos, could amount to veiled threats and trigger considerable anxiety in the recipient, depending on the circumstances.

d) Should the offence apply irrespective of whether the intimate images actually exist?

Yes. If an offender knows (or correctly guesses) that a person has shared intimate images, they have the capacity to use this against the person as a tool of control or coercion, even if they are bluffing about having access to the images. Ex-partners may also pretend that they have kept images from the past or recorded intimate activities without their partner's knowledge. This could cause significant distress for the victim, even if it turns out to be false.

Question 7

a) Should the new offence/s apply to images of children?

Yes. In a survey conducted in NSW schools in 2012, students were asked to assess the level of harm associated with consensual and non-consensual sexting behaviours. Sending nude/sexy photos of someone without permission was identified as the most harmful type of conduct (71.3% said it was

[46] Eg Ibid; Eastern Community Legal Centre, *Submission no. 23 to the Victorian Inquiry on Sexting*, at p 2; BoysTown, *Submission no. 9 to the Victorian Inquiry on Sexting*, 12 June 2012, at p 11; National Children's and Youth Law Centre, *Submission no. 36 to the Victorian Inquiry on Sexting*, 15 June 2012, at p 3.

very harmful and another 19.6% said it was harmful).[47] 92.1% of the students said that the non-consensual distribution of these images should be a crime.[48]

Currently, the offences most likely to be applied in cases involving the distribution of intimate images of someone under the age of 16 are child abuse material offences. However, young people have consistently voiced the opinion that these offences should not apply to peer-to-peer sexting between young people.[49]

Accordingly, in the absence of child sexual abuse, we believe that the non-consensual distribution of images of children between children and/or young people should fall under the new offence/s and not under child abuse material offences. Otherwise, child victims may be hesitant to report their situation to the police for fear that the offender will be excessively penalised as a sex offender (or for fear that they will be punished for their own involvement in producing and sharing the images). Children who are victims of non-consensual distribution should have access to the remedies available through this offence and should not be fearful of negative consequences if they seek help.

In the event that child victims are carved out from the application of the new offence/s, we note that the definition of 'child' should be consistent across relevant provisions. If the offence/s only cover images of people over the age of 18, this will leave young people aged 16-17 in the awkward position of no longer being covered by child abuse material laws but also lacking the protection of the new offence/s.

b) How should the issue of consent be dealt with in relation to images of children?

We acknowledge the urge to protect children and young people from potential harm by asserting that their consent can never be considered valid when they are below a certain age (such as 16 years, which is the age of consent to sexual intercourse in NSW),[50] or by declaring that children and young people under a certain age may be able to consent to sexting in a close-in-age relationship but not to any further distribution (as in Victoria).[51] However, our view is that accepting a young person's consent in relation to some matters (eg sexting or sexual intercourse) and disregarding it in others (eg distribution of intimate images) is confusing to young people and risks undermining the broader message about what it means to obtain genuine consent in a respectful and healthy relationship.

The best way to ensure that children and young people understand what the law says about consent is to make sure that the law is consistent in its approach. Currently, NSW law sets the age of consent for sex,[52] as well as the point at which a young person is no longer considered a 'child' for purposes of child abuse material,[53] at 16 years. Accordingly, one way to achieve consistency would be to apply

[47] Tallon, et al, above n 6, at p 36.
[48] Ibid.
[49] Ibid at 8; 36-37; 40-44; 47-49; Crofts, et al, above n 1, at p 158-60, 181-84; Albury, K, Crawford, K, Byron, P & Mathews, B. (2013). *Young People and Sexting in Australia: Ethics, Representation and the Law*, ARC Centre of Excellence in Creative Industries and Innovation at the University of New South Wales.
[50] *Crimes Act 1900* (NSW) s 66C.
[51] *Crimes Act 1958* (Vic) s 70AAA(2); *Summary Offences Act 1966* (Vic) s 41DA(3)(a).
[52] *Crimes Act 1900* (NSW) s 66C.
[53] *Crimes Act 1900* (NSW) s 91FA.

this age of consent across the board, including in the context of sharing intimate images. However, ACYP is of the view that this would not be appropriate given that a substantial portion of young people under the age of 16 have said that they are engaging in this behaviour consensually.[54]

While we understand that the present discussion is focussed on the harmful conduct of non-consensual distribution, not considering the capacity of those under age 16 to give consent in this context would have obvious implications for further law reform around consensual sexting among this cohort. Therefore, we suggest that the development of any new offence/s should occur alongside the broader review of laws which apply to sexting and child sexual assault, and that the review should consider what a more nuanced approach to the age of consent might look like. For example, NSW might consider taking a stepped approach to the age of consent based on evolving capacities and close-in-age relationships, as in Victoria and Tasmania.[55]

We also suggest that police guidelines could be developed to support a consistent approach to responding to situations involving young people who are close in age and voluntarily engage in behaviour for which they are too young to consent under the law.

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?

ACYP is of the view that the ages of the parties must be a factor in determining whether consent to share and distribute intimate images is valid. However, we are not convinced that a sharp line should be drawn to automatically invalidate consent given by a person who is under 18 years to someone who is over 18. Below, we explore some of the potential scenarios and how the legal framework might apply.

(i) One party is 16-17 and one party is 18+

Currently, the age of consent for sexual activity is 16 regardless of the age of the other person.[56] The equivalent approach in this context would be to treat a case involving the non-consensual distribution of an intimate image of a 16-17 year old by someone who is 18+ in the same way as cases where both parties are adults.

We would support a broader approach to consent which takes into account the circumstances of the particular relationship, including the age and maturity of the parties and whether the older person is in a position of power relative to the younger person.

(ii) One party is under 16 and one party is 18+

In terms of non-consensual distribution cases involving a victim who is under 16 and an offender who is 18+, this becomes a question of which offence should apply—the non-consensual intimate image distribution offence or the child abuse material distribution offense. (There are also grooming offences which may apply.)[57]

---

[54] Ibid at p 110.
[55] *Crimes Act 1958* (Vic) s 45(4)(b); *Criminal Code Act 1924* (Tas) s 124(3).
[56] We note that the law precludes an adult over 18 from having a sexual relationship with any young person under 18 who is in their care. *Crimes Act 1900* (NSW) s 73.
[57] *Crimes Act 1900* (NSW) s 66EB.

One way to address this might be to explicitly state that the new offence/s are an alternative to child abuse material offences. This is the approach taken by the offence against the publication of indecent articles in NSW.[58] This provision criminalises the distribution of indecent 'articles' including photos, and provides that "A person cannot be convicted of an offence against this section and section 91H [Production, dissemination or possession of child abuse material] in respect of the same matter". Police guidelines could be developed (if they do not already exist) to assist officers to determine which charge, if any, is appropriate in the circumstances.

Where the situation involves the consensual exchange or distribution of an image of someone who is under 16 by a person who is 18+, it becomes a question of whether the younger person's consent is valid. Again, we encourage a nuanced approach to this issue. While there will certainly be circumstances where a wide age gap or other dynamics negate the younger person's consent, we can also envision situations where consent given by a person who is just shy of 16 to someone who has recently reached adulthood should be accepted. If distribution of the image ends up causing harm to the younger person, a welfare response focussing on the use of support services and take-down options can be used to mitigate this harm rather than a criminal justice response focussing on the punishment of the older partner who genuinely sought consent and understood it had been given.

(iii) Both parties are under 16

The same question arises in a non-consensual distribution case involving two children under the age of 16. ACYP is of the view that it is inappropriate to charge children with child abuse material offences in the vast majority of cases where the behaviour clearly does not fall within this definition. The only situation where consideration should be given to charging a child with child abuse material offences is where they have engaged in serious exploitation and paedophilic behaviour on par with adult sexual abuse of children. Anyone aged 10 to 18 years who has not engaged in serious exploitation of a much younger child should benefit from the provisions of the *Young Offenders Act*, with a charge of non-consensual distribution as the most serious option.

We note that the age of criminal responsibility is 10;[59] the principle of *doli incapax* applies to offenders under the age of 14;[60] and the age of consent to sexual intercourse is currently 16.[61] If the new offence/s were to introduce a stepped approach to the age of consent, consideration could be given to using these age brackets as potential guide posts. However, we would urge further consultation before adopting these parameters.

Finally, we reiterate our view that close-in-age, consensual youth sexting should not amount to criminal behaviour. We suggest that guidelines should be developed for stakeholders to help them assess the developmental appropriateness of the behaviour and determine what services may be available to help.

---

[58] *Crimes Act 1900* (NSW) s 578C.
[59] *Children (Criminal Proceedings) Act 1987* (NSW) s 5.
[60] Johnston, M. (2006). *Doli Incapax – The Criminal Responsibility of Children.* The Children's Court of New South Wales, Children's Law News.
[61] *Crimes Act 1900* (NSW) s 66C.

d) Should a conviction for the new offence/s be considered relevant for obtaining a working with children check?

ACYP notes that other offences of a similar nature—such as non-consensual filming and publication of indecent articles—are relevant for obtaining a working with children check.[62] We believe there will be some circumstances where the non-consensual distribution of intimate images of a child is indicative of an offender's risk to children more broadly, and other circumstances which are not symptomatic of any ongoing risk to children. Therefore, if the offence/s are to be considered for the purposes of obtaining a Working with Children Check, we are of the view that they should be triggers for assessment but not disqualifying offences. Our view is that young adults who are convicted of the new offence/s in relation to images of children deserve consideration of their individual circumstances before being denied the opportunity to work and volunteer with children.

We also note that consideration will have to be given as to whether the new offence/s are considered registrable offence/s for purposes of the child protection register. We feel strongly that no child or young person should be placed on the register unless a court finds that they present an ongoing risk to a particular child or to children more broadly.

We reiterate that where the victim is under 16 and the offence involves an element of child sexual abuse, ACYP is of the view that the child abuse material provisions (which are registrable offences relevant for obtaining a Working with Children Check clearance) would apply.

Question 8

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

There should be a range of penalties corresponding to the spectrum of potential harm to the victim, culpability of the offender and actions that may be covered by the offence/s.

In a NSW-based survey, students were asked to identify the best ways to address sexting, including the non-consensual distribution of nude or sexual images. The most popular responses were education and an apology,[63] which could form part of an outcome plan developed through youth justice conferencing.[64] Police cautions and community service were also popular responses.[65] The imposition of a prison sentence was the least popular response.[66]

ACYP broadly agrees with these views, and strongly believes that the new offence/s should be covered by the *Young Offenders Act* so that offenders who are under 18 years are eligible for warnings, cautions and youth justice conferences in appropriate circumstances. In relation to financial penalties, fines should not be imposed on those under age 18, and that any imposition of fines on young people aged 18-24 should take into account their capacity to pay and risk of financial hardship. Detention, of course, should always remain an option of last resort.

---

[62] *Child Protection (Working with Children) Act 2012* (NSW) Schedule 2(1)(p) and 9(y).
[63] Tallon, et al, above n 6, at p 37.
[64] *Young Offenders Act 1997* (NSW) s 52.
[65] Ibid.
[66] Ibid.

In determining the appropriate penalty, consideration might be given to mitigating circumstances such as any actions taken by the offender to remove an image from public view or to stop its redistribution.

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?

ACYP recognises the need for a fast, easy and accessible mechanism for a victim to seek removal of intimate images which have been posted online. We are concerned that an order which is only available after an offender has been convicted of a criminal offence will not provide timely relief for victims. The longer an image remains online, the more opportunities there are for it to be seen, saved and further shared by others, and the greater the risk of damage to a victim's wellbeing.

Ideally, a take-down regime would be available to victims immediately upon becoming aware that their image/s had been distributed and without having to involve the police or go through the criminal court process. But even if such a regime were available, there may be practical barriers to its implementation, particularly if the relevant site is hosted overseas and does not provide an avenue for people to remove images that they have posted.

Assuming that the person who posted the image is able to take it down, it may be helpful to include the offender's voluntary removal of the images as a mitigating factor in sentencing for the new offence/s. This could provide the police with a legal basis to suggest to offenders that their cooperation in promptly removing the image will be beneficial to all parties.

We note that the Children's e-Safety Commissioner has the power to investigate complaints about serious cyberbullying material targeted at Australian children under the age of 18 and to issue take-down notices to individuals and some social media sites.[67] The Commissioner also has the power to investigate reports of illegal online content, such as child pornography material, and to direct action to remove it.[68] As a result, the Commissioner is well-placed to help victims of 'revenge pornography' who are under the age of 18 to have their images removed from public view quickly, easily and with appropriate support.

However, the Commissioner does not currently have the power to deal with complaints about the publication of images depicting people who are 18 or older. Therefore, potential remedies for these victims are limited. We note that Google now provides an avenue for victims of 'revenge pornography' to request that these images are removed from Google search results of the victim's name.[69] In addition, most major social media platforms provide reporting mechanisms which allow users to flag images which may violate the site's terms of service or community standards.[70] Where a

[67] Children's e-Safety Commissioner, *Role of the Office*, https://www.esafety.gov.au/about-the-office/role-of-the-office.
[68] Ibid.
[69] Google, *Remove 'revenge porn' from Google*, https://support.google.com/websearch/answer/6302812?hl=en.
[70] Children's e-Safety Commissioner, *Social Media Services Safety Centres,* https://www.esafety.gov.au/complaints-and-reporting/cyberbullying-complaints/social-media-services-safety-centres.

site does not have a reporting mechanism or determines that an image does not violate its terms of service, a victim can attempt to compel removal through legal action in defamation, copyright or breach of confidence, but this is hardly a quick, easy and accessible option.

While acknowledging that this issue is beyond the scope of the current review, the NSW Attorney-General could raise with the Law, Crime and Community Safety Council the possibility of extending the Commissioner's complaints remit to cover young people aged 18-24 whose intimate images are distributed without their consent. The 'harmful digital communications' complaints agencies in New Zealand, which will be phased in by July 2017 to provide a speedy and efficient take-down mechanism for New Zealanders of all ages who are dealing with serious or repeated harmful digital communications,[71] is a model that may also be worth exploring.

Finally, we suggest consideration of whether other legal regimes in NSW could be adapted for use in this context. For example, Apprehended Violence Orders (AVOs) are intended to provide fast and effective protection for someone who is experiencing violence, threats, stalking, intimidation or harassment. A victim can apply for an AVO regardless of whether an alleged offender has been charged with or convicted of an offence. When making an AVO, a court may impose such prohibitions or restrictions on the behavior of a defendant as appear necessary or desirable to the court to ensure the safety and protection of a victim of domestic or personal violence.[72] This could include a prohibition or restriction on the defendant's distribution of intimate images. To address distribution that has already been threatened or taken place, the *Crimes (Domestic and Personal Violence) Act* could be amended to explicitly authorise a court to order the take-down or deletion of intimate images that the defendant possesses or has posted online. The breach of such a condition would amount to an offence.[73]

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

Depending on the framing of the offence/s, it may be appropriate to include one or more statutory defences. For example, the presence of consent may be included as a defence to the distribution of intimate images if the absence of consent is not built into the offence itself (as discussed above in response to question 4). There could also be a defence of unintentional distribution if the alleged offender can establish that a file was shared inadvertently (also discussed above in response to question 4).

We strongly believe that defences also need to be inserted into the child abuse material provisions to ensure that children and young people who engage in consensual, close-in-age sexting are not captured by these offences.

[71] https://www.justice.govt.nz/justice-sector-policy/key-initiatives/harmful-digital-communications/key-parts-of-the-act/
[72] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(1)
[73] *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1)