NEW SOUTH WALES
BAR ASSOCIATION

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Director, Crime Policy
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Dear Director,

The Sharing of Intimate Images Without Consent – 'Revenge Porn'

I refer to *The Sharing of Intimate Images without Consent – 'Revenge Porn'* Discussion Paper (Discussion Paper) released by the Department of Justice on 15 September 2016.

The New South Wales Bar Association (the Association) thanks the Department for the opportunity to comment on the Discussion Paper. We provide the following comments for the Department's consideration.

General comments

Recent inquiries both in Australia and overseas have highlighted the disturbing rise in 'revenge pornography'. Describing the offence as revenge pornography is misleading. Pornography offences involve the creation and distribution of images for sexual gratification. The behaviours associated with revenge pornography are instead aimed at inflicting harm, embarrassment, ridicule and shame on the victim.

The Association considers that finding an appropriate criminal legislative response is complex, both in terms of conceptualising the nature of the behaviours to be prohibited and in defining them. Submissions to inquiries have described the behaviour to involve capturing images with and without consent, distributing those images with clear intent and recklessness to cause harm and distress to the victim.

In some circumstances the victim (the person captured in the image/s) and

the distributor may have been involved in a relationship prior or at the time of distribution. In some cases, no relationship exists between the victim and distributor.

The distribution of images for sexual gratification appears to be a secondary intention, if at all. Distribution or threat of distribution of images for financial gain seems rare.

The ease and accessibility of online platforms has contributed to the speed and frequency information, including images may be distributed. While distribution and sharing of images predominantly occurs online and can be seen to cause the greatest distress, distribution of images also includes sending images via post to another person or physically showing the image to someone.

The Department's paper refers to 'Revenge Porn' offences in Victoria and South Australia. We would also draw the Department's attention to versions of the offence in section 2 of the *Abusive Behaviour and Sexual Harm (Scotland) Act* 2016 and section 33 *Criminal Justice and Courts Act* 2015 (Eng. and Wales).

While the Association is generally in favour of prohibition of the sharing of intimate images without consent, it has reservations about the approaches already taken in other jurisdictions. We address our concerns with reference to the questions in the Discussion Paper.

Discussion Question 1:

a) *What images should be captured by the new offences?*
b) *Should the definition include images which are intimate but not sexual, including by reference to cultural context?*

The Association considers that the essence of the wrongdoing is a breach of confidence, as has been recognised in recent decisions in *Wilson v Ferguson* [2015] WASC 15 and *Giller v Procopets* [2008] VSCA 236. Limiting the scope of the offence to particular types of images has the potential to be both under-inclusive and over-inclusive. The UK offence refers to "private sexual photograph or film", the Victorian offence to an "intimate image" defined as images depicting a person engaged in sexual activity, a manner or context that is sexual or images of private parts and the South Australian offence refers to an "invasive image" defined as engagement in a private act or in a state of undress such that private parts are visible.

As the Discussion Paper notes there are issues with these definitions. There are other images which if distributed can be just as distressing and harmful to the victim.

The Association has significant reservations with measuring what may be a distressing image by reference to community standards or ordinary behaviour. Given sexuality and sexual behaviour varies widely across the community establishing an 'ordinary' behavioural pattern is problematic and likely to limit the protection of the law to those who engage in what a court considers conventional behaviour.

The South Australian definition - which defines a private act as a 'sexual act of a kind not ordinarily done in public' - also fails to appreciate the importance of context. There are a range of sexual acts or sexualised situations that may regularly occur in public – but which if done in a deliberately private manner can cause distress if distributed. "Ordinarily" is also an unfortunate term in that it might suggest that the only sexual acts not covered by the offence are those which would be not ordinarily be done in private. There are unlikely to be any sexual activities that are not undertaken in private.

A fundamental aim of an offence of this kind is to prevent harm to others. It would be inappropriate to convict persons of the offence where there is no likelihood of harm to a victim. It would also be inappropriate not to convict if the nature of the image was not sexual but caused distress to the victim. The Association submits that the Department should give consideration to the likely effect the act of distributing the images has on victims and whether this would be an appropriate measure of describing the scope of the offence.

For example, the offence of intimidation in section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* requires 'physical or mental harm', the UK offence requires 'distress' and defamation cases founds a basis for damages on a finding of ridicule (cf *Shepherd v Walsh* [2001] QSC 358).

Discussion Question 2:

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

The Discussion Paper notes the lack of certainty over whether showing or sharing images amounts to distribution. Given the reason for the offence is to prevent distress to victims it would seem that any form of distribution likely to cause that distress should be prohibited. Passing a phone around a group of people with an image displayed on it is just as likely to be distressing as sending the image to those persons via post, email or social media. Even though the viewers of the image would not be able to permanently retain it by 'downloading' the image, physical distribution of the image can still amount to a breach of confidence and trust.

The Association would support an expansive definition of distribution that included methods by which third parties could temporarily view images.

The Association has reservations about the Victorian approach of basing liability on distribution that is "contrary to community standards of acceptable behaviour". That phrase is defined compendiously in section 40 to include all the circumstances of the parties involved, the image and the distribution. It does not provide a clear standard for liability that allows members of the public to act in compliance with the law. Every act of distributing an 'intimate image' may potentially give rise to criminal liability until a court determines it does not breach a community

standard. Criminal laws should allow citizens to be confident that proposed behaviour is or is not illegal. The Victorian approach fails to do this. While 'community standards' may well be an appropriate basis for a defence, it should not be the principle basis for liability.

Furthermore, the Victorian offence contains no requirement for subjective wrongdoing on the part of the accused. As this offence is proposed on the basis of intentional harm to victims, it is inappropriate to create liability on the basis of non-accidental distribution that is objectively against a community standard but without any reference to the broader intentions of the accused towards the victim.

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 Association would not be in favour of amending sections 91K and 91L of the *Crimes Act 1900.* Sections 91K and 91L are aimed at criminalising different behaviours – the sexual gratification of the person who captures the image. The behaviour discussed in the Discussion Paper involves causing distress to the victim and sexual gratification or otherwise of the distributor (accused) is irrelevant. We note that the person who captures the image, may not necessarily be the person who distributes the image, although in most cases it will be.

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?*

The Association considers that there are difficulties with a reliance on a lack of consent to found liability in these offences. Factually, consent to distribute may have been given at the time of the creation of the image without understanding of the full ramifications of that consent. The circumstances and impact of withdrawing consent at a later time is problematic. This is likely to be even more difficult if the image is one that was initially voluntarily distributed to another by the victim themself. Proving the exact extent of any consent is likely to be difficult to establish if there are conflicting accounts. Legally, any implication of limited consent or deeming of certain forms of images to not have consent for distribution may be troubling. It could involve the legislature or the courts making moral or hypothetical community based decisions about private behaviour. Practically, any need to have victims give evidence in court as to the circumstances in which the images were created may be a disincentive to proceed with a prosecution, and may

involve a re-victimisation. Proof of negatives, in this case non-consent, should be avoided if possible.

Conversely, if there is evidence of consent to distribute the image, such consent should be a complete defence available to an accused. This is the approach taken in the UK and Victorian offences with which the Association is broadly in agreement.

The Association considers that consideration should be given to the Scottish approach to the fault element: "A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress" (section 2(1)(b) of the *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*). This emphasises the harmful intent or disregard the accused has and may be able to found liability without the need to rely on proof of non-consent.

Discussion Question 5:

a) *Should consent be defined for the purposes of the new offence/s?*
b) *Should there be a requirement for consent to the sharing of intimate images to be explicit?*
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?*

As discussed above, the Association considers a better basis for liability is a breach of confidence. This can be determined by all the relevant facts. A confidential image would remain confidential unless explicitly agreed by all the parties that it no longer be confidential.

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 Association is supportive of the notion of an offence of threatening to distribute such images, whether they exist or not. However, it considers in such cases, there would need to be a requirement of a clear intent to cause harm or distress by making the threat to the victim rather than simply threatening to distribute or to actually distribute. Recklessness would not be a sufficient basis for liability. It would be unlikely that a communication of an intention to distribute an image would be seen as a threat unless it was accompanied with an intention to cause harm.

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?*

There is evidence of widespread 'sexting' amongst minors. The legislative intention of the *Young Offenders Act* is to deal with minors in an alternative manner to adults committing crime. Due to these considerations, the Association would be reluctant to see any criminal liability falling on minors for distributing an intimate image without detailed consideration and further consultation. The Association supports deferring this question to be part of the forthcoming review of child sexual assault offences foreshadowed in the Discussion Paper.

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 maximum penalty for such an offence would be determined by the scope of the offence and the fault elements required. The Association considers it is premature to comment on this question.

Notices or Orders to take down the material would seem to be an essential part of preventing occurrence of this behaviour. The Association suggests that the appropriate mechanisms and enforcement could be developed in consultation with media regulatory authorities.

The Association notes the Western Australian Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016. The Association supports apprehended violence orders being extended to prohibit distribution of intimate images, but notes that such orders can only be a deterrent to future behaviour and are no substitute for a substantive offence. Indeed, if the basis for the restraining order is evidence of behaviour that has already occurred much of the harm to the victim will have already been occasioned.

Discussion Question 9:

Should the new offence include one or more statutory defences?

The Association considers that a range of exclusions or defences should be available. The UK offence provides a model where defences are provided for journalism, public interest or previous disclosure. No breach of confidence should arise if there is consent to the distribution by the victim which has not been revoked.

The Association looks forward to further consultations with the Department regarding this matter.

Should you or your officers have any questions regarding this letter please do not hesitate to contact me on 02 9232 4055 or by email at amcconnachie@nswbar.asn.au.

Yours sincerely,

[redacted]

Alastair McConnachie
Deputy Executive Director