Children's Court of New South Wales

21 October 2016

Executive Director, Strategy and Policy
Department of Justice
DX 1227 SYDNEY

To the Executive Director,

Re: Consultation on new offence for the non-consensual sharing of intimate images ("revenge porn")

Thank you for providing the Children's Court of New South Wales with the opportunity to comment on the Discussion Paper, "The sharing of intimate images without consent – 'revenge porn'".

There is no doubt that the extraordinary growth in access to technology in recent years has resulted in an equally extraordinary growth in the sharing of intimate images, particularly by children and young adults. It is therefore, important that the implications of any new offence on children be given appropriate consideration, whether from the perspective of a child offender or child victim. However, it is also important to ensure that considerations relating to the non-consensual sharing of intimate images involving children are not conflated with policy considerations underpinning existing child abuse offences and the comments presented in this submission are made on this basis.

The Children's Court will not respond to all of the questions in the Discussion Paper but will instead make submissions on the specific issues set out below.

Discussion Question 1: Defining the scope of the offence
"Images"
The Discussion Paper refers to the proposed offence as an offence of sharing intimate "images". The Children's Court suggests that consideration be given to widening the scope of the proposed offence to apply to material other than images. For example, the offence of possessing, disseminating or producing child abuse material relates to "material", defined under s 91FA of the *Crimes Act 1900* (NSW) as including any film, printed matter, data or any other thing of any kind (including any computer image or other depiction). While the use

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of visual material may be the predominant means of sharing information as an act of "revenge porn", conduct may be equally culpable which shares, for example, a sexually explicit text message or email or sound recording.

"Intimate"

The Children's Court takes the view that the proposed offence should be limited to images (or material) of a sexual rather than intimate nature. The parameters of what is "intimate" are too uncertain and may involve a wide range of images that should not give rise to criminal liability. It is worth noting that the offence of voyeurism under Part 3 Division 15B of the *Crimes Act 1900* is limited to observing or filming acts relating to a person's toilet or sexual acts "of a kind not ordinarily done in public". Similarly, the offence relating to child abuse material is limited in its scope to material of a sexual nature (as well as material depicting child physical abuse). It is difficult to justify a policy rationale that extends the scope of the proposed offence relating to revenge porn beyond the scope of these existing offences, which are primarily focused on acts of a sexual nature. For this reason, the Children's Court favours the definition in the Victorian legislation over that in the South Australian legislation. Section 40 of the *Summary Offences Act 1966* (Vic) uses the phrase, "intimate image", but defines it as an image depicting a person "engaged in sexual activity; or a person in a manner or context that is sexual; or the genital or anal region of a person or, in the case of a female, the breasts". Consideration might be given to the inclusion in the proposed offence of a requirement that the act be one "of a kind not ordinarily done in public", which is consistent with the articulation of the offence of voyeurism in s 91I of the *Crimes Act 1900* (NSW). This addresses the concern raised in the Discussion Paper that acts that are generally considered socially acceptable public acts, such as adults kissing, not be brought within the parameters of the offence but would also cover images of a person toileting where those images showed the genital or anal region of a person.

Community standards component

The Children's Court agrees that the scope of the proposed offence should be limited in some way. However, the Court does not support the use of a community standards component as operates under the Victorian model, with a requirement to consider whether the distribution of the image is contrary to community standards of acceptable conduct. The Court prefers some form of "reasonable person" test, requiring consideration of whether a reasonable person would consider distribution of the image to be offensive or unacceptable. The notion of "community standards" is too vague and it may be difficult for a judicial officer to make a determination as to its meaning. By contrast, judicial officers are familiar with the notion of "reasonableness". Both the voyeurism and child pornography offences in NSW require consideration of a reasonable person test. For consistency and clarity, it is preferable to import a reasonable person test into the proposed offence.

Discussion Question 2: Definition of "distribution"

The Children's Court agrees that the definition of "distribution" should be sufficiently broad to encapsulate the various means, including technological means, of sharing material. It is worth noting that the child pornography

offence under s 91H of the *Crimes Act 1900* (NSW) uses and defines the term, “disseminate” rather than “distribute” and consideration might be given to adopting the same terminology for consistency. The definition should make it clear that “distribution” (or dissemination) can involve an act of sharing an image with one particular person, with a group of people or to the public at large. The Children’s Court considers that the definition of “distribution” should exclude acts that are not intentional, for example, where a person sends a photo to another by mistake, without the intention to share the photo, or where a person stores photos on a computer which is hacked into.

Discussion Question 4: Fault element

The Children’s Court agrees that it is overly restrictive to require proof of actual knowledge of a lack of consent. The Court agrees that the fault element of the proposed offence should allow for recklessness about consent. Recklessness is an established concept of criminal law. It is included within the definition of knowledge of consent in relation to sexual assault offences under s 61HA of the *Crimes Act 1900*. It is a concept with which the Courts are familiar. Inclusion of recklessness about consent also allows for the potential application of the proposed offence to a situation in which a person receives an image of another person (whether or not he or she knows that person) and distributes the image on to others, provided it can be shown that the person was reckless as to whether there was consent to that image being passed on.

Discussion Question 5: Consent

The Children’s Court takes the view that there should not be a requirement that consent must be given explicitly nor should the proposed legislation make express reference to the withdrawal of consent. These are issues that the Courts may take into account when determining whether the defendant knew or was reckless as to the victim’s lack of consent. The Children’s Court notes that “consent” is defined within the context of sexual assault offences under s 61HA of the *Crimes Act 1900* as free and voluntary agreement and that it may be worthwhile adopting this definition in the drafting of the proposed offence.

Discussion Question 6: Threats to share intimate images

The Children’s Court suggests that threats to share intimate images may be more appropriately dealt with under the existing legislative framework of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Discussion Question 7: Application to children and young people

The Children’s Court takes the view that the proposed offence should apply to young people both as victims and as defendants. The requirement to prove knowledge, or recklessness, about lack of consent should apply equally to young defendants and victims under the age of 16 years as it will do to adult defendants and adult victims. Child pornography offences that do not require proof of lack of consent would still be available in cases where the offending behaviour is in the nature of child abuse. The Court notes that the current review on “sexting” between child peers may possibly result in amendments to the child pornography provisions. Whatever these amendments may be,

“sexting” describes conduct that is fundamentally different from “revenge porn” in so far as sexting involves the consensual sharing of images. A young person who shares images knowing that there is no consent to the sharing, or reckless as to consent, should be able to be brought within the framework of the proposed revenge porn offence provisions.

In regards to Working With Children Checks, the Children’s Court takes the view that a finding of guilt as a young person under the proposed revenge porn legislation should not affect the ability to obtain a Working With Children Check as it is not indicative of a potential risk to children. The restrictions on obtaining a Working with Children Check should only be invoked where a young person has been found guilty of a child pornography offence or other offence where an element of child abuse is evident.

Discussion Question 8: Appropriate penalties

The Children’s Court considers that it may be impractical to make an order directing a young person to initiate action to remove or take down an image. This is because children are likely to lack the knowledge of how to go about taking down an image and the maturity and perseverance to negotiate with service providers. It may also simply be outside a young person’s control to be able to take such action, particularly where an image is posted on social media.

In conclusion, the Children’s Court makes the general observation that the introduction of a revenge porn offence is likely to be of particular relevance to young people, with the increasingly significant role that technology plays in adolescent interactions. It is crucial that the introduction of this legislation is accompanied by a comprehensive education campaign directed at assisting young people to understand the elements of the offence and the parameters of acceptable behaviour.

Yours sincerely

Judge Peter Johnstone
President