

Submission to Department of Justice

The sharing of intimate images without consent – ‘revenge porn’

1 Introduction

- 1.1 The Department of Family and Community Services (**FACS**) appreciates the opportunity to comment on the Discussion Paper, “*The sharing of intimate images without consent – ‘revenge porn’*” (**Discussion Paper**). FACS agrees that it is preferable to use the term ‘non-consensual sharing/distribution of intimate images’, as it provides a more accurate description of the behaviour in question, than the colloquial term ‘revenge porn’.
- 1.2 FACS maintains a broad portfolio of accountabilities, which involve the delivery of assistance and support to some of the most vulnerable members of the community. FACS has considered the impact of the proposal in two key areas, firstly, in a family violence context and, secondly, on children and young people.

2 General comments

- 2.1 FACS supports the creation of the proposed offences in-principle. We acknowledge that the distribution of intimate images without consent produces unique consequences. These consequences are often compounded by the ease with which information can be distributed on the internet and can result in serious and long-lasting implications for those who have been victimised.
- 2.2 Currently, Victoria and South Australia are the only Australian jurisdictions to criminalise the distribution of intimate images without consent,¹ however a number of international jurisdictions have created similar provisions.²
- 2.3 While FACS supports the creation of an offence in-principle, it notes that this course of action can only be justified where the relevant conduct is not captured by existing provisions. The Discussion Paper provides an analysis of areas of overlap between the *Criminal Code Act 1995* (Cth),³ *Crimes Act 1900* (NSW)⁴ and the *Surveillance Devices Act 2007* (NSW)⁵ and identifies gaps requiring legislative reform.

¹ *Crimes Amendment (Sexual and Other Matters) Act 2014* (Vic) ss 41DA - 41DB makes it an offence to distribute an intimate image without consent and an offence to threaten to distribute an ‘intimate’ image without consent; *Summary Offences Act 1953* (SA) s 26C makes it an offence to distribute an ‘invasive’ image without consent.

² See, for example: *Harmful Digital Communications Act 2015* (NZ), *Criminal Justice and Courts Act 2015* (UK), *Protecting Canadians from Online Crime Act 2014* (Canada), *Privacy Protection Bill 2015* (USA).

³ *Criminal Code Act 1995* (Cth) ss 474.17, 474.12, 474.19 - 474.20 and 474.25.

⁴ *Crimes Act 1900* (NSW) Div 15A.

⁵ *Surveillance Devices Act 2007* (NSW) ss7 - 14.

3. Answers to specific questions

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?

- 3.1 In FACS' view, the offence should be sufficiently broad to account for the distribution of images that are harmful, but not so broad as to capture conduct that is acceptable by community standards. The Victorian provisions appear to strike this balance well.
- 3.2 In Victoria, the offence captures 'intimate images' 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".⁶
- 3.3 The Victorian offence provisions achieve balance by providing a standard against which unacceptable conduct can be measured. This test requires the distribution of the intimate image/s to be contrary to "community standards of acceptable conduct". These community standards are defined to include "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 and the degree to which the distribution of the image affects the privacy of a person depicted in the image."
- 3.4 The Victorian Attorney-General Robert Clark, explained the function of the community standards test in his 2nd reading speech:
- "The law provides guidance for courts to determine the application of community standards of acceptable conduct in a particular case. The court is directed to consider the context in which the image was captured and distributed, the personal circumstances of the person depicted and the degree to which their privacy is affected by the distribution. The purpose of the community standards test is to ensure that offences do not unjustifiably interfere with individual privacy and freedom of expression, while at the same time targeting exploitative, harmful and non-consensual behaviour."*⁷
- 3.5 An alternative test can be found in Division 15A of the *Crimes Act 1900*, which deals with the production and dissemination of child abuse material. Under s 91FB(2) of the *Crimes Act 1900* (NSW) the relevant test is "whether reasonable persons would regard particular material as being, in all the circumstances, offensive" and includes: "(a) the standards of morality, decency and propriety generally accepted by reasonable adults, and (b) the literary, artistic or educational merit (if any) of the material, and (c) the journalistic merit (if any) of the material, being the merit of the material as a record or report of a matter of public interest, and (d) the general

⁶ *Summary Offences Act 1966* (Vic) s 40.

⁷ Victorian Parliamentary Debates, Legislative Assembly, 21 August 2014, p 2935.

character of the material (including whether it is of a medical, legal or scientific character.”⁸

Discussion Question 2:

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

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

- 3.6 FACS agrees that the offence should capture images that are shared through the use of technology (via social media, text etc) as well as physically, for example sharing a hard copy of an image or showing an image on a screen to another person.
- 3.7 FACS supports a definition of distribution that includes ‘to make available for access by any other person’. It should be immaterial whether another party has indeed accessed or viewed the image.
- 3.8 If there is to be an exception for internet/carriage service providers (ISP) as exists in the South Australian legislation, FACS believes there should be a mechanism to compel ISPs to remove the subject image. The image will continue to cause harm and distress to the victim if it remains accessible online, so it is important that take-down powers are explored.

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?

- 3.9 FACS considers that the fault elements of the offence should contain an intention to distribute the image, knowing, or having reason to believe, that the person depicted in the image did not consent to the distribution of the image. Relevant factors to consider when determining whether there were reasonable grounds to believe that the person did not consent include the age of the offender, their relationship to, and knowledge of, the victim.
- 3.10 FACS accepts the arguments made in submissions to the Senate Committee that a fault element of intending to cause harm fails to acknowledge the range of motivations for this conduct and may create a loophole that can be exploited by offenders.

⁸ *Crimes Act 1900* (NSW) s 91FB. See also: *Criminal Code Act 1995* (Cth) Division 474.

- 4.0 FACS appreciates the Commonwealth Director of Public Prosecutions' recommendation to include recklessness as to whether consent was given as an element of an offence provision, particularly where there is a pre-existing relationship. However, FACS is concerned about the implications this would have on a large number of young people.
- 4.1 FACS prefers the South Australian test as it expressly includes knowledge of the victim's lack of consent as part of the fault element. In addition, the offence should include qualifications such as capacity to consent – if a person is under the age of 16, consent should not be relevant (see the discussion at Question 7 below).

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 it 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?**

- 4.2 FACS accepts 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.⁹ Threatening to share or distribute intimate images of a person without their consent is an example of how modern technology is being used as a means of furthering the abuse and control of victims of domestic violence.
- 4.3 FACS notes that family violence, particularly in the context of Family Court or care and protection proceedings, may involve the use of threats to coerce, undermine and intimidate.¹⁰ For this reason, FACS agrees that the offence should also cover threats to distribute intimate images, whether implicit or explicit.
- 4.4 FACS supports the Senate Committee's recommendation that this offence apply irrespective of whether the intimate images exist.¹¹ In our view, it should be sufficient to establish the offence if the offender intends to cause the victim to fear that the image will, or is likely to, be distributed. Whether the image actually exists should be immaterial.

⁹ Ms Loughman, Women's Legal Services NSW, *Commonwealth Senate Legal and Constitutional Affairs References Committee Hansard*, 18 February 2016 p 28.

¹⁰ Royal Commission into Family Violence, 30 March 2016, Victoria, Volume III, Chapter 17, p 223.

¹¹ Department of Justice, *The sharing of intimate images without consent*, (Discussion Paper, September 2016), p 11.

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 and the victim is not?**
- d) Should a conviction for the new offence/s be considered relevant for obtaining a working with children check?**

- 4.5 Without question, communication technologies have a powerful presence in the lives of children and young people. As the agency charged with responsibility for protecting the safety, welfare and well-being of children and young people, FACS is acutely aware of the deleterious risks these technologies can pose. Therefore, consistent with its care and protection responsibilities and, as a matter of principle, FACS supports the application of the offence to images of children and young people (under 18 years).
- 4.6 Given the sexualised nature of these offences, FACS' view is that capacity to consent should align with the existing law regarding consent to sexual intercourse.¹² This will ensure the protection of children under the age of 16 by clearly providing that they are incapable of consenting to the distribution of intimate images of themselves by another person.
- 4.7 However, FACS is concerned about the impact that this may have on children and young people, particularly in cases where, for example, a 16 year old and a 15 year old exchange intimate images of themselves in the context of a teenage relationship. In this situation, the 16 year old could be prosecuted for sharing intimate images of the 15 year old without consent (as the 15 year old cannot consent). FACS notes that, in some Australian jurisdictions, consent by a person who is under the age of consent can be used as a defence to sexual offences. In Victoria, consent may be a defence to the offence of sexual penetration or an indecent act where the victim is aged 12 years or over and the accused is not more than 2 years older than the victim.¹³ Defences of this kind could be contemplated where young people are close in age.¹⁴
- 4.8 As the Discussion Paper notes, sharing intimate images of children (aged under 16 years) may overlap with child pornography offences. If the proposed offences are to operate alongside the offence provisions in Division 15A of the *Crimes Act 1900* (NSW), FACS' view is that the definition of 'child' should be consistent with the definition in Division 15A, that is, a 'child' is a person who is under the age of 16

¹² *Crimes Act 1900* (NSW) s 61HA.

¹³ *Crimes Act 1958* (Vic) s 44(5)(b), 47(2)(b).

¹⁴ See also: *Criminal Law Consolidation Act 1935* (SA) s 49(4) and *Criminal Code 1924* (TAS) s 124(3).

years.¹⁵ This is also consistent with the definition of ‘child’ for the purposes of the *Children and Young Persons (Care and Protection) Act 1998*.¹⁶

- 4.9 A further issue to resolve is whether young people can be held criminally culpable, notwithstanding cases where *doli incapax* is raised, for the commission of the proposed offences. There should be some defences to ensure that people, particularly children and young people, are not liable for criminal penalties in cases where criminal intent cannot be established. For example, where two 15 year-olds have exchanged images in a mutually consensual manner. FACS notes that there are a number of defences to Division 15A offences and that these defences should be considered if new offences are created.¹⁷
- 4.10 Where young people do come within the scope of the offence, FACS’ view is that education, diversion and rehabilitation are paramount.¹⁸ The Discussion Paper highlights the prevalence and accessibility of sexualised images on the internet. For young people, the availability of images, coupled with the neuro-biological development that takes place during adolescence, enhances the risks posed by the internet.¹⁹ It is crucial, therefore, that education and awareness about sexuality, vulnerability and maintaining a safe technological presence is provided to young people.
- 5.0 FACS submits that if offence provisions are to apply to young people, sentencing options should be consistent with the rehabilitative emphasis in s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW).²⁰ FACS proposes that the offences come within s 8 of the *Young Offenders Act 1997* (NSW) so that if a young person has committed an offence, they are eligible for diversion through the use of a warning, caution or conference under the *Young Offenders Act 1997* (NSW). Diversion under the *Young Offenders Act 1997* (NSW) could be conditional on the completion of online safety education or that diversion could be accompanied by appropriate education for children and young people.
- 5.1 In addition, FACS submits that young people should be exempted from the operation of the *Child Protection (Offenders Registration) Act 2000*. If the offences are to be included as registrable offences under the *Child Protection (Offenders Registration) Act 2000*, this may offend against the rehabilitative emphasis codified in s 6 of the *Children (Criminal Proceedings) Act 1987*.

¹⁵ *Crimes Act 1900* (NSW) s 91FA.

¹⁶ *Children and Young Persons (Care and Protection) Act 1998* s 3.

¹⁷ *Crimes Act 1900* (NSW) s 91HA: provides a defence to the production, dissemination or possession of child abuse material if “the defendant did not know, and could not reasonably be expected to know, that he or she produced, disseminated or possessed (as the case requires) child abuse material.”

¹⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(1).

¹⁹ Johnson, S.B, Blum, R.W, Giedd, J.N (2009) ‘Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy’ *Journal of Adolescent Health*, 45(3).

²⁰ See also: *R v GDP* (1991) 53 A Crim R 112.

- 5.2 Similarly, for the purposes of Working With Children Checks, FACS submits that a conviction of a child or young person under the proposed offence should trigger a risk assessment, not an automatic disqualification under Schedule 2.²¹

²¹ *Child Protection (Working with Children) Act 2012*, Schedule 2.