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LA TROBE UNIVERSITY

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21 October 2016

Justice Strategy and Policy
NSW Department of Justice
GPO Box 6
Sydney, NSW 2001

Dear Sir/Madam,

Re: Discussion paper: The sharing of intimate images without consent – 'revenge porn' – September 2016

Thank you giving us the opportunity to provide feedback on the scope of a new criminal offence in NSW to address the non-consensual distribution of intimate images, also known as 'revenge pornography'.

Two of us (Drs Powell & Henry) recently completed an Australian Research Council Discovery Project (DP130103094) on technology-facilitated sexual violence and harassment (TFSV). This project uncovered a range of adult experiences of technology-mediated sexual violence, digital harassment abuse, and analysed the effectiveness of legal and policy frameworks for responding to these new and emerging harms. In our Australian survey on online abuse and harassment (n = 2,956), we found that 1 in 10 Australians (aged 18-54 years) had a nude or semi-nude image of them distributed online or sent onto others without their permission (Powell & Henry 2015, 2016, forthcoming, 2017). As our research was not exclusively focused on image-based sexual violations, our survey did not explore further the contexts in which nude or semi-nude images were shared without permission. However, our 1 in 10 finding does demonstrate that the non-consensual sharing of intimate images is prevalent, affecting not simply young people but also adults members of the Australian community.

The three of us are now currently conducting more specific research that focuses on the non-consensual creation, distribution, and threat of distribution, of nude or sexually explicit images of adults. Our research represents the first Australian empirical study to investigate the phenomenon of image-based sexual abuse, focusing on the nature, impacts and prevalence, as well as implications of Australian legal responses. This research is being funded by La Trobe University and

a Criminology Research Council Grant, CRG08-16/17. At the time of this submission, we were in the final stages of data collection and will report on the data in early 2017.

Previously, we have provided commentary and witness statements on legal responses (both criminal and civil) to non-consensual imagery to the: Australian Law Reform Commission Inquiry into Serious Invasions of Privacy in the Digital Era (2014); to the NSW Parliamentary Law and Justice Committee's Serious Invasions of Privacy Inquiry (2015); and to the Federal Senate Inquiry into the Phenomenon Colloquially Referred to as 'Revenge Porn' (2016).

Our comments below indicate that we are supportive of a new criminal offence in NSW that criminalises image-based sexual abuse, including: images created or distributed of sexual assault; images created or distributed that have been obtained from the use of a hidden device to record another person; the distribution of stolen or hacked images from a person's computer or other device; the distribution of photo-shopped images; and the distribution of images obtained consensually in the context of a relationship with another person. We also believe that the threat of distribution of intimate images should be made a criminal offence.

Our submission below first provides some background into the terminology of 'revenge pornography' and the impacts of such acts, before then providing feedback on the scope and form of new offences to address these behaviours. We end by making some further suggestions for responding to these harms over and above the criminal law.

1. 'Revenge Pornography'

'Revenge pornography' is a media-generated term used to describe foremost the distribution of nude, semi-nude or sexually explicit images of another person without their consent. While we support attention being directed towards this harmful conduct and for legislative intervention as a response, we note, along with others, that the term 'revenge pornography' is a misnomer since not all perpetrators are motivated by feelings of revenge, and not all content constitutes or serves the purpose of 'pornography'. Labelling such images pornographic may in fact be highly offensive to victims. Some scholars have alternatively labelled the behaviour as 'non-consensual pornography' (Citron & Franks 2014; Franks 2015), 'involuntary porn' (Burns 2015), or 'non-consensual sexting' (see Henry & Powell 2015a). However, these alternate terms are also problematic, in part because they tend to focus on the behaviour of the victim (e.g. the voluntariness of the creation and/or distribution of the image) rather than on either the *abusive impacts* of the behaviour, or the *perpetrator's actions* as a form of sexual violation, abuse or exploitation.

Consequently, we prefer to name these harmful behaviours as they are – as a form of *image-based sexual abuse* (Powell & Henry forthcoming, 2017). Such a term better captures the diverse range of harmful behaviours increasingly reported by victims and allows for clearer distinctions between child sexual exploitation material and image-based sexual harms, which are not distinct in current terminology. We also use this broader term since it also captures not simply the distribution of images, but also the non-consensual *creation of images* as well as the *threat of distribution* – which can have equally damaging impacts as the non-consensual distribution of intimate images.

Image-based sexual abuse includes a wide range of behaviours and motivations. It includes images originally produced or obtained with and without the consent of the victim, and may involve: images

obtained (consensually or otherwise) in an intimate relationship (including images taken by the victim – also known as 'selfies'); photographs or videos of sexual assault/s; images obtained from the use of hidden devices to record another person; stolen images from the Cloud or a person's computer or other device; and pornographic or sexually explicit images that have been photo-shopped, showing the victim's face. While these wrongs are often perpetrated by jilted lovers who distribute or threaten to distribute images to get 'revenge' on their partner or ex-partner, perpetrators may also be acquaintances or strangers who distribute images in order to coerce, blackmail, humiliate or embarrass another person, or who distribute images for sexual gratification, fun, social notoriety or financial gain.

The methods of distribution are likewise diverse, including text message or email to family, friends, colleagues, employers and/or strangers; uploading images to pornography websites, including mainstream pornography sites, or specifically designed 'revenge pornography' or 'ex-girlfriend porn' websites; uploading images onto social media, thread or imageboard websites; or more traditional means of distributing images, such as through the post, letterboxes or in public spaces.

Image-based sexual abuse has been increasingly identified as a significant and serious problem, warranting substantial legislative reform and non-legal remedies (Citron & Franks 2014; Henry & Powell 2015a; Powell & Henry forthcoming, 2017). While the non-consensual distribution of intimate images may cause minimal harm to some individuals, context and circumstances may lead to profound, adverse and long-lasting impacts for many victims. For example, victims may be at risk of stalking if their personal details are revealed next to their images online or if information underneath their images incites others to make sexual demands of them in person. Images may be shared or distributed to children, intimate partners, family members, friends, colleagues and strangers, resulting in feelings of shame and humiliation to both the victim and their significant others. The victim's cultural, ethnic or religious background may precipitate further shame and humiliation. The experience may substantially affect relationships with others, including leading to a loss of employment or future employment prospects and relationship breakdown. Images are also being distributed (or threats are being used to distribute images) in domestic violence contexts, meaning that victims may be forced to engage in non-consensual acts, stay in the relationship or refrain from pursuing criminal charges or an intervention order. This adds a significant burden on victims who may already find it difficult to leave their violent partners (Henry & Powell 2015a). Like sexual violence generally, victims may be blamed for engaging in certain behaviours, including those who consent to having their photograph or video taken by another person, or those victims who take the image themselves. Victim-blaming is likely to exacerbate these diverse social, financial and psychological impacts.

Overall, victims may feel unsafe in their own homes and may suffer significant emotional distress. They may retreat from engaging in both offline and online social activities. They may suffer anxiety, depression and a host of other social, economic and psychological problems as a result of knowing that their images are out in cyberspace and that they have little control over who possesses these images, or whether those images are being continually distributed thereafter (Flynn et al 2015). To add to these concerns, the effect more generally is to consolidate the idea that the bodies of women and girls, as well as other sexual minorities, are available for objectification, consumption, degradation and ridicule (see Henry & Powell 2015b).

In the absence of specific criminal offences, such is the case in NSW (as well as other states and territories and at the federal level in Australia), the only available legal avenues for victims can be found in much broader criminal offences either at the state or federal level, or through the civil law. In NSW, under s578C of the *Crimes Act 1900* (NSW), perpetrators can be prosecuted for 'publishing indecent articles'. While an 'article' can include more broadly anything that can be read or looked at, the term 'indecent' is highly problematic in cases of image-based sexual abuse since it is defined in the Act as 'contrary to the ordinary standards of respectable people in this community'. This implies, we argue, that it is the image itself that is indecent, not the actual act of distributing the image without consent. As such, this existing offence is ill-suited to addressing these behaviours.

There are also other existing criminal offences under the same Act that might apply, for instance, 'filming a person engaged in a private act for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification' (s91K) or 'filming a person's private parts for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification' (s91L), as well as blackmail and voyeurism offences. In relation to s91L, in a recent case a female nurse took photos of a patient's genitals while she was under anaesthetic. In this case, as no motive of sexual gratification could be established, the nurse could not be prosecuted under any existing legislation (Scott 2015), demonstrating a major loophole in the law.

Other criminal offences might be applicable in NSW, including stalking and the misuse of surveillance devices. At the federal level, in the absence of a specific criminal offence as well there, the only applicable law is the telecommunications legislation under the *Criminal Code Act 1995* (Cth) (use of a carriage service to menace, harass or cause offence),

Unfortunately, existing civil laws are inherently limited in addressing the non-consensual creation, distribution and threat of distribution of intimate images for a number of reasons. First, these laws are ill-suited in their applicability and language. Second, there are significant costs associated with civil litigation for ordinary Australians who may not have the financial means to bring civil action. And third, the civil laws arguably privatise the issue and do not serve as an effective deterrent against future behaviours. The harms associated with such acts (as described above) further warrant it being specifically classified as a specific criminal offence, including at the federal level.

2. Framing New Offences in NSW: Issues for Consideration

Below we discuss provide feedback on the framing of a specific criminal offence in NSW.

<u>Discussion Question 1: Definition of 'Intimate Images'</u>

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

If a specific criminal offence is introduced, it is vital that the most appropriate terms are used to capture the wide variety of behaviours that fit under the umbrella term 'image-based sexual abuse', and that adequate definitions of such terms are provided.

We believe that 'sexual images' is too narrow and ambiguous because of confusion over what would constitute a sexual image. A similar argument has been made by UK Professors Clare McGlynn and Erika Rackley (2015) in relation to the *Criminal Justice and Courts Act 2015* (England and Wales) which defines images as 'private and sexual'.

We note that in South Australia, the term that is used is 'invasive image' which captures a broader array of private acts, such as a sexual act not done in public or the use of a toilet, or images of a person in a state of undress (where their bare genital or anal region is visible). We note that in South Australia the legislation does not currently specify whether images distributed non-consensually of the female breast would be covered. We believe that this omission is problematic, although note that the Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA) seeks to amend the definition to include images where the female breasts are 'visible'.

While the term 'invasive' can imply either the quick and harmful spread of something and/or the intrusion of privacy, which may seem to perfectly capture the nature of the harms of non-consensual imagery, we contend it is the *act itself* of creation, distribution or threat of distribution that is invasive, not the image per se. Therefore, 'invasive image' does not appear to capture the harms of the acts themselves sufficiently; for instance, the image may be a sexual act that was recorded in the context of a loving relationship and as such, the image itself is not 'invasive - rather, *it is the act of distributing that image without consent that is invasive*. Moreover, while the breadth of the South Australian legislation may be a strength, we believe that it is important to have a more specific criminal offence (or offences) in place to more clearly communicate the harms of image-based sexual abuse.

Under the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), amending the *Summary Offences Act 1996* (Vic) in Victoria, the term 'intimate image' is used. While this may be imply something confidential, personal or private, the legislation defines this term more narrowly as 'a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or content that is sexual; or (c) the genital or anal region of a person, or, in the case of a female, the breasts'. The Victorian legislation also states that community standards of acceptable conduct must be taken into account, including regard for the nature and content of the image, the circumstances in which the image was captured and distributed, and any circumstances of the person depicted in the image, including the degree to which their privacy has been affected.

Although there remain questions about how 'a person in a manner or content that is sexual' will be interpreted, we believe 'intimate images' is the most appropriate term and the most effective way of ensuring that both breadth and clarity are covered. The use of 'intimate images' better captures nude (or semi-nude), sexually explicit, or otherwise private images than does either 'sexual' or 'invasive' or 'private' images. We also support the definition to also include the female breasts (which would also include the breasts of a transgender or intersex person). We believe the Victorian legislation is a good model because it also requires that the intimate image be contrary to 'community standards of acceptable conduct', which is defined as having regard to: the nature and content of the image; the circumstances in which the image was captured and distributed; age, intellectual capacity and other circumstances of the victim; and the degree to which the distribution affects that person's privacy. Consideration should also be given to culturally-specific contexts in defining intimate images. For example a photograph of a Muslim woman without her hijab on may, in some contexts, be considered an intimate image, although it would not be considered

'pornographic' or 'sexually explicit' (pers. comm. Mohamad Taabba) and should not be covered by this specific legislation. However, there is a need to ensure flexibility in the legislation for judicial interpretation of circumstances where an image in some cultural contexts might not be considered 'sexual', but would in other cultural contexts; for example, an image of a woman with a very short skirt or low cut top might be considered sexually explicit in some Muslim societies (pers. comm. Mohamad Taabba) and the non-consensual distribution of such images should therefore be covered under a new offence.

In summary, we prefer 'intimate' images over 'invasive' or 'sexual' or 'private' images when defined as including nude, semi-nude or sexually explicit images, taking into consideration cultural and community standards not from an ordinary member of the Australian community, but from the perspective of an ordinary member of the victim's community.

Discussion Question 2: Definition of 'Distribution'

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

Although the terms 'distribute', 'disclose' or 'disseminate' appear variously in different 'revenge porn' laws internationally, the law needs to be clear about what distribution, disclosure, sharing or dissemination means. For instance, do these terms equally apply where a hidden device is used to record another person without their knowledge engaging in a sex act? Does showing another person a picture on a mobile phone (but not actually pressing send or upload) mean the same thing as 'distribute'? We believe there is need for the legislation to include a clearer definition than the one contained in s40 of the *Summary Offences Act 1996* (Vic) (which is similar to the South Australian definition) which defines 'distribute' as 'publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not'. It is not clear, for instance, whether 'communicate' could mean 'showing' another person an image. Any new offence should clearly state that distribution can mean sharing and showing, and that it is irrelevant whether it is distributed to one person or millions of people. This would also encompass more traditional, non-digital, forms of showing/sharing, such as distributing photographs of a person without their consent in mailboxes.

Discussion Question 3: Taking or Recording an Intimate Image Without Consent

(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 1990 be amended to apply when images are taken for purposes other than sexual gratification or sexual arousal?*

Although existing offences in NSW can be applied for addressing the *taking or recording* (the 'creation') of intimate images without consent, including 91K and 91L of the *Crimes Act 1990* (NSW), as well as a number of surveillance devices offences (e.g. relating to the installation of an optical surveillance device – s8), these existing offences do not adequately encapsulate situations where a sexual assault is recorded, regardless of whether or not it was distributed. For instance, the wording 'filming a person engaged in a private act… for the purposes of sexual arousal or sexual gratification'

(s91K) or 'filming a person's private parts… for the purposes of sexual arousal or sexual gratification' (s91L) does not adequately capture the harms as it is not appropriate to label the recording of a sexual assault as 'a private act' or to use the language of filming of the victim's 'private parts'. Therefore, we strongly advocate that the NSW legislation specifically criminalise the taking or recording, or creating of intimate images without consent. Although 'intimate images' may not appear to be the correct label for sexual assault images, if 'intimate image' is defined in such a way in the new legislation to include images of a person or context that is sexual, then that would sufficiently overcome, we believe, this problem. Moreover, under s91K and 91L of the NSW *Crimes Act*, the requirement that the acts be done for sexual arousal or gratification is very problematic since perpetrators may have a wide diversity of motivations and will escape punishment under these circumstances, for instance, if the motivation was to make fun of the victim, or to humiliate them etc.

Relatedly, we strongly support the amendment of 91K and 91L in the *Crimes Act* so that there is no requirement that the images are taken for the purposes of sexual gratification or arousal. (Please see discussion above of the case involving a nurse taking images of a patient's genitalia while under anaesthetic who could not be prosecuted under 91L because she did not do so for sexual arousal or gratification.)

Discussion Question 4: Fault Element

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

Perpetrators may have diverse motivations for creating and/or distributing intimate images without consent, including those who distribute or threaten to distribute images out of spite or revenge against a current or former partner; those who threaten to distribute images in order to coerce, blackmail, humiliate or embarrass another person; and those who distribute or threaten to distribute images for sexual gratification, fun, social notoriety and/or financial gain. Given the diversity of motives, we support legislation that does not require that the perpetrator intended to cause harm or distress, as is the case in a variety of international jurisdictions (including New Zealand, the UK and a number of US states).

It is important that legislation clarifies the intent of the perpetrator in order for the law to apply only in cases in which the perpetrator knows another person did not consent to the disclosure of an intimate or sexually explicit image, or is reckless as to whether consent was given. One key question is whether the offence should apply to the actions of third parties who may not know whether the image was distributed without consent, and yet may participate in distributing the image further; for instance, people who 'collect' or share images for fun or sexual gratification. Although that behaviour may be abhorrent, *an offence should only apply if the person knows, or has reason to know, that the other person did not consent to the distribution of the image*. As US legal scholar Danielle Citron (2014, p. 150) claims, 'It [should] not be a crime, for instance, to repost a stranger's nude photos having no idea that person intended them to be kept private'.

We thus strongly support the Senate Committee's recommendation that the fault element include knowingly or recklessly sharing an intimate image without consent. This will address the difficulties

that might arise in proving that the victim consented to the distribution of the images, particularly when the victim took the image of themselves and/or shared the image consensually with an intimate partner or friend.

Discussion Question 5: Consent

(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 bet considered to have terminated upon the conclusion of that relationship?*

Consent should be clearly defined for the purposes of a new offence, otherwise the risk is that perpetrators will be able to easily claim that the victim consented to the distribution of images, particularly when those images were either taken by the victim and/or shared consensually in the context of an intimate relationship. The Victorian legislation contains a number of exemptions to help clarify consent. For example, under s41DA (3)(b), the law does not apply, if 'B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consent to – (i) the distribution of the intimate image; and (ii) the manner in which the intimate image was distributed'. The Victorian legislation also makes it clear that consent constitutes 'free agreement'. It is important that new NSW legislation makes it clear that consent at one time to take or share an image does not equate to consent to take or share an image at another point in time, that a person may withdraw their consent at any time and that giving someone permission to possess an image does not constitute consent to distribute the image (Citron 2014). In other words, consent should be defined as specific to the particular creation and/or distribution of the image. We do not believe, however, that the legislation should explicitly state that consent is terminated upon the conclusion of a relationship since image-based sexual abuse is not exclusive to ex-lovers (e.g. perpetrators may distribute images of their partners while in the context of a relationship). We believe that reference to the conclusion of a relationship could be detrimental to victims in existing relationships, implying that there may be consent during the relationship.

Discussion Question 6: Threats to Share Intimate Images

(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?*

We support the creation of a specific offence in relation to threats to create or share an image, regardless of whether the accused person has made threats specifically in relation to the subject of the image, or to another person (in line with s 41DB of the *Summary Offences Act 1966* (Vic)). Creating an offence to threaten to distribute an intimate image means that the law will communicate the serious harms that result from such threats – for instance, perpetrators using threats in the context of an intimate relationship or in a post-separation context, or perpetrators using such images as a way to coerce a victim to engage in unwanted sex acts or other acts. However, we believe that any new offence should explicitly state that this offence applies regardless of whether or not the image or images exist in the first place.

We support the wording contained in the Victorian legislation so that threats can be either explicit or implicit. However, we prefer the proposed wording in the South Australian Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 (SA) which seeks to add the element of recklessness (e.g. the perpetrator may be 'recklessly indifferent' as to whether they have aroused a fear in the victim that the threat will be carried out). Finally, we prefer the wording of the proposed South Australian offence which includes that the perpetrator intended to arouse a fear that the threat would be carried out. We contend that the wording in the Victorian law in relation to belief to be confusing with too many 'believe/s'– for instance, "A intends that B will believe, or believes that B will probably believe, that A will carry out the threat". Therefore, we find the proposed wording on recklessness in the South Australian bill to be much simpler.

Discussion Question 7: Application of the Offence/s to Children and Young People

(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?*

We are very much opposed to any legislation that criminalises the behaviour of young people who *consensually* take and/ share images of themselves, such as child exploitation offences. However, when a person *non-consensually* creates, distributes or threatens to distribute intimate images of another person, unless they fall under the age of criminal responsibility, they should be called to account and prosecuted under either existing or new legislation.

If the perpetrator is over the age of 18 and creates and/or distributes (or threatens to distribute) images of a person under the age of 18 – with or without their consent – then this should deemed a criminal offence of distributing child abuse material under 91H the *Crimes Act 1990* (NSW), depending on the content of the image. However, in line with the changes made to Victoria's legislation in 2014, an exception should apply if an 18+ year-old perpetrator was not more than 2 years older than the person depicted in the image.

Finally, we believe that a conviction under a new criminal offence should not be listed in Schedule 1 of the *Child Protection (Working with Children) Act 2012* and instead should be listed in Schedule 2 so that the person is automatically disqualified from obtaining a WWCC. The only exception would be in situations where a person was convicted of the new criminal offence where they were over the age of 18 and the victim under the age of 16 (with no more than a 2 year gap in age difference between them) – however, if the new legislation was worded correctly, and a distinction made between child exploitation offences and the new 'revenge pornography' offences, this would render such wording irrelevant.

In summary, we support the following:

- New laws to ensure that consensual taking and sharing of images among young people under the age of 16 are not criminal offences for either parties.

- New laws to ensure that the non-consensual taking or sharing, or the threat to take or share, images, apply to children over the age of criminal responsibility.
- Existing child exploitation offences to only apply to persons over the age of 18 (except where the person depicted in the image less than 2 years younger) who take or share intimate images – regardless of whether or not the child depicted in the image consented or not.
- Any new offences be listed in Schedule 2 of the WWCC so that a person who has a conviction for taking, sharing or threatening to distribute/share is not prevented from working with children – but only if there is a distinction made between child exploitation offences and the new offences suggested here.

Discussion Question 8: Appropriate Penalties

(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?*

Both Victoria and South Australia have a maximum penalty of 2 years for distributing an intimate/invasive image without consent and a maximum penalty of 1 year in Victoria for threatening to distribute an intimate image (in South Australia the proposed maximum penalty for threatening to distribute an invasive image is likewise 1 year). We believe these respective penalties are suitable.

One of the most harmful aspects relating to image-based sexual abuse concerns the lack of control the victim has over the image once the image has been distributed. In other words, there is no way of controlling where the image ends up, or how long it stays on another person's phone, computer, other device, or the intent at large. Like other jurisdictions (e.g. Canada, US, New Zealand), we are strongly supportive of a takedown notice that could be issued requiring a person or organisation remove the images, including an additional criminal offence for failing to comply with an takedown order. Although such powers would not guarantee the images are completely removed from the internet or personal devices, it at least would give victims some sense of relief that they currently do not have under either Victorian or South Australian jurisdictions. The takedown power could, as in New Zealand, be granted to an approved agency that has existing relationships with domestic and international service providers, online sites and other agencies to ensure co-operation, particularly when the content is hosted on an online website outside of Australia. However, it would be beneficial for the Office of the Children's eSafety Commissioner to have extended powers to investigate adult complaints of illegal or offensive online content, including the non-consensual distribution of intimate images to enforce civil penalties on those posting or hosting the offensive content, and to enforce a legal obligation to comply with a request to remove the material.

Discussion Question 9: Defences

(a) *Should the new offence include one or more statutory defences?*

Under the current South Australian legislation, it is a defence if the conduct constituting the offence of distributing an invasive image if the image was 'for the purpose connected to law enforcement' or was 'for medical, legal or scientific purpose, or if the image was filmed by a licenced investigation

agent for the purpose of obtaining evidence in a particular context' (s 26C). A new criminal offence in New South Wales should also clearly state that the law does not apply if someone has posed naked in a magazine or in another commercial setting.

We support Danielle Citron's (2014, p.153) list of exceptions as including:

- Lawful and common practices of law enforcement, criminal reporting, legal proceedings; or medical treatment; or
- The reporting of unlawful conduct; or
- Images of voluntary exposure by the individuals in public or commercial settings; or
- Disclosures that relate to the public interest.

3. A Note on Prevention

While specific legislation criminalising image-based sexual abuse is overdue and constitutes an important measure to address these harms, ultimately we support a range of both legal and non-legal responses. The law should not be relied upon as the *only* mechanism for addressing these behaviours. Other measures should include those focused on corporate and organisational 'bystanders'; for example: government and community representatives working collaboratively with internet, website, social media and other service providers in order to promote service agreements and community codes of conduct that include clear statements regarding the unacceptability of these acts; strategies for victims and other users to report content in violation and have it removed; and appropriate consequences for an individual's violation of such terms of service/codes of conduct.

We further recommend the development of information resources (such as a website and print materials) for victims advising them of their legal and non-legal options. This might be delivered via existing victims of crime, legal aid, health and other information services, as well as through existing national hotlines (such as 1800 RESPECT, the Men's Referral Service and Kids Helpline). Staff responding to these hotlines should also be trained in legal and non-legal options so as to effectively respond to and advise victims of image-based sexual abuse.

Finally, we suggest the development of prevention strategies such as through public education campaigns in traditional and digital media, workplace harassment and anti-discrimination resources, and school curriculum packages. Some of the harms can be understood to result from the same *attitudinal support for violence against women*, that minimises violence, blames victims and excuses perpetrators (see VicHealth, 2014, National Community Attitudes Towards Violence Against Women Report). As such, prevention strategies could include content which: (a) identifies and challenges the gender and sexuality-based *social norms* and *cultural practices* that underlie the stigma that is directed at victims of technology-facilitated sexual violence; (b) redirects the responsibility onto the perpetrators of image-based sexual abuse; and (c) encourages and provides tools for individuals to *take action as bystanders* and support a victim, report content for removal, and/or call-out victim blaming and shaming where they encounter image-based sexual exploitation of others. In short, by challenging the blame and stigma too often directed at victims of revenge pornography, and communicating a clear message of the responsibility of perpetrators and those who knowingly distribute these images, we can create the cultural change needed to support victims seeking redress, and ultimately, prevent these harms before they occur.

Finally, should new criminal offences be introduced in NSW, we strongly advocate that law enforcement training and public awareness campaigns accompany the introduction of such laws.

Conclusion

Australian law has not kept pace with evolving behaviours where technology is used in some way to perpetrate violence or harassment. While legal redress is not the only way to address technology-facilitated abuse, criminal legislation should be introduced in all jurisdictions to specifically capture the harms related to the non-consensual creation, distribution, and threat of distribution, of intimate images. A formal legal response should be implemented in conjunction with a range of other legal and non-legal remedies and support services at educational, community, law enforcement, and policy levels. Lawmakers should ensure that such laws are broad enough to cover a range of different behaviours beyond the paradigmatic 'revenge pornography' example (e.g. ex-lovers using sexually explicit images as a way to get revenge), but not so broad that they criminalise behaviours that lack specific, malicious intent and/or do not cause distress or harm. NSW has the opportunity to lead the way in designing best practice legislation to address these harmful behaviours.

Thank you for considering our feedback. We are happy to respond to any further questions, or provide witness statements, should this be required.

Yours sincerely,

[redacted]

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