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**Submission from Dr Tyrone Kirchengast and Professor Thomas Crofts regarding the Discussion Paper. *The sharing of intimate images without consent - 'revenge porn'*, September 2016 (herein the 'Discussion Paper')**

Dr Tyrone Kirchengast (UNSW) and Professor Thomas Crofts (Sydney) have significant concerns regarding the development of a criminal offence on the 'distribution of an intimate image without consent' given the lack of available data on 'revenge porn' offences and offending, and associated issues of cross-jurisdictionally that such offending necessarily presents. The following summarises various concerns and issues as to the creation of a 'revenge porn' offence, its policing and prosecution, interconnected sociological and gendered assumptions as to policing and prosecution, and the relationship to affiliated jurisdictions and areas:

1. There is limited data on prosecution rates for current similar offences in Victoria and South Australia;
2. There is limited data on sentencing for the new offences in Victoria and South Australia;
3. We have no real assessment of the usefulness of a general offence per s 578C *Crimes Act 1900* (NSW) other than limited reporting in the Local and District Courts (also see stalking/harassment s 13 *Crimes (Domestic Violence) Act 2007* (NSW));

4. There should be consideration of the role of possible Commonwealth legislation regarding use of a telegraph service, specifically the possibility of double prosecution for like offences in NSW and at the Commonwealth level;
5. There is presently limited research on the use of 'revenge porn' offence(s) in Victoria and South Australia regarding charge bargaining, that is, use of the offence not as a substantive charge but as a threatened charge in order to induce a guilty plea for other more familiar (public order, assault, IPV/DV) charges, or charges of general application;
6. Further research is needed on the difference between the fault element of intent and recklessness (and perhaps negligence) as it applies to the 'distribution of an intimate image without consent' with the need for corresponding or associated harms and the level of liability;
7. There is a need for consideration as to whether any criminal offence ought to operate on the assumption of mens rea, or alternatively, strict liability;
8. Defences or circumstances that preclude or exclude a person from prosecution ought to be researched and enumerated, given the prospect of (one, or a combination of) ill-defined, express, intimated or implied consent, and ease of distribution through smart technology;
9. The sociological and gendered assumptions and issues as to the normative policing and prosecution of 'revenge porn' offences have not been thoroughly investigated or researched, in particular, how such offence(s) may be rationalised in a heteronormative context where women are situated as always the victims, as distinct from other relationships, married, non-married, homosexual, or even non-intimate relationship or possible friendships, where images are taken then later shared without consent;
10. There is need for further research on the disconnect between technology and the criminalisation of the use of that technology when used initially in a way that is sanctioned by law (ie. an image taken and distributed consensually but then further distributed without consent upon a relationship breakdown, or consent to distribute on one smart phone application but not another);
11. The use of equity through breach of confidence and the associated remedies may provide an adequate avenue of redress for certain victims. However, civil actions for such wrongs are expensive and a lack of general or lay knowledge as to the remedies available at equity limit the use of this jurisdiction to those seeking legal counsel, and not all lawyers are well versed in equitable remedies. However, equity will continue to provide an important means to relief (or adjunct to any criminal jurisdiction) given the remedies available – access to the complainant and their future conduct to desist in present or future dissemination, to take down images from social media, to close accounts, etc. A criminal jurisdiction by statutory creation/extension of powers associated with a new offence may also provide such powers to a court;
12. The internet cannot be subject to easy control and an administrative authority to 'take down' offending images may only be partially successful. Distribution of intimate images may occur through an individual who can take down images themselves, by logging into accounts and doing so, and where an offender is non-compliant with a court who orders a 'take down', an administrative authority may be able to act on the offender's behalf to remove offending images. However, were images have been uploaded to a 'revenge porn' website hosted offshore, either by the offender or because since posting on social media, the images have been copied by another, an administrative authority tasked to 'take down' images may have

little success. This may be a problem for victims who otherwise expect such an authority to be able to provide redress by having the images removed from the internet. Nevertheless, such an authority may be able to work with international law enforcement to do whatever may be done to remove the offending images;

13. Education and self-responsibility continue to be underemphasised in this area. Mass media tends to react to 'horror stories' of victims, whose sexualised images are shared over the internet following a relationship breakdown or where used in the context of IPV. For some victims the consequences are very real, and further harassment and vilification ensues. However, although people are free to express their legitimate sexual desires including through the use of technology, educating the public as to the setting of clearer boundaries around such imagery, and the consequences of allowing images to be taken in a digital age of ease of distribution and where the internet cannot be subject to easy control, may also provide an essential role guiding the public to better protect their private selves. The submission here is not one of prudish self-censorship, nor of victim blaming, but of identifying the realities of the practices of sexting, as well as the risks and consequences of the technologies that assist and facilitate our everyday lives. Technology in this area has moved ahead of social ethics around the taking, possessing and distrusting of intimate images. Therefore, public education is essential. The media tend to overly focus on the negative outcomes of people taking and disseminating intimate images rather than the more positive aspects of the practice where people may engage in it to 'flirt' or 'have fun'. The focus should not thus be solely on when things go wrong or the risks involved, or on poor outcomes for the 'victim'. Instead, consistent with contemporary sexual assault campaigns which focus on the actions of the offender instead of the 'imprudent' actions of victims, a public awareness campaign should acknowledge sexting while addressing unethical behaviour where one person breaches the trust of his or her partner(s) with whom they take sexualised images; and
14. It follows that where Parliament is considering a new offence, (a) it should be drafted to exclude matters of lesser seriousness or where individuals have been reckless or careless, in order to capture only those more serious and intentional cases where the offender intends to cause harm as a result of non-consensual distribution; (b) that such a criminal offence be restricted to serious intentional behaviour; (c) that existing Commonwealth or NSW offences may suffice; and (d) whichever mode of criminalisation of serious intentional matters, a public awareness and education campaign should follow.

Despite reservations regarding the creation of a criminal offence, we have addressed the questions in the Discussion Paper, below:

**Discussion Question 1:**

**a) What images should be captured by the new offence/s?**

Either still or moving images (photographs or video) may be so classified.

**b) Should the definition include images which are 'intimate' but not sexual, including by reference to cultural context?**

Where a new offence is considered, the focus should be on the sexualised image and not an offensive image, the latter being subject to alternative offences per publishing indecent articles s 578C *Crimes Act 1900* (NSW).

However, the term 'intimate' or 'intimate image' obfuscates the purpose of criminalising an image that may offend at a level that warrants criminalisation. Images of persons taken to be intimate by social custom, such as holding hands, kissing or touching in a non-sexualised way, ought to be excluded. However, there is significant overlap as to what may be classed as intimate as compared to sexualised. While it may be envisaged that distribution of a non-consensual sexualised image, that is, images of the penis, vagina or the breasts of a woman, may have a sexual connotation, and may cause harm where distributed without consent, the non-consensual distribution of an intimate but non-sexualised image may substantially widen the category of images that may be subject to criminalisation. Where the term 'intimate' is preferred, it should be defined as a 'sexualised image or image of the genitalia and breasts of the female' (cf. s 911(1) *Crimes Act 1900* (NSW) definition of 'private parts' "means a person's genital area or anal area, whether bare or covered by underwear"). For adults only, to remove ambiguity and the requirement of the court to impose a subjective judgement, 'image' should exclude a sexualised pose without exposure of the genitalia. Images should also require exposure of the genitalia, and underwear should be insufficient.

Images of children whether sexualised or intimate are covered by existing, alternative offences and this distinction should remain (see response to Question 7).

A focus on sexualised image overcomes the need to consider the cultural context of the appropriateness of an image. Cultural context includes a further interpretative dimension that serves to obfuscate the basis of criminalisation being reserved for the most serious offensive of non-consensual distribution of 'sexualised imagery', based on identifiable exposure of genitalia.

The definition of image may also extend to digitally modified images where genitalia (of the subject or another as depicted in the image) are exposed.

An objective standard for determining whether an image is a 'sexualised image' should be adopted as based on contemporary community standards. It may be appropriate to preface community standards with 'contemporary', given changing social values to sexting practices.

#### **Discussion Question 2:**

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

Distribution should be defined as making available to another person other than the victim or complainant.

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

Sharing and showing will be captured in a definition of 'distribution' as noted above. However, a person may merely show their phone to another without giving that person control over the image. This may not constitute a distribution, although showing may still involve a breach of privacy.

#### **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?**

The basis of a 'sharing of intimate image without consent' offence lies in the distribution. Where a more restrictive definition of 'sexualised image' is adopted, taking or recording based offences would be covered by ss 91K and 91 L of the *Crimes Act 1900* (NSW). Sections 91K and 91L already cover those instances of filming a person engaged in a private act or filming a person's private parts and there is no need to duplicate these offences, given the harms that a distribution based offence seeks to address.

**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?**

Extending these offences beyond sexual gratification or arousal without consent may confuse the offence of 'filming person in a private act without consent' with the criminalisation of the distribution of a 'sexualised image without consent'. The latter, the subject of this inquiry, addresses the harms caused by distribution of an otherwise confidential image. An inquiry into the subjective circumstances of the complainant and offender, their relationship and what was assumed or permitted upon the taking of the image, is required. The former depends on an objective assessment of the context of the filming, where privacy may be assumed in the context of the circumstances (ie. a person filmed in public in a state of undress, such as at the beach). The two offences speak to different circumstances and situations and require different (subjective or objective) inquiries by the trier of fact.

#### **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?**

Where an offence is contemplated, the relevant fault elements should be distribution of a sexualised image without consent, with intent to cause the complainant harm. Harm may include reputational harm or injury, or humiliation. The intent ought to be to cause harm, not in the establishing of harm itself. Where particular harms are established these may be subject to an especially aggravated offence, or addressed in sentencing. Recklessness (or negligence), despite some turning of the mind to the completed offence, should be insufficient on the basis that the technology that facilitates the taking of the image is designed to distribute it. Recklessness (and negligence) to consent to distribute poses too low a threshold given the ease of the use of the technology and the social context in which images may be shared (also

see response to Question 5 on definition of consent, below). Prior distribution of the image by the complainant or their consent to distribute unless expressly withdrawn, should negate liability.

The offence should require mens rea to be established by the prosecution, and any proposed offence should not be based in strict liability. A lowering of the mode of liability to strict liability would expose persons otherwise distributing images to prosecution, only to then require them to demonstrate that the distribution was innocent, or devoid of intent to cause harm. Against the technology that now facilitates the taking of images, and the applications which allow for the ready distribution of those images, this unsatisfactorily lowers the threshold of prosecution and favours the complainant and prosecution, who should be compelled by law to prove the actus reus and mens rea elements in the first instance, beyond reasonable doubt. This would therefore not preclude serious matters being investigated and prosecuted but would limit prejudicial claims against an innocent accused.

In North Dakota, the offence is phrased as the distribution or publication of a sexually expressive image with the intent to cause emotional harm or humiliation to the person depicted in the image, and who has a reasonable expectation of privacy (North Dakota Century Code § 12.1-27.1-03.3(1)(b)). This offence criminalises the intention of the offender. It is also an offence to surreptitiously create or wilfully possess a sexually expressive image without the consent of the subject of the image, where there the subject has a reasonable expectation of privacy (North Dakota Century Code § 12.1-27.1-03.3(1)(a)). Acquiring and knowingly distributing a sexually expressive image that was created without the consent of the subject of the image is also an offence (North Dakota Century Code § 12.1-27.1-03(2)). In all these instances, the person must know the character and content of the image.

The Discussion Paper raises the prospect that intent should not be an element because this may create a 'loophole' where the offender can state they did not intend to cause harm. The assessment of harm will be relevant to sentence, however, the harm caused by distribution should not in itself be a fault element. To ensure that only serious offences are captured by a new offence, where contemplated, both distribution of the intimate image without consent in addition to an intent to cause harm to the complainant should found the relevant fault elements. This combination of fault elements would exclude innocent or lower threshold conduct, such as careless or accidental dissemination, that may otherwise become criminalised.

#### **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?**

The law of sexual assault informs us that consent can be a difficult issue because it is often implied in context, as intimated by behaviour or gesture, rather than given expressly, verbally or otherwise. 'Revenge porn' offences will likely share a similar context unless the issue has been discussed directly between partners. Consent should be defined a 'freely and voluntarily

given' consistent with sexual assault (per s61HA *Crimes Act 1900* (NSW)). Any offence should also identify that consent can be express or implied, and the court should be free to determine whether there is an objective basis to consent, to determine if the complainant could reasonably be considered to have expressly or impliedly consented. Standards of consent should apply equally to all persons engaging in the distribution of intimate images. Consent ought to be interpreted in the context of each association, whatever form that relationship takes, and non-traditional or alternative relationships should not be assumed to consent by virtue of their alternative or non-traditional form. Circumstances that preclude a person from consenting as provided by the law of sexual assault may also be instructive.

**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?**

Relationships are diverse and complex and many people are not in normatively constituted or conceived relationships. This goes to the problematic assumptions of conceiving an offence through a heteronormative context of partnership, and would encourage the policing of the offence in that context alone. Intimate relationships should also not be privileged above other relationships. Irrespective of heteronormativity, relationships are diverse enough for most people to understand pragmatic issues where a couple breaks up but then resumes their relationship, or where such an end to a relationship is unclear. It is preferable that any definition of consent be left at large, rather than confined to a context of an unambiguous relationship. The context of the individual association is paramount. A focus on 'non-consent with expectation of privacy' should cover all relationships that are assumed private, whatever their form or duration, or nonconformity to social expectations of what constitutes a relationship.

**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?**

Research on the Victorian provisions is necessary. The extent to which the Victorian provisions may be used in charge bargaining where an accused faces multiple alternative offences for DV/IPV offending would be instructive. We recommend that in light of the lack of clear evidence as to the usefulness of an extension of a primary charge to cover instances of threats, in particular, in the normative context of relationships, that NSW does not extend the offence to threats to distribute. Such threats may be responded to per a ADVO or under stalking or intimidation with intent to cause fear of physical or mental harms under s 13 *Crimes (Domestic Violence) Act 2007* (NSW).

**Discussion Question 7:**

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

There are a number of issues concerned with extending the definition of the new offence to include images of children. Whether the new offence should apply to children may depend on whether the offence is designed to apply to adults and children. In relation to adults it may not be necessary or appropriate to extend the new offence/s to images of children. The new offence could (dependent on how the 'images' captured by the new offence are defined) overlap with child abuse material offences. This could mean a duplication of offences applicable and could cause complications in charging because there may be an incentive for offenders to plead to the new offence rather than a child abuse material offence to avoid the stigma attached to a conviction for a child abuse material offence. Different penalties may also provide an incentive for an offender to plead to the lesser of the offences. Similarly, there may be an incentive to plead to the new offence to evade registration on the sex offenders register if this is not associated with the new offence. Thus, there is potential for an offender to avoid conviction and appropriate sanctions for the offence most suitable to their offending behaviour. Such concerns have been expressed in relation to the new offence of Unlawful Assault Causing Death in Western Australia – where it has been noted that some offenders have been convicted of this less serious offence with a lower penalty rather than manslaughter or murder (see, Blake and Tarrant, 'The Violation of Principle and Perpetuation of Gender Bias in the Western Australian Assault Causing Death Offence' (2015) 40 *UWA Law Review* 415; Cullen, 'WA's 'One-Punch' law: Solution to a complex social problem or easy way out for perpetrators of domestic violence?' (2014) 2(1) *Griffith Journal of Law and Human Dignity* 52).

In relation to children, at present child abuse material offences (*Crimes Act 1900* (NSW) s91H and equivalent Commonwealth offences) can apply to children who create, possess or disseminate images of a child engaged in a sexual pose or sexual activity, in the presence of a sexual pose or sexual activity or images of a child's private parts (*Crimes Act 1900* (NSW), s 91FB). Such serious offences are in the main inappropriate for children who engage in the production and dissemination of sexualised images of themselves or other children (often termed 'sexting') (see for instance, Crofts et al, *Sexting and Young People*, Palgrave Macmillan 2015). The research of Crofts et al 2015 confirms that in the main children sext for fun and to flirt – which is not to deny that there may be cases where sexting is done for malicious or bullying purposes. However, the question is whether there is a need to create a new offence to deal with cases of sexting. Where sexting is consensual – which it mainly is – there may still be negative consequences if a child regrets disseminating an image or agreeing to an image being disseminated. However, in such instances an educational approach would be preferable to any criminal response (see Crofts et al 2015). Where there is bullying or a malicious intent a child abuse offence may be too harsh but there may be a need for a criminal response. If this is the case, there should first be a thorough examination of whether there are already sufficient offences to cover such behaviours and whether or not they are being charged by police and prosecutors.

There are some considerations which speak in favour of a new offence applying to images of children where children are the offenders. The principle of fair labelling (or 'representative



labelling’) could support the creation of a new offence of non-consensual distribution of intimate images. Criminal law is a tool of social control, warning citizens about behaviour that should be avoided and the consequences that will ensue if that behaviour is not avoided. Offence labels stand as a ‘moral and legal record, as a testimony to the precise respect in which the defendant failed in her or his basic duties as a citizen’ (Horder, ‘Rethinking non-fatal offences’ (1994) 14(3) *Oxford Journal of Legal Studies* 335 at 339). This is important for the victim and the offender. From the perspective of the victim the offence label is important because ‘she deserves to have her suffering reflected by an offence of appropriate seriousness’ (Chalmers and Leverick, ‘Fair labelling in criminal law’ (2008) 71 *Modern Law Review* 217 at 238). For the offender the offence label lets him or her know exactly how his or her behaviour has been classified by the justice system and why he or she is being punished in a certain way (Chalmers and Leverick at 229). More broadly Criminal law has an educative effect and an appropriate offence label communicates clearly society’s disapproval of the behaviour subject to it.

However, exactly because the offence label better fits the behaviour of children means that there is a danger of net-widening, with increased prosecutions of young people for sexting. The research of Crofts et al 2015 has found that at present, because child pornography offences are generally seen as an inappropriate response for most cases of sexting, police are choosing not to charge children and to divert them from formal criminal proceedings, unless there are aggravating factors. Because of this, a new offence that is appropriately labelled and fits the scenario of non-consensual distribution of intimate images may be seen as the correct response to sexting and may result in increased prosecutions. Such concerns were raised by Neil Paterson, Acting Commander of Victoria Police (Evidence before the inquiry into Sexting, Victorian Law Reform Committee, Parliament of Victoria, 18 Sept 2012), who argued that police discretion was a useful way of dealing with sexting.

In Victoria, there is now evidence that these offences are considered appropriate for children who engage in sexting. Between January 2015 and March 2016, a total of 27 children aged 10–17 were alleged to have committed these offences. However, it should be noted that the majority (16) were cautioned or given a warning and so diverted from formal proceedings while five were summonsed and less than three were arrested for these offences (statistics obtained from the Crime Statistics Agency for offences coded 139BY and 139BZ).

We therefore see the need for caution and more investigation into the appropriateness of extending any new offence to images of children.

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

Without further research we do not recommend that the new offence extend to images of children – with adults this could overlap with child abuse offences and with children it may be an unnecessary response. Therefore, the issue of consent regarding children does not arise.

**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?**

Any new offence should distinguish between cases where both parties are minors and where one party is a minor and the other an adult. There is a significant difference between children engaging in sexting and adults creating, possessing and distributing 'intimate' images of children. As the research of Crofts et al (2015) shows the motivations for children to engage in sexting are often to have fun or to flirt, and to provide a sexy gift to a boyfriend or girlfriend. They are largely not exploitative and even where pressure or coercion might take place this rarely accords with the motivations of adults who have a sexual interest in children.

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

Whether a conviction for the new offence should be considered relevant for obtaining a working with children check depends on whether the offence applies to children as offenders and to images of children. If the offence applies to children, then it should not be relevant to obtaining a working with children check – as noted above generally children who sext do not show a problematic interest in other children. If the offence applies to images of children and the offender is an adult, then a conviction should be relevant.

**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?**

We make no submission on relevant penalties at this time other than to indicate that sentencing practices in Victoria and South Australia are unknown and data on sentencing would be important and determinative in drafting NSW provisions. Information is needed on relevant sentencing options, those options most relied upon, recidivist rates and consequences to victims. This may also include consequences for persons in ongoing relationships and there is likely an interconnection with ADVO requirements, in particular where there is evidence of harassment or intimidation within a relationship. As for 'take down' orders, an offence may be drafted to contain remedies otherwise available in equity. However, we repeat our initial submission at points 11 and 12 above, particularly the difficulty of removing offending imagery beyond the immediate control of the individual offender.

**Discussion Question 9:**

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

See response to Question 4(a) and (b). Also see response to threats to distribute, Question 6.

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