



# Gay and Lesbian Rights Lobby

## Response to NSW Government's Discussion Paper:

### The sharing of intimate images without consent - 'revenge porn'

October 2016

## Table of Contents

<b>OVERVIEW OF SUBMISSION .....</b>	<b>2</b>
A LGBTIQ CONTEXT .....	2
<i>Impacts of distribution of images on LGBTIQ people.....</i>	<i>3</i>
IMAGE SHARING AS DOMESTIC VIOLENCE .....	3
<i>Barriers to Reporting Instances of DFV.....</i>	<i>3</i>
BARRIERS IN ACCESSING SUPPORT.....	4
DISCUSSION QUESTION RESPONSES.....	5
<i>Discussion Question 1.....</i>	<i>5</i>
<i>Discussion Question 2.....</i>	<i>5</i>
<i>Discussion Question 3.....</i>	<i>6</i>
<i>Discussion Question 4.....</i>	<i>6</i>
<i>Discussion Question 5.....</i>	<i>7</i>
<i>Discussion Question 6.....</i>	<i>7</i>
<b>CONCLUSION .....</b>	<b>8</b>

## Overview of Submission

The Gay and Lesbian Rights Lobby (GLRL) welcomes the opportunity to provide a response to the NSW Government’s Discussion Paper: *The sharing of intimate images without consent – ‘revenge porn’* (“discussion paper”).

The GLRL welcomes a legislative framework to address the issue of the non-consensual distribution of intimate images and supports the creation of a specific offence covering such acts.

This submission offers some overarching policy points for consideration that need to be considered in any legislative response. Further, we offer some brief views on a number of the discussion questions as posed by the discussion paper.

### A LGBTIQ Context

Much of the already existing literature, research and focus of the issue of revenge porn comes from a heteronormative viewpoint, presupposing a heterosexual relationship between cisgendered individuals.<sup>1</sup>

GLRL acknowledges that many LGBTIQ people in particular use sexual images to express their sexuality in a consensual way through the use of a range of technologies, but in particular using social media applications which are commonplace in the LGBTIQ community.<sup>2</sup>

---

<sup>1</sup> K Albury and P Byron, *Queering Sexting and Sexualisation*, Media Australia International (2014) 153, p138-147.

<sup>2</sup> D Gudelunas, *There’s an App for that: The Uses and Gratifications of Online Social Networks for Gay Men*, *Sexuality and Culture* (2012) 16(4) pp347-365.



Research has shown that LGBTIQ identifying people, especially gay men, are more likely to engage in the sharing of intimate images, when compared to their heterosexual counterparts.<sup>3</sup> Another study found that the sharing of intimate images was somewhat routine amount same-sex attracted young people (aged 18 to 26) and that there was a set of mostly unspoken rules as to how these images were to be respected.<sup>4</sup>

It is important for any policy response to be mindful of this and balancing the rights of consenting adults to share images of themselves as a way of exploring and expressing their sexuality but for there also to be an appropriate legislative framework that deals with individuals who release such images without consent.

### Impacts of distribution of images on LGBTIQ people

The impact of the non-consensual sharing of intimate images among LGBTIQ people can vary when compared to their heterosexual counterparts. There is a real issue of such images “outing” an individual to their peers, colleagues, family and friends in addition to them embarrassment, shock and other psychological impacts that could potentially result.

In addition, many LGBTIQ people may face additional transphobic and homophobic abuse, whether it be in the digital or physical world.

### Image sharing as Domestic Violence

The sharing of intimate images without consent is a form of domestic violence, which was recognised in the submission to, and findings of, the Senate Inquiry into revenge porn.<sup>5</sup> The impact for anyone in reporting instances of domestic or family violence (DFV) is great, but for LGBTIQ individuals, reporting to Police has a range of significantly unique barriers.

It is essential that any policy response take into account these barriers so that any legislative response can be effective in its application.

### Barriers to Reporting Instances of DFV

A number of barriers are faced by LGBTIQ people in reporting DFV. Reporting by LGBTIQ people is three times lower than the national average, as at 2012,<sup>6</sup> and one piece of research found that 85% of those participants who had experienced DFV did not report the matter to the Police.<sup>7</sup>

Previous research has articulated the barriers to under-reporting, including:

---

<sup>3</sup> M Lee, T Crofts, A McGovern and S Milivojevic, *Sexting among young people: Perceptions and practices*, Trends and Issues in Criminal Justice (2015) 508.

<sup>4</sup> Albury and Byron *ibid.*

<sup>5</sup> Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as ‘revenge porn’*, February 2016.

<sup>6</sup> ACON, *ibid.*

<sup>7</sup> ACON, *ibid.*

- shame and stigma and fear of being ‘outed’ in making a report;
- discrimination previously experienced from previous interactions with law enforcement;
- the heteronormative view of DFV can suggest that abuse in a lesbian relationship must be consensual because it occurred between two women;
- the impact from LGBTIQ communities not wishing to acknowledge an issue that may detract from a more positive view given historical discrimination;
- lack of understanding as to what constitutes DFV;<sup>8</sup>
- a general reluctance to take legal action.<sup>9</sup>

In addition, for many individuals in LGBTIQ communities the actual or perceived lack of confidentiality can be a barrier for those experiencing domestic violence in accessing assistance.<sup>10</sup> This is often the case in small cities or towns, where the communities may be small and close-knit. The specific barriers that can stop reporting in small communities can include feeling shame or embarrassment, their partner being friends with others in the community or the abusive partner may take steps to isolate them from the other members of the LGBTIQ community.

### Barriers in Accessing Support

Barriers to accessing service delivery for LGBTIQ people experience domestic violence are multifaceted, and in many cases a victim’s reasons for not seeking assistance needs to be viewed in its broader social, political and legal context. Key issues include:

- barriers to access arising from fears of homophobia and confidentiality;
- lack of referral options for female perpetrators and male victims within mainstream services;
- lack of service provider awareness, or service provider policies and procedures, in order to identify and respond to same-sex domestic violence;
- lack of general police training in relation to responding to same-sex domestic violence. Such training and responsibility should not be limited to gay and lesbian liaison officers;
- no emergency housing accommodation for gay men, which is of particular issue in rural and regional locations;
- difficulty accessing domestic violence refuges by lesbians and the need for appropriate screening to ensure a perpetrator is unable to access the refuge;
- NSW Police Gay and Lesbian Liaison Officers (GLLOs)<sup>11</sup> are not always accessible, and for many in regional areas, there are no GLLOs at their local Police station. As such, training for general duties and DVLOs in particular on LGBTIQ issues could be of use;

---

<sup>8</sup> LGBTIQ Domestic Violence Interagency, *Another Closet: LGBTIQ Domestic and Family Violence* (24 October 2014) <<http://www.anothercloset.com.au>>.

<sup>9</sup> ACON, *ibid*.

<sup>10</sup> LGBTIQ Domestic Violence Interagency, *ibid*.

<sup>11</sup> “GLLOs are police officers located throughout the state assisting in building the overall capacity of local commands to respond to gay, lesbian, bisexual, transgender and intersex issues. GLLOs

- difficulty in accessing appropriate services exacerbated in rural and remote areas;

## Discussion Question Responses

GLRL offers some comment on a number of discussion questions which we feel not only impacts the rights of our members but too would ensure an effective legislative scheme.

### 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?**

GLRL notes the importance of having a clear definition of what images are captured by any new offence provision. There is benefit in having a specific definition of which images are contemplated by the provision, though such language should be inclusive.

GLRL notes that any such definition of images be fully inclusive regardless of gender. Wording should be genderless to contemplate all individuals, regardless of gender identification.

### Discussion Question 2

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

Given the disproportionate impact that sharing of such images may have on LGBTIQ individuals, GLRL support an expansive definition of the term ‘distribution’.

We note the Victorian approach to distribute which states:

*‘Distribute’ is defined as including publishing, exhibiting, communicating, sending, supplying or transmitting to any person, whether a particular person or not, and ‘to make available for access by any other person’<sup>12</sup>*

GLRL supports a wide ranging definition of distribute as contemplate by Victoria, with some additional provisions to specifically include the showing of an image to another, whether it has been “communicated” or “sent” as contemplated by the definition above.

The concept of distribution should be contemplated broadly to include a range of methods. GLRL supports specific provisions relating to the definition of distribution to include:

---

*undertake a training course which covers key policing responses to homophobic violence, domestic and family violence in same sex relationships and by transgender and intersex people, among other topics.” NSW Police Force, Domestic and Family Violence Code of Practice (25 November 2013) <[http://www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0016/165202/domestic-and-family-violence-code-of-practice.pdf.pdf](http://www.police.nsw.gov.au/__data/assets/pdf_file/0016/165202/domestic-and-family-violence-code-of-practice.pdf.pdf)>*

<sup>12</sup> Summary Offences Act 1996 (Vic), section 40

- The showing of an intimate image of a person to a third party without the person's consent whether it be by:
  - Hard-copy photograph;
  - Digitally via email, social media, mobile phone app, text message or any other electronic viewing device;
  - The sending of an image via any method of conveyance whether it be digitally or otherwise;
  - The sending of an image via a mobile phone application (app), within the app to cover applications such as Grindr, Tinder and Growlr regardless of where the image is stored.

### Discussion Question 3

**a) Should the new offence/s include not only the sharing but also the taking/recording of an intimate image without consent? b) Should existing NSW offences such as sections 91K and 91L of the Crimes Act 1900 be amended to apply when images are taken for purposes other than sexual gratification or sexual arousal?**

GLRL broadly supports an offence to cover this type of behaviour, though note that legitimate medical intervention should be excluded. Whether that is achieved through an additional offence added or an amendment to the current section 91K, GLRL has no view on this.

### 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?**

GLRL supports a provision that would require the person accused to expressly have the individual's consent to distribute the image, noting that such consent may only apply to a distribution of the image to in certain circumstances, and that consent may be time-specific (e.g. consent may be given to share an image to another person in the relationship, for the period in which the intimate relationship continued). As to how the fault element in the framing of the offence is created, this is a matter for the drafting.

GLRL sees a danger in the contemplation of a fault element as enacted by South Australia.<sup>13</sup> This provision requires proving the person distributed an image while knowing or having reason to believe that the other person did not consent.<sup>14</sup> The subjective element in this contemplation of fault could lead to situations in which the distribution of photos in mobile applications could be outside the section as drafted given that the use of sharing intimate photos is common practice.

---

<sup>13</sup> *Summary Offences Act 1953 (SA)*, section 26C.

<sup>14</sup> *Summary Offences Act 1953 (SA)*, section 26C.

GLRL does not support a requirement that an intent to cause harm be proved, as it may provide an opportunity for impactful behaviour with serious consequences to fall outside of the provision just because an individual did not have the particular intention at the time of distribution.

#### Discussion Question 5

**a) Should consent be defined for the purposes of the new offence/s? b) Should there be a requirement for consent to the sharing of intimate images to be explicit? c) Should consent to having intimate images shared during the course of a relationship be considered to have terminated upon the conclusion of that relationship?**

Consent should be explicitly provided by an individual for distribution of intimate images. The form this consent takes is an evidentiary question that should be considered on a case by case basis, but could take the form of being provided in writing or verbally.

GLRL is wary of the use of the term 'intimate relationship' as the definition of such could be ambiguous in many factual scenarios. Whether the individual has explicit consent to distribute these images should be the test regardless of the relationship they are in, especially for many LGBTIQ individuals who have relationships which fall outside or are not recognised by current societal values.

#### Discussion Question 6

**a) Should the new offence include threats to share intimate images? d) Should the offence apply irrespective of whether the intimate images actually exist? 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?**

GLRL agrees that an offence should include the threat to share images, regardless of whether they exist or not.

Given the impact on LGBTIQ people in dealing with the potential of being outed by such images, the threats of distribution could add an additional level of fear and be used as a tool of domestic violence in a relationship.

Threats should be contemplated as being explicit as well as implied threats through conduct or words. It should amount to conduct that could reasonably in the circumstances, be considered to be conduct which the individual could construe as a threat to distribute images through any action, including recklessness. Factual scenarios to be contemplated by such a definition include:

- An individual who threatens to text an image to the person's boss;
- A person displaying an image to another with body language suggesting they are going to distribute the image;

- The threat of an image being left on a device or in a physical location to be viewed by others.

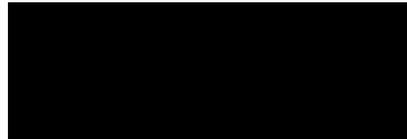
## Conclusion

We would urge the government to release an exposure draft of any bill and seek feedback on the specific wording and legislative framework before it is introduced into Parliament.

If you would like to discuss this submission further, please contact GLRL on [policywg@glrl.org.au](mailto:policywg@glrl.org.au).



Lauren Foy  
**Co-Convenor**



Chris Pycroft  
**Co-Convenor**