

**Consultation on new offence for non-consensual sharing of intimate images
Juvenile Justice Response
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Children and Young People

The focus Juvenile Justice NSW is to work with young people who are at a high risk of offending. The division emphasises the importance of diverting young people from entering the criminal justice system due to the fact it is the most costly means of dealing with anti-social behaviour and the long term impacts of young people having a criminal record.

The most effective responses to addressing anti-social behaviour are often programs that are delivered in a family, school or community-based setting. Given that most young people use social media it is reasonable to say that of the approximately 750,000 young people in NSW a number could be needlessly drawn into the criminal justice system through criminalising actions that could be considered thoughtless and impulsive.

The research clearly indicates that adolescents have less capacity for forward planning, delaying gratification and for regulating impulse. Impulsivity is a commonly observed element in adolescence and raises questions as to the culpability in relation to criminal behaviour¹. It is also important to note that children and young people considerably more susceptible to peer-pressure in the “on-line” environment.

The preferred approach for children and young people where there have been images uploaded that are clearly offensive is to monitor the inappropriate use of technology through the Commonwealth agency, The Office of the Children’s E Safety Commissioner (OCESC). This agency has certain powers under legislation to efficiently remove images from social media and websites, as well as images that have been transmitted by email. This agency has a specific Cyber Report Team that investigates complaints about offensive and illegal online content. This has proven to be an effective strategy, even in response to persistent offenders.

Juvenile Justice recognises that in those cases whereby the child or young person has consistently and deliberately shares non-consensual intimate images they can be charged under the:

- *Crimes (Serious Sex Offenders) Act 2006* for those offences considered to be serious enough to warrant such a charge or the
- [Crimes Legislation Amendment \(Telecommunications Offences and Other Measures\) Act \(No. 2\) 2004](#) for using a carriage service to menace, harass, or cause offence or the

¹ Standing Committee on Law and Justice The Prohibition On The Publication Of Names Of Children Involved In Criminal Proceedings Report 35 – April 2008, at page x.

- Crime (*Domestic and Personal Violence*) Act 2007 for persistently exercising power and control over another person. Sexually explicit/ cyber bullying could be considered a similar circumstance.

In recognition of the advances in technology and the possibility that young people sending sexual explicit images could be considered child pornography the Victorian government's *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014* provides exemptions for people under 18 years old.

Clause 70AAA has been added to the Crimes Act 1958 which provides an exception to child pornography offences. The amendment states that a minor will not be guilty of child pornography offences (sections 68, 69 and 70) provided that the child pornography is an image, the image depicts the minor alone or with an adult and the image is child pornography because of its depiction of the minor.

Additionally, a minor (A) will not be guilty of child pornography offences (sections 68, 69 and 70) provided that the following conditions are met;

- (a) the child pornography is an image;*
- (b) the image depicts (A) with another minor;*
- (c) the image is child pornography because of its depiction of (A) or another minor;*
- (d) where the image is child pornography because of its depiction of a minor other than (A), at the time at which the offence is alleged to have been committed—*
 - (i) (A) is not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography; or*
 - (ii) (A) believes on reasonable grounds that they are not more than 2 years older than the youngest minor whose depiction in the image makes it child pornography; and*
- (e) the image does not depict an act that is a criminal offence punishable by imprisonment.*

Any new legislation must recognise that sending sexual explicit images by young people is different to the non-consensual sharing of images by adults and should include exemptions for minors in line with the Victorian legislation.

Juvenile Justice NSW recommends that it is preferable to inform and educate children and young people through a series of initiatives or interventions that would assist young people to avoid engagement or entrenchment in the criminal justice system. Education about non-consensual sharing and cyber bullying should be within the primary and secondary school curriculum. This would also be an opportunity to explore the importance of consent and the possible consequences of distributing sexual images.

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

The new offences should apply to sexually exploitative images of children when shared by an adult.

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

Any distribution by adults of **sexually exploitative** images of children under 18 years, regardless of consent to the distribution of the image, should be considered an offence. Any other exemptions in terms of age differences could mirror the Victorian Legislation.

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?

The legislation should not apply to minors. Any other exemptions in terms of age differences could mirror the Victorian Legislation

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

Yes but should only apply if the person was over 18 at the time the offence was committed and it was of a sexually exploitative nature.