

Justice Strategy and Policy
NSW Department of Justice
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Dear sir/madam

Thank you for the opportunity to provide a submission into the discussion paper regarding the sharing of intimate images without consent, colloquially known as 'revenge porn'. I am a final year law student at the University of Technology Sydney and am currently completing a research paper into this topic. Due to time constraints, not all discussion questions have been addressed, however I hope that the information I have been able to provide is of some use when considering possible legislative measures to address this concern.

Discussion Question 1: Definition of 'intimate image'

- 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?**

A broad definition should be preferred when defining an 'intimate image'. The most obvious form of images that should be included are those where a person is engaged in a sexual act and/or was taken in a sexual context. It is not considered necessary to specifically define what constitutes a 'sexual act' or 'sexual context', rather they should be given their ordinary meaning.

Secondly, the definition of an 'intimate image' should expressly include images that display:

- i. A person's genitals;
- ii. A person's anal region; and/or
- iii. The breasts of a woman.

Expressly including the breasts of a woman in the definition will help prevent the potential ambiguity which may be found under similar provisions in South Australian and the UK, where they are not expressly included.¹

Thirdly, the *context* in which nude or semi-nude images are captured should not be limited to occasions involving sexual activity. For example, images of a nude person that were taken for artistic expression, or of a breastfeeding mother, may warrant inclusion under the definition if they are distributed for improper purposes.

¹ *Summary Offences Act 1953 (SA)*, s 26A; *Criminal Justice and Courts Act 2015 (UK)*, s 35.

Fourthly, following the lead of New Zealand legislation,² it may be appropriate to include in the definition images of a person wearing only their underwear, on the proviso that such images are strictly limited to occasions where the image was taken in circumstances where there was a reasonable expectation of privacy.

Finally, the approach of the UK legislature in allowing their definition of an intimate image to include images that have been manipulated (or 'photoshopped') to portray the victim's head transposed on the body of another person engaged in a sexual act or in a state of undress should be included under the definition.³ This is likely to become an increasing issue into the future as photo editing software becomes more popular and easier to use.

In terms of drawing a distinction between intimate and culturally sensitive images, it may be that the approach taken by Victoria, in requiring an image to be 'contrary to the community standards of acceptable conduct',⁴ is an effective way of ensuring that the context of an image is taken into account and that the provisions of the Act are not misapplied.

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?**

A broad approach is necessary when defining 'distribute' as there are a number of means by which an image can be disseminated using modern technology. The terminology currently used by other Australian jurisdictions, such as, 'publishing, exhibiting, communicating, sending, supplying, transmitting, uploading or making available for access by another person', is comprehensive and should be considered for inclusion in future legislation.

However, there are concerns that the definitions found under current Australia laws may not cover occasions where an offender simply shows the image to another person without actually forwarding or sending it on. Therefore, the definition under the UK legislation should be considered. This provides that the term 'disclose' (as opposed to 'distribute') includes occasions when 'a person, by any means, gives or shows an image to a person or makes it available to a person'.⁵

Another issue to consider is that intimate images will be distributed unintentionally by individuals on occasions, such as when their computer is hacked, or they lose their phone. For this reason, the requirement of intent when 'distributing' or 'disclosing' an image on should be considered.

Lastly, despite revenge pornography being a phenomenon that originated from technology, any proposed offence should still include the distribution of images in both digital/electronic format and in hard copy. This will ensure that a person who distributes images in hard copy does not escape punishment merely because their actions were not conducted online.

² *Harmful Digital Communications Act 2015* (NZ)

³ *Criminal Justice and Courts Act 2015* (UK), s 34(5).

⁴ *Summary Offences Act 1966* (Vic), ss 41DA(1)(b).

⁵ *Criminal Justice and Courts Act 2015* (UK), s 34(2).

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 1900 be amended to apply when images are taken for purposes other than sexual gratification or sexual arousal?**

The taking/recording of an intimate image without consent can be just as damaging, particularly if later down the track a person decides to distribute the images to others. Therefore, the proposed legislation should include provisions covering the taking/recording of an intimate image without consent.

In terms of whether there is a need for sexual gratification or sexual arousal, these elements are not considered necessary. There will be occasions where a person engages in such acts without a sexual motive. For example, a journalist may do engage in such conduct with the ultimate goal of wanting to feed the public interest.

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?**

The overlap between current child abuse material legislation and proposed revenge pornography laws has created a dilemma for law-makers. Current child abuse laws do not fit neatly with the increased use of social media and consensual 'sexting' by minors in recent years. This has resulted in a number of charges being laid against minors for child abuse material offences, including occasions where minors have consensually and willingly shared intimate images with their boyfriend or girlfriend.⁶

In terms of legislating for a revenge pornography offence involving minors, however, an important first step is to determine the age for which distributing intimate images in any capacity should be made unlawful. Because revenge pornography laws are likely to be administered by individual states and territories, until such time that uniform laws are implemented, it is suggested that mirroring the relevant age of consent laws in each jurisdiction will be the most effective and consistent approach.

⁶ Thomas Crofts and Murray Lee, "Sexting", Children and Child Pornography' [2013] 35 *Sydney Law Review* 85.

AGE OF CONSENT IN AUSTRALIA

State	Legislation	Age of Consent
ACT	<i>Crimes Act 1900</i> (Section 55)	16
NSW	<i>Crimes Act 1900</i> (Section 66C)	16
NT	<i>Criminal Code Act 1983</i> (Section 127)	16
QLD	<i>Criminal Code Act 1899</i> (Sections 208 and 215)	16 – except for anal sex which is 18
SA	<i>Criminal Law Consolidation Act 1935</i> (Section 49)	17
TAS	<i>Criminal Code Act 1924</i> (Section 124)	17
VIC	<i>Crimes Act 1958</i> (Section 45)	16
WA	<i>Criminal Code Act Compilation Act 1913</i> (Section 321)	16

The next step is to determine an appropriate method of distinguishing between matters involving adults and minors. Consideration may firstly be given to excluding offenders who are minors from any general revenge pornography offences, and creating a separate provision which applies only to them. Another potential option is to create an aggravating circumstance to a general revenge pornography offence where the offender is an adult and the victim is under the age of consent. A further consideration is to include safeguards in the legislation to require police officers to consider a list of factors prior to prosecuting an offender who is under the age of consent, such as the age of the victim, the context in which the images were captured and distributed, the nature of the image itself, and most importantly, whether it is in the public interests to do so. In terms of the public interest, it is suggested that this be an objective test is used, and should include consideration as to whether alternative actions such as a warning, caution or youth justice conference might be more appropriate rather than court action.⁷

A final consideration for a revenge pornography offence involving minors is for the courts to be given the discretion to determine whether it is appropriate, based on the facts of the case, to place the offending minor's name on the sex offenders register. The consequences of placing a minor's name on such this register is serious and has the potential to drastically affect their future employment. If they have simply engaged in an act of consensual sexting with peers, it is not considered appropriate to have their name placed on the sex offenders register.

⁷ This follows the approach taken under the *Young Offenders Act 1997* (NSW).

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?

There is a current consensus with the maximum sentence of two years imprisonment across a number of jurisdictions, including SA, VIC and the UK. An exception to this is in Canada, where an offender can be sentenced to a maximum term of five years.⁸

Because revenge pornography offences are still in their early stages across many jurisdictions, it is difficult to determine what maximum penalty will serve as a more effective deterrent to prevent people engaging in acts of revenge pornography, as well as provide adequate punishment for those who do.

What is clear is that once intimate images of an individual are distributed, the harm cannot easily be undone. This is particularly the case for images that are posted online, as the reach of how far they have extended, or whether they were saved by a viewer is almost impossible to know. For this reason, deterrence will be a key factor in terms of determining an appropriate penalty.

Deputy Chief Magistrate Mottley in *Police v Usmanov* supported this view, stating that deterrence is a key consideration in revenge pornography cases due to the fact that once images have been posted online, they can be instantly accessed by the world, causing incalculable damage to a person's reputation.⁹

For this reason, the approach taken by the Canadian legislature in providing a maximum penalty of five years imprisonment is preferred. By locating the offence within the *Summary Offences Act* which contains less serious offences - as is the case in Victoria and South Australia,¹⁰ there is the potential that this will lessen the deterring effect when compared to an offence located in a more serious piece of legislation such as the relevant state's *Crimes Act* or *Criminal Code*, accompanied by a harsher maximum penalty. A 5 year maximum sentence delivered by Canada will allow the offence to be indictable, yet treated summarily if required.

In addition to this maximum penalty, courts should also be given the power to issue orders as they see fit. This will allow for practical orders to be made to ensure a victim is adequately protected and the offence does not remain ongoing. For example, the power to order images be taken down from online, that images be surrendered and destroyed, and restricting an offender's access to the internet are all examples that will have utility in revenge pornography cases.

⁸ *Criminal Code*, RSC 1985, c C-46, s 162.1.

⁹ *Police v Ravshan Usmanov* [2011] NSWLC 40, 19.

¹⁰ *Summary Offences Act 1966* (Vic), s 41DA; *Summary Offences Act 1953* (SA), s 26C.

Discussion Question 9: Defences

Should the new offence include one or more statutory defences?

Consideration should be given to providing a defence to those who are acting in good faith, such as law enforcement officers investigating offences, or health practitioners acting for legitimate medical purposes.

Further consideration as to whether 'consent' should form part of the offence itself, or as a separate defence, is also recommended.

Concluding Remarks

New laws criminalising acts of revenge pornography are welcomed and are a necessary response to the issues associated with the rapid growth of technology in recent years. However, a wider approach outside of simply just the criminal law will be required to effectively combat revenge pornography, and may include other options such as:

- i. Education;
- ii. Consideration of a specific tort;
- iii. A cooperative nation-wide response by the Commonwealth government and key stakeholders, such as ISP's, to introduce a body which has the power to receive reports of revenge pornography content and have the ability to either take it down, or block the website in Australia.

As a final point, it is recommended that the proposals put forward by a number of submissions in the recent Commonwealth Senate Inquiry is that the term 'revenge pornography' is replaced with a less offensive and more accurate term such as the 'non-consensual disclosure of intimate images'.

Kind regards,

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