



## REGARDING DISCUSSION PAPER:

### "THE SHARING OF INTIMATE IMAGES WITHOUT CONSENT - REVENGE PORN"

SEPTEMBER 2016

#### Submission from NSW Health Education Centre Against Violence (ECAV): 19<sup>TH</sup> October 2016

We are very pleased to see that NSW Department of Justice is preparing the groundwork for legislative measures regarding the phenomena of "revenge porn". As acknowledged in the paper, this form of harassment and humiliation is causing tremendous pain and suffering, impacting the mental health and reputations of numerous innocent victims. This crime is often carried out within the context of sexual and physical violence where the power dynamic is unequal, compounding the disempowerment of the victim. For this reason we support legislation to ensure a higher level of accountability for offenders, along with less scope for victims to be scrutinised.

**In response to the questions posed in the September submission paper:**

#### **DISCUSSION QUESTION 1:**

**a) What images should be captured by the new offences?**

ECAV agrees that images which are intimate as opposed to specifically sexual can be equally damaging and traumatic in the eyes of the victim and the community. Age, culture and context also contribute to the consideration of what is offensive and intimate.

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

Yes, following the lead of both Victoria and South Australia, the definition of intimate as "contrary to community standards of acceptable conduct" or "invasive" image" as termed in South Australia. Suggestion to add to the definition "causing psychological shame to the victim" as it draws attention to the negative impact and covers actions which could be degrading and humiliating to the person, which are not necessarily sexual.

#### **DISCUSSION QUESTION 2:**

**a) How should distribution be defined in the new offences?**

**b) Should distribution include the sharing and showing of images?** Distribution should include sharing and showing of these images by any method, electronic or hard copy; including even "fleeting" images as evidenced on Snapchat or any further new technologies. ("A recent survey by Voucher Codes Pro found that more than half of Snapchat users polled had received an "inappropriate" picture." Any item once placed on the web is widely available and for an indefinite period. )

### DISCUSSION QUESTION 3:

- a) **Should the new offences include not only the sharing but also the taking/recording of an intimate image without consent?**

Yes, as many times there will be an element of bullying, coercion along with collusion and intent between the filmer/recorder and the distributor(s) or the images.

**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?**

Yes, the laws need to extend beyond an intent regarding sexual arousal and gratification as revenge, and coercive filming and recording are also acts of bullying, of violence, and a tool of humiliation. From a feminist psycho-social model, these are actions primarily, though not solely, of gender based violence, demonstrating disrespect not only of the specific person objectified and viewed in “revenge porn,” but also of a class of people, primarily women.

### 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?**

In the above, the question of consent is implicit. Where consent may be given in one instance to recording, consent has not been given in the second instance to sharing or distribution. Also, in the first instance of consent, often coercion is a strong factor in the case of relationships characterised by domestic violence or of any emotional blackmail. Frontline work with women affected by revenge porn along with sexual assault and domestic violence, supports an understanding that they were not in a position to provide informed consent in the context of relationship parameters of implicit or explicit violence and threat. There should be no inclusion of an “intention to cause harm” as this would be difficult to establish, and the absence of intent does not mitigate the impact on the victim. This offence should include an element of recklessness as to whether or not consent was given, as this addresses the difficulty of proving consent.

### DISCUSSION QUESTION 5:

- a) **Should consent be defined for the purposes of the new offences?** We support a twofold definition, of consent regarding both the taking of images and the sharing of images - both need to be made explicit and expressed. It is important that the onus is on the accused to prove that they had gained consent.
- b) **Should there be a requirement for consent to the sharing of intimate images to be explicit?** Yes consent should be made explicit or expressed and specific to image, the time it was taken, the context and the manner it was taken- ensuring a higher level of accountability for the accused to prove consent was obtained.

- c) **Should consent to having intimate images shared during the course of a relationship be considered to have terminated upon conclusion of that relationship?**

Yes, it must be made clear in legislation that consent terminates at the conclusion of the relationship. People engaging in the sharing of intimate images need to know that at the termination of the relationship, these images must be removed and within a specified timeframe.

#### **DISCUSSION QUESTION 6:**

- a) **Should the new offence include threats to share intimate images?**

Yes, threats can be as damaging to mental health as actual distribution, especially for members of certain cultural groups, and may affect the victims' subsequent actions and choices of a negative nature. Threats to distribute intimate imagery constitute another form of abuse.

- 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?**

The fault element should be defined with a combination of Vic and SA law, including: engendering a belief that the threat will be carried out; OR arousing a fear that a threat will be carried out. Also include an element of reckless indifference as to whether a belief that the threat would be carried out OR a fear was aroused. The definition then allows for a higher benchmark for those accused to defend and the inclusion of an element of recklessness allows for less scope to discredit the victim.

- c) **Should 'threats' be defined to include both explicit and implicit threats made by any conduct?**

Yes include both explicit and implicit threats.

- d) **Should the offence apply irrespective of whether the intimate images actually exist?** Yes. The threat is based on a premise of harm, and that is what creates the harmful effect, regardless of whether such an image exists, or whether the perpetrator of the threat has access to such an image.

#### **DISCUSSION QUESTION 7:**

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

Offences dealing with children should continue to be dealt with under laws targeting child pornography and also may be dealt with additionally under this law. Ideally, there would be an agreed-upon definition of a 'minor' across Australia.

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

This law should state that minors depicted in an image cannot give consent for the purpose of this offence. Additionally at the conclusion of a relationship, any images which are of children without clothing or in any circumstance outside the bounds of decency and community standards may not be distributed by the adults, nor any threats made regarding distribution.

- c) **Should the legislation distinguish between cases where both parties are minors and cases where the is over 18 years and the victim is not?**

No, as in both cases, the crime and harm have been committed, and it is important that responsibility is taken. Young offenders would be better dealt with in the first

instance via mandatory education regarding respectful relationships and community service projects.

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

Yes, they should be listed for the conviction and then have to apply for a risk assessment which includes a written submission.

**DISCUSSION QUESTION 8:**

**a) What penalty should the new offence/s carry?**

Legislation should acknowledge the seriousness of these crimes, and that these offences can cause significant and prolonged suffering, and has the potential to ruin reputations and familial and community relationships. The existing legislation in South Australia and Victoria give some gauge with regards to penalties.

**b) Should the Court be able to order an individual convicted of an offence to take down/ remove the images in question?**

Most definitely. This should be part of the legal process that the Court orders the offender to remove the images. The Court should also have a formalised process involving the offender agreeing to and demonstrating that they have - A) Removed the offending material immediately (B) That they will not use this material at a future time. C) They will not publish similar abusive material.

**Should a breach of such an order amount to a further offence?**

This needs to be seen as a very serious crime with relevant consequences.

**What penalty should a breach offence carry?**

Any breaches need to result in additional fines and community service bonds. The court can order removal and there will need to be a timeframe for and evidence of the removal.

**DISCUSSION QUESTION 9:**

**a) Should the new offence include one or more statutory defences?** Yes, there needs to be exclusion for medico-legal reasons, policing, or lawful research however express and explicit consent in writing by the relevant authority needs to be gained by adults with specific reference to image, time taken and manner it was taken. Such an authority needs to undertake their duty of care in the following:

- Seeking written consent for taking images
- Advising the person that these images may be used over an indefinite period (perhaps even decades)
- Seeking written consent for distributing images
- Explaining where and who will be in possession of these images - this needs to be clearly evidenced in the consent form.

It needs to be expressly stated that consent to distribution of any intimate partner, filming, and sharing of images is removed immediately upon the victim having left the relationship physically, leaving a residence, or verbally terminating the relationship, or in writing.

Finally, the following questions may be posed - how will these laws be applied and defended interstate and internationally as the internet knows no bounds? It is imperative that victims are protected wherever the images originate from, and wherever they are distributed to. Consistent and uniform legislation Australia-wide, between the Commonwealth, States and Territories, to protect victims and to hold perpetrators accountable for their actions is strongly recommended.