

**Response to the
Department of Justice Discussion Paper
The sharing of intimate images without consent – ‘revenge porn’**

The Children’s Guardian welcomes the opportunity to provide feedback on possible legislative measures to address the non-consensual sharing of intimate images in NSW.

The Children’s Guardian supports the introduction of a new criminal offence to address the non-consensual sharing of intimate images.

A tailored approach is required to tackle this growing contemporary issue, in light of its significant and damaging impact on the psychological well-being of children and young people, as well as members of the broader community, particularly victims of domestic and family violence.

A new offence is required because the existing Commonwealth and NSW legislation suffer from deficiencies in dealing with the conduct. For example, the Children’s Guardian notes the existence of current NSW offences in ss 91J (voyeurism), 91K (filming a person engaged in a private act), 91L (filming a person’s private parts) and 91M (installing a device to facilitate observation or filming) of the *Crimes Act 1900* (NSW) (**Crimes Act**). Offences against s 91J, 91K and 91L disqualify a person from working with children if committed as an adult. An offence against s 91M disqualifies a person from working with children if committed as an adult and the person intended to be observed or filmed was a child. As noted on page 9 of the Discussion Paper, these offences do not, however, cover behaviour which is not sexually motivated, but rather for the purpose of causing distress to the victim.

A new criminal offence should not be introduced in isolation, but rather in conjunction with education, training and consultation with key stakeholders, including children and young people.

How the offence should be framed

Scope

Images to be captured by the new offence/s should include intimate, not just sexual, images. Particularly, sharing intimate images of a child or young person without their consent can be as distressing to that child or young person as sharing sexual images. The Children's Guardian supports the Commonwealth Senate Committee's suggestion that cases where both parties are minors should be distinguished from cases where the offender is over the age of 18 years and the victim is not. This recognises that where an offender is an adult and the victim is a child, the victim cannot provide legal consent. It also allows for the recognition of developmentally appropriate exploration of sexuality and boundaries between peers of an appropriate age.

A broader definition of images beyond only sexual images also allows consideration of a child or young person's individual cultural background and vulnerabilities.

The new offence should include threats to share intimate images, regardless of whether the images actually exist. Such threats, even where images may not in fact exist, have the potential to cause significant distress to the victim, and allow the perpetrator to exert control over the victim.

Consent

The Children's Guardian notes difficulties in assuming consent in many relationships characterised by domestic violence. Therefore, any new offence should include a safeguard that consent is not assumed based on an ongoing relationship. Victims of domestic violence should not be doubly punished for sharing images under duress from an abusive partner, only to have consent assumed in the context of a criminal prosecution because they remained in a relationship with that partner.

The Children's Guardian recognises that a new offence may overlap with the existing offence against distributing child abuse material under s 91H of the Crimes Act. The Children's Guardian supports the proposed approach taken in South Australia, which takes into account the fact that children and young people can engage both in harmful non-consensual sharing behaviours and mutually consensual, developmentally appropriate sharing. Police and prosecutors would be best placed to decide whether to lay charges under the new offence and/or s 91H, depending on the specific circumstances of the matter.

Penalties

The Children's Guardian supports an increased maximum penalty for offences involving images of minors, as currently proposed in South Australia. This recognises the particular vulnerability of children and young persons and is consistent with the age of the victim being an aggravating factor in sexual and indecent offences under the Crimes Act. Considering in turn the age of the offender, if children and young persons could be convicted of the new offence, it is imperative that sentencing options are broad and flexible, with an emphasis on rehabilitation as appropriate.

Issues on commencement of the offence in relation to the Working With Children Check (WWCC)

The Children's Guardian is mindful of the consequences which can flow from criminal convictions for children and young persons. Children who exchange images in a mutually consensual and developmentally appropriate manner should not be criminally punished. The Children's Guardian notes that this issue is being considered as part of the review of child sexual assault offences being conducted by the Department of Justice. Child victims of non-consensual sharing of intimate images should also be able to report offences to the Police without fearing self-incrimination. This is consistent with the distinction between adult and juvenile offenders in the *Child Protection (Working with Children) Act 2012 (WWC Act)*, such that a person convicted of a disqualifying offence committed as a child is subject to risk assessment, rather than automatically disqualified from working with children.

Once agreement has been reached about the form of the criminal offence, the OCG can consider how it is to be treated under the WWCC framework. The options include:

- whether it should be included as an offence which disqualifies a person from working with children if committed as an adult;
- triggers a risk assessment. The Children's Guardian notes that Victorian convictions of distributing or threatening to distribute an intimate image trigger a risk assessment under Victorian working with children legislation; or
- the WWC Act under Schedule 1.1(6) recognises that some offences may not be considered serious in isolation. Where the behaviour is repeated, however, it may contribute to a cumulative level of risk and would therefore justify a comprehensive risk assessment of an individual's suitability to work with children. The proposed new offence could therefore be considered as part of a pattern of behaviour that warrants investigation as to whether it may cause a risk to the safety of children.