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DIRECTOR'S CHAMBERS

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DATE

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Mr Daniel Noll
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By Email to: Daniel.Noll@justice.nsw.gov.au

Dear ~~Mr Noll~~ Daniel

Discussion Paper: the sharing of intimate images without consent – 'revenge porn'

Thank you for your invitation to make a submission on the above Discussion Paper.

Discussion Question 1:

a) What images should be captured by the new offence/s?

Images distributed without consent, and to which a person depicted in the image has a reasonable expectation of privacy, should be captured.

The use of the colloquial term "revenge porn" to describe the non-consensual distribution of intimate images is misleading (as is the benign term "sharing"). The term shifts attention to the image as the tainted element, rather than the accused's behaviour, and it creates an expectation that images should be akin to "porn" and therefore overtly sexual, explicit and, in all circumstances, unsuitable for general release.

This is not the case. Some images, if distributed without consent and, particularly where accompanied by abusive or distressing text, as many of these images are, and where directly distributed to persons whom it was never contemplated would view the images (such as parents and employers) will cause a level of humiliation, shame, embarrassment and distress that may not otherwise attach to such an image.

As such, images to which a person has a "reasonable expectation of privacy" can include images that, in other circumstances, may not result in harm.

A reasonable expectation of privacy would include such things as, an image in which:

- A person is depicted naked or partially naked, irrespective of whether their genitals are explicitly exposed and irrespective of the type of pose the person has adopted;
- A person is depicted engaged in a sexual act/activity, irrespective of whether their face is visible;
- A person is depicted in a way which, by the context or content, would suggest that the image is of an intimate or private nature such as images depicting a person dressed in lingerie, or in a sexual pose.

This is a non-exhaustive list and will give content to the concept of a "reasonable expectation of privacy". Images in the second example are included, as even though a person's face may not be visible, they will likely be identifiable by their association with the other person (if depicted), or by the accompanying text or by reference to whom the image is distributed.

A "reasonable expectation of privacy" should not be further defined, as to do so would limit it, but giving content to the concept as suggested above, should remove from its ambit images where no such expectation could reasonably exist. (For example, images of a person sunbathing topless on a public beach or "flashing" at a public event. Existing legislation such as s13 of the *Crimes (Domestic and Personal Violence) Act* 2007 could be utilised where distribution or other use of such images amounted to a form of intimidation.)

On this point I note that the South Australian legislation specifically excludes images of "a person who is in a public place".

"Privacy" would not have been waived even if the victim had themselves initially consensually shared the image (albeit, not to the public at large).

(In many instances, the victim will have participated in the creation of the image or created it themselves and will have consensually shared the image in a limited capacity.)

Framing the offence in terms of an image to which a victim has a reasonable expectation of privacy allows for different victims and different attitudes towards images in which they are depicted. Images captured by the third example, the "context or content" category, may cause harm to some victims but not others.

"Image" would need to include still (photographs) and moving (film/video) images.

Consideration should also be given to whether doctored images involving superimposition of an image or part thereof onto another image or using techniques such as "morphing" (the computer-generated changing of one image into another through a seamless transition) should be included in the definition of "image". And correspondingly, whether the non-exhaustive list referred to above should include the currently nominated images in a doctored form in which the victim is still identifiable or able to be identified.

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

As indicted above, images to which a person has a "reasonable expectation of privacy" would capture images which are "intimate" but not necessarily sexual or explicitly sexual. The suggested non-exhaustive list of examples would allow for a person's cultural background to be taken into account in considering whether a reasonable expectation of privacy exists.

Discussion Question 2:

a) How should 'distribution' be defined in the new offence/s?

"Distribution" should be given a wide definition to incorporate traditional electronic sharing mechanisms such as fax, text and email and even older sharing "platforms" such as the use of flyers and posters. Distribution should also include new technologies loosely caught by the concept of "social media", as well as the use of new, "non-social media" technologies such as remote server storage facility iCloud and the device transference system AirDrop.
Distribution should therefore be defined to include things such as communicate, send, share, forward, supply, upload, transfer, post, link (or make available to access), transmit and exhibit. If a list is used it should be non-exhaustive and consideration could perhaps be given to

including, as is included in the extended definition of "supply" in the *Drug Misuse and Trafficking Act* 1985, all or some of the concepts of "authorising, directing, causing, suffering, permitting or attempting any of those acts or things" in order to capture offenders who keep at arm's length of the actual act causing the distribution.

Consideration should also be given to what level of proof is required in relation to the distribution. Requiring the prosecution to obtain evidence in relation to, for example, overseas-based servers/IP addresses etc, could preclude prosecutions where there is no other evidence that the accused either did or caused the distribution.

b) Should 'distribution' include the sharing and showing of images?

Ideally, "distribution" should include the sharing and showing of images, as this can cause significant harm akin to that caused by the electronic distribution of the image. Therefore, there is no policy reason not to include the showing of an image.

If "distribution" is defined to include "exhibit" and "share", then the showing of an image could be captured by the offence. The inclusion of the word "show" in the definition would put it beyond doubt. If showing an image were to be captured, I would expect that, in the vast majority of cases, such a matter would be dealt with summarily, which is appropriate. It may also be appropriate for the NSW Police to have a caution option where the showing is done in a brief and limited capacity and is not accompanied by any other action.

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?

I would support a sub-set of the offence to include the taking or recording of an image where that image was taken or recorded without the knowledge and/or consent of the subject victim and the image is one to which a reasonable expectation of privacy attaches.

This offence should operate independently of the distribution of the image.

Where images are taken without knowledge and/or consent and the image is distributed, the circumstances of the taking or recording could perhaps be an aggravating factor in either penalty or upon sentencing.

The only note of caution I would raise with this proposal, is that it could appear to be a form of "value judgment", as images to which the victim did consent to being taken or took themselves, but which were also distributed without consent, would not attract the harsher penalty or sentence.

I would also support the creation of a sub-set of the offence to capture situations where there is a threat to distribute an image, as Victoria has done. Threats to distribute such images occur, for example, following the break-down of an intimate/sexual relationship where an offender wishes the relationship to resume as well as within the confines of an on-going relationship. Such threats cause significant emotional and psychological harm in their own right and are a form of controlling and manipulative behaviour.

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?

Sections 91K and 91L, filming a person engaged in a private act and filming a person's private parts, could be amended to include filming, for example, for the purpose of causing

embarrassment, humiliation or distress (presumably by its subsequent distribution or threat thereof), but I envisage that it would be difficult to prove that that was the purpose of the filming, rather than an intent formed at a later time.

Creating a sub-set of a new offence, rather than amending existing offences, would be my preferred option, especially as I now consider that the new offence should be a Table offence, which s91K and s91L are not.

Discussion Question 4:

a) How should the fault element be defined in a new offence of sharing an intimate image without consent?

As I consider that there can be, absent specific uses, no intention other than to cause embarrassment, humiliation, distress, etc by the non-consensual distribution of an image to which a person has a reasonable expectation of privacy, I do not support a fault element linked to an intent to cause such harm etc.

As noted in the discussion paper, linking the fault element to "harm" or any such concept, may give an offender a "loophole" where they can claim another intention or motivation, particularly where they have resisted accompanying the distribution with derogatory text.

Arguably, such a fault element would also send to the community an unacceptable message – that the non-consensual distribution of such an image is acceptable, as long as no harm was intended. In my experience, I doubt many victims would appreciate such a nuance.

Certainly, if such a fault element was created, I would support an exception to proof of the harm akin to s13 of the *Crimes (Domestic and Personal Violence) Act* 2007, where the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm.

As mentioned above, images may be distributed without consent for specific uses where there is no intent to cause any harm to the victim. Such specific uses will include for law enforcement/investigation purposes or for the purposes of prosecution and perhaps for medical or scientific use, although presumably consent would have been obtained in these latter situations. Consideration should perhaps be given to including a sub-section which specifically excludes such specified or defined uses from the operation of the new law.

I support the fault element attaching to the consent element of the offence: knowingly or recklessly distributing an image without consent, as recommended by the Senate Committee.

Recklessness is required so that earlier distribution of the image by the victim themselves, or earlier distribution by the [now] accused or another person with the victim's consent, could not be used to imply consent to the later distribution.

In my submission, consent would need to be explicit or express and would need to be consent to the distribution of that particular image at that particular time and in that particular way.

Additionally, there should be a reverse onus placed upon an accused to prove consent if they wish to rely upon this as a defence to the distribution.

b) Should the offence include an element of recklessness as to whether the consent was given?

As mentioned above, I support an element of recklessness in relation to consent to address issues arising from prior consensual distribution.

I do not support the Victorian model whereby the offence does not apply if the victim "could reasonably be considered to have expressly or impliedly consented", as I consider that prior consensual distribution by the victim or consent to distribution by another person could be used to support a defence of "impliedly consented".

Although the South Australian legislation requires that an accused knows or "has reason to believe" that the victim is not consenting, which is a more stringent requirement than the Victorian legislation (and one which presumably places the onus on the accused to prove the "reason to believe"), it is not quite a recklessness requirement and may still allow an accused to extrapolate later consent from an earlier agreement.

I note also that recklessness is a concept already used in NSW criminal legislation and that a body of case law has developed around it.

Discussion Question 5:

a) Should consent be defined for the purposes of the new offence/s?

As mentioned above at **Question 4** ***a),*** I believe that consent should equal explicit or express consent from the victim to the distribution of the particular image/s at that particular time and to the particular form of distribution used and its scale. The onus of establishing consent would lie upon the offender.

I would support consent being defined along these terms.

Such a definition would be a clear statement of the law, would put possible offenders on notice (particularly if the introduction of the new offence/s is accompanied by an education program) and would remove any uncertainty where there was prior distribution or prior consent to some form of distribution.

Consideration could perhaps also be given to including a non-exhaustive list of factors which would negate consent, based on s61HA of the *Crimes Act* 1900, and adjusted for the new offence. Given that the non-consensual distribution of such images could be – or should be - considered a form of domestic violence in the majority of cases (whether or not the relationship is ongoing at the time of distribution), the use of threats or force, for example, should operate to negate consent.

b) Should there be a requirement for consent to the sharing of intimate images to be explicit?

Yes, see the comments above.

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?

Yes. Just as "privacy" should not be considered to have been waived if the victim had previously consensually shared the images, prior consent should not operate to waive the requirement for consent at the time of the distribution of the images/s.

Discussion Question 6:

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

Yes, see the comments at **Question 3** ***a)***, above.

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 could perhaps be similar to that in s13 of the *Crimes (Domestic and Personal Violence) Act* 2007, that is, an intent to cause the victim "fear of [physical] or mental harm". "Mental harm" could be defined, non-exhaustively, to include things such as shame, embarrassment, humiliation, distress and the like. As previously mentioned, in relation to considerations of a fault element for the substantive offence, the prosecution should not be required to prove that the victim actually feared mental harm (as per s13). Recklessness should be part of the fault element.

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

I can see no policy reason as to why implied threats should not be included, particularly as the relationship between the victim and accused, whether ongoing or not, creates or has created, the environment in which an implied threat can be "successfully" delivered and understood, and the accused, in making the implied threat, has taken advantage of this.

d) Should the offence apply irrespective of whether the intimate images actually exist?

In this scenario, presumably the victim believes, or is made to believe, that the images exist, as otherwise the threat would be hollow. Experience shows that such images can and are taken without the victim's knowledge, so a belief in the existence of such images following a threat to distribute them, is not unrealistic. As such, the damage would be the same as if the images existed. The gravemente of the "threat offence" is the threat itself (which is a form of blackmail) and the damage done by that threat, not whether the accused could have actually carried out the threat.

Discussion Question 7:

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

If the images were created as the result of "sexting" between children/teenagers and then non-consensually distributed by the recipient of the "sexting", then consideration should be given to the proposed offence applying, as victims who are children and whose images are distributed by other children should receive the same protections under the law as adult victims.

I note that South Australia has now recognised that children or young people are as capable as adults at engaging in harmful "revenge porn" behaviour.

I also believe that it would not be appropriate to treat this situation under legislation relating to child abuse material. Further, court alternatives and penalty options currently available to children should be available under this legislation.

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

In terms of the fault element discussed above and situations where both victim and accused are children, there should be no change.

To place an age-related proviso on the ability to consent, thereby creating, in effect, an offence where consent is not an element, could cause issues where the accused child is of or around the same age as the victim and/or where the distribution is the joint act of both children.

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

As mentioned at ***a)*** I believe that there is a basis for the offence applying where both parties are minors. Where an offender is over 18 and the victim is not, the law relating to child abuse

material may be more appropriate, depending on the image, but consideration needs to be given to how to deal with situations where the age gap is relatively small, the image was created as the result of consensual "sexting" and shared when the accused was themselves a minor. In these situations it may be appropriate to charge under the new offence.

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

As the offence is directed at the non-consensual sharing of an image, some of which will not be sexual or explicitly sexual, I do not consider that such a conviction is relevant for obtaining a working with children check.

Discussion Question 8:

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

The offence should be a Table offence and carry the same penalty as s13 of the *Crimes (Domestic and Personal Violence) Act* 2007: five years imprisonment on indictment and/or 50 penalty units. Like s13, it should be a Table 2 offence and carry a two-year maximum in the Local Court.

By making the offence a Table offence, there will be no statutory limitation period in which prosecutions must be brought, which would cause issues, as victims are often not initially aware of the distribution or the extent of it. And there will be scope to deal with particularly egregious examples of offending and with repeat offenders.

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 the breach offence carry?

I support the Court being able to issue a "take-down" order, but at the time of conviction is too late to reduce the harm done to the victim. Take-down orders ideally should also be able to be issued by the police at the time of complaint/charging, as enforceable stand-alone orders (or, less ideally, as part of bail conditions). These orders could have the same status as AVO breaches and therefore a breach could amount to a further offence. Penalties by way of fines, should apply to a breach of the order and breaches should be able to be taken into account as an aggravating factor on sentence.

Discussion Question 9: Should the new offence include one or more statutory defences?

As discussed above at **Question 4** ***a)***, there should be a specific use "defence" to cover, for example, law enforcement and prosecution purposes.

Yours faithfully

[redacted]

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