

21 October 2016

Director, Crime Policy
NSW Department of Justice
GPO Box 6
SYDNEY NSW 2001

By email: policy@justice.nsw.gov.au.

Dear Director, Crime Policy

**Re: A new offence of sharing intimate images without consent
Discussion Paper September 2016**

Victims Services thanks the Department of Justice for the opportunity to provide submissions on the issues raised in the discussion paper.

Victims Services provides support services to victims of crimes occurring in NSW. Within the context of applications for support in respect of domestic violence, Victims Services has noted an increase in cases involving threats to distribute intimate images without the consent of the person depicted. Victims of such threats have indicated that such images, which may or may not have been recorded with the consent of the victim at the time of recording, can be used as yet another method to coerce or control a victim in a domestic relationship.

As such, Victims Services generally supports the creation of a new offence aimed at addressing the non-consensual sharing or distribution of intimate images, including specific criminalisation of threats to do so. In relation to the discussion questions, Victims Services makes submissions in relation to the issues of consent, threats, and court enforcement powers as follows:

Discussion Question 5

- a) Should consent be defined for the purposes of the new offence/s?**
- b) Should there be a requirement for consent to the sharing of intimate images to be explicit?**
- 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?**

Victims Services agrees with the narrower approach suggested in submissions to the Senate Committee made on behalf of the Sexual Assault Support Service Inc, the Office of the Director of Public Prosecutions, and the Law Council of Australia's National Criminal Law Committee. That is, within the context of an intimate personal relationship, recording of images may be consented to during a relationship, however the distribution of such images should be the subject of separate express consent and limited to the particular time and manner used. Any consent given should be taken to be terminated upon the conclusion of that relationship.

The proposed Victorian offence defines consent in a manner that adds little to the ordinary meaning of consent, and, if a definition is to be given to consent it should make clear that consent obtained through threat or coercion is no consent at all. It should also be noted that, once consent is given and images are distributed, and in the event that subsequently consent is withdrawn, the danger of such images "going" or having "gone viral" cannot be mitigated. These are, however, practical issues that go beyond the scope of this paper. Ultimately, if separate consent is required for the recording of images, the distribution of images, and is presumed to be withdrawn upon termination of the relationship, then a definition of consent may not be necessary beyond the ordinary meaning.

Discussion Question 6

- a) Should the new offence include threats to share intimate images?**
- 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?**
- c) Should 'threats' be defined to include both explicit and implicit threats made by any conduct?**
- d) Should the offence apply irrespective of whether the intimate images actually exist?**

As indicated above, Victims Services strongly supported an offence that includes threats to share intimate images. This offence should apply regardless of whether the intimate images actually exist, and should be broad enough to cover explicit and implicit threats made by any conduct.

Threats intended to cause physical harm or mental harm to one or another party to a relationship are already criminalised in NSW. However, the dynamics of domestic violence are predicated on power imbalances that exist in relationships, and threats to shame a party through distribution of intimate images, whether such images in fact exist or not and whether the threat is intended to cause mental harm or otherwise, are arguably as powerful in terms of coercive power. The offence should include both explicit and implicit threats.

Discussion Question 8

- 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?**

Victims Services supports empowering courts to order an individual to take down or remove the images in question, with a breach of such an order amounting to a further offence. However, in practice, Victims Services recognises that an image, once distributed (in the case of through the internet), takes on a life of its own.

In the case of cloud service providers, for example, proprietary rights to the image often times vest in the service provider once uploaded, and its continued availability may be beyond the direct control of a convicted offender in these matters. One potential enforcement provision may be to frame the order as requiring a convicted offender to make all reasonable attempts to take down/remove the images.

If you have any further questions please do not hesitate to contact Matthew Ting, Senior Advocate (matthew.ting@justice.nsw.gov.au) or the writer (Mahashini.krishna@justice.nsw.gov.au) on 02 8688 5511.

Yours faithfully,



Mahashini Krishna
Commissioner of Victims Rights