



Justice Strategy and Policy  
NSW Department of Justice  
GPO Box 6  
Sydney NSW 2000

14<sup>th</sup> October 2016

## **Submission to NSW Justice**

### **RE: THE SHARING OF INTIMATE IMAGES WITHOUT CONSENT**

#### **'Revenge Porn'**

The following submission addresses each proposed question in order consistent with the Discussion Paper. Each question is answered very briefly with reference where applicable to the current *Crimes Act NSW* 1900.

#### **Question 1:**

- (a) What images should be captured by the new offences?
- (b) Should the definition include 'intimate' but not necessarily sexual images?

#### Submission

- (a) Any intimate image whether moving or still showing a person's genitals, anal region or a woman's breast/s or an image detailing a person engaging in intimate and private behaviour which if seen in public would offend
- (b) Yes. Not all 'intimate' images are necessarily sexual.

#### **Question 2:**

- (a) How should distribution be defined?
- (b) Should distribution include the sharing and showing of images

#### Submission

- (a) Distribute means 'the transmitting, sharing, uploading, supplying, showing or publishing any intimate image or making available for another person to access without the express consent of the person in the image
- (b) Yes. The sharing or showing of any intimate image without express consent should be included in the definition of 'distributing'

### Question 3:

- (a) Should the new offence/s include not only the sharing but also the taking of the image without consent
- (b) Should the existing NSW offences such as s.91K and 91L be amended to include images taken other than for sexual gratification

#### Submission

- (a) Yes. The new offence/s should prohibit the taking of intimate images without the express consent of the person contained in the image.
- (b) No. The new offence/s should be contained in the *Crimes (Domestic and Personal Violence) Act NSW 2007* or the *Summary Offences Act NSW*. The current sections 91K and 91L of the *Crimes Act NSW 1900* should not be amended to widen the definition to include 'revenge porn'. New revenge porn laws should be distinct and separate pieces of Legislation.

### Question 4:

- (a) How should the fault element be defined in the new offence of sharing intimate images without consent?
- (b) Should the new offence include an element of recklessness as to whether the consent was given?

#### Submission

- (a) Recklessness should be the test for the fault element as currently defined in s. **61HA (2), (3) (a), (b), (c), (d) and (e) & (4) (a), (b), (c) and (d)** of the *Crimes Act NSW 1900* and should be 'defined' in the /relevant legislation where 'revenge porn' laws are located. For example the Summary Offences Act does not define 'intention' or 'recklessness' and the current definition of 'recklessness' in section 4A of the *Crimes Act NSW 1900* should not be the definition for the purposes of the fault element for 'revenge porn' legislation.

**Question 5:**

- (a) Should consent be defined for the purposes of the new offence?
- (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 the relationship be considered to have terminated upon the conclusion of that relationship?

## Submission

- (a) Yes. Consent should be defined as an express and voluntary agreement to allow intimate images to be taken of the person giving consent to the person taking the image of the person who has given express consent.
- (b) Yes. Consent to the transmitting, sharing, uploading, showing, supplying or publishing any intimate and private image must be obtained from the person depicted in the intimate image and must be unequivocal and express (which should include third parties who did not take the original still or moving image).
- (c) Yes. Express consent to transmit, share, upload, show, supply or publish any moving or still intimate image is automatically terminated and revoked at the conclusion of the intimate relationship and if the intimate relationship resumes then express consent must again be obtained.

**Question 6:**

- (a) Should the new offence/s 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?

## Submission

- (a) Yes. An express threat should be included as an offence. It is the threat of such a personal violation of intimacy that is used to cower, bully and coerce the person receiving the threat.
- (b) Yes the fault element should be recklessness as currently expressed in s. 61H of the *Crimes Act NSW* 1900.
- (c) The threat should be both implicit and or explicit, including threats to distribute an 'intimate image' via a third person.
- (d) Yes. The purpose of the threat is to cower, intimidate, bully and coerce the person receiving the threat.

### Question 7:

- (a) Should the new offences apply to images of children?
- (b) How should the issue of consent be dealt with in relation to the 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?

#### Submission

- (a) Yes. If the child depicted in the image is under 14 then the *Crimes Act NSW 1900* sections 91G-H may apply. Alternatively the new 'revenge porn' legislation should apply to all other images of children as the fault element in s. 91G-H requires the image to have been taken for a 'pornographic purpose'. The majority of 'intimate images' would not have been taken or procured for pornographic purposes.
- (b) Children under the age of 18 cannot give consent. The legislation must protect children against the possibility of millions of their intimate images being published and the ramifications on their wellbeing and likely consequences of their future employment prospects.
- (c) Yes. Child offenders should be sentenced in accordance with the *Children (Criminal Proceedings) Act NSW 1987*; however the legal tests for fault must be consistent with other NSW Legislation regardless of the age of the offender and therefore the same as adults (*doli incapax* will apply where it is a relevant element). Where an offender is an adult and the non-consensual victim is a child, the current sentencing regime in the *Crimes (Sentencing Procedure) Act NSW 1999* will apply. However the legal tests for proof should be the same as for adults.
- (d) Yes in a case where the offender is an adult and convicted for an offence against a child (an image of a child). With regard to a child offender and the offence is against a child then for a second conviction only.

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