

The sharing of intimate images without consent – 'Revenge porn'

Legal Aid NSW Submission to
the Department of Justice

October 2016

Table of Contents

About Legal Aid NSW	3
Introduction	4
<i>Question 1: Definition of intimate image</i>	4
Reference to cultural context.....	6
<i>Question 2: Definition of distribution</i>	6
<i>Question 3: taking/recording of an intimate image without consent</i>	7
<i>Question 4: fault element</i>	7
<i>Question 5: Definition of consent</i>	8
<i>Question 6: threats to share intimate images</i>	9
Defining the fault element of an offence of threatening to share an intimate image	10
<i>Question 7: Children</i>	11
Children as victims	11
Juvenile offenders	11
<i>Question 8: Penalties</i>	13
Other court powers.....	14
<i>Question 9: statutory defences</i>	14
Conclusion	15
Model of new offence	15
Measures beyond a criminal offence provision	15

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW administers funding through its Women's Domestic Violence Court Advocacy Program (WDVCAP) to 28 non-government organisations to provide Women's Domestic Violence Court Advocacy Services (WDVCASs).

WDVCASs work alongside the legal system to assist women and their children seek legal protection in obtaining Apprehended Domestic Violence Orders. WDVCASs also provide information and referrals to women for their ongoing legal, and social/welfare needs. WDVCASs have a presence in 115 local courts across NSW.

Legal Aid NSW's Domestic Violence Unit (DVU) is a specialist unit helping clients who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point.

The DVU provides legal advice and representation in a range of areas

including: apprehended domestic violence orders, family law, care and protection, housing, social security, credit/ debt problems, Victims Services, financial assistance matters and criminal law.

Legal Aid NSW also provides state-wide criminal law services through the in-house Criminal Law Practice and through legal aid funding to private practitioners. The Criminal Law Practice services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia. The Children's Legal Service advises and represents children and young people 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

Legal Aid NSW draws on its experience delivering services to domestic violence victims and offenders in the preparation of this submission. The names of all clients in the case studies have been changed to protect their privacy. Should you require any further information please contact Annmarie Lumsden, Director, Strategic Planning and Policy, at

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Introduction

Legal Aid NSW welcomes the opportunity to respond to the issues raised in the Department of Justice's Discussion Paper *The sharing of intimate images without consent - 'revenge porn'* (September 2016).

Legal Aid NSW supports the introduction of an appropriately targeted offence dealing with this type of behavior, given its prevalence in the domestic and family violence context. We note that stakeholders' views are sought as to how an offence addressing this issue should be framed, rather than whether or not an offence should be introduced in New South Wales.

At the outset we are concerned that:

- As the non-consensual sharing of intimate images commonly occurs in the context of domestic and family violence, this context should determine the appropriate elements of the offence. The essence of any offence should be the non-consensual use of intimate images as a means of coercing and controlling victims of domestic violence. We therefore submit that the offence should be modelled on the stalk/intimidate offence in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (**CDPV Act**) and located in that legislation.
- The offence should be formulated with a view to minimising potential risk to freedom of expression, including artistic expression, and any inconsistency with both express and implied constitutional rights and federal legislation.
- The new offence should not be categorised as a sexual assault offence, as its aim is to criminalise behavior that involves abuse of power, controlling and coercive behaviour and the breach of privacy of its victims.
- The issue of non-consensual sharing of intimate images, both in and beyond the domestic violence context, should not be addressed solely by a criminal justice response. This issue is complex and demands a multi-pronged approach with civil, criminal and non-legal interventions. Suggestions for such measures are outlined at the conclusion of this submission.

It is noted that Legal Aid NSW represents and advocates on behalf of victims of domestic and family violence, as well as those charged with criminal offences. Differing views exist within Legal Aid NSW as to how certain elements of a new offence should be framed. The following submissions respond in turn to the questions posed in the Discussion Paper. Where relevant, any points of difference within the organisation are identified.

Question 1: Definition of intimate image

Legal Aid NSW supports a definition of images to be captured by the new offence which is similar to that adopted in Victoria, but expanded to take into account gender and sexual identity issues (see further below). The Victorian provision is preferable to its South Australian equivalent, as it is broad enough to cover situations where, for example, a woman is sexually assaulted in public and the image distributed non-consensually.

Subject to our comments below about the fault element, it is vital that the definition of image (or its distribution) be tied to an objective test concerning community standards of acceptable conduct¹ to ensure the offence appropriately targets exploitative, harmful and non-consensual behavior.

We also submit that the definition should:

- Refer to “intimate” rather than “invasive” images. The term “intimate” more accurately reflects the circumstances in which these images are taken. It is more flexible than defining the images as “sexual”, and also contemplates situations where the images are otherwise private, for example, of a person’s genitals. The term “invasive” is a misnomer, as the non-consensual sharing of the images themselves can be invasive, but not necessarily the images themselves or the context in which the images were originally taken. In our view, the definition of “intimate image” in section 40 of the Victorian *Summary Offences Act 1966* is appropriate.
- Not include any explicit reference to images of a person using a toilet. There are a number of reasons for this:
 - These images would most likely be captured by the definition of “intimate” images.
 - Where appropriate, the voyeurism provisions of the *Crimes Act* may also apply.
 - Including a reference to toileting may undermine the gendered nature of this form of behaviour. Research, and our practice experience, demonstrates that women and girls are the primary targets of this conduct.² Sharing sexualised images of female victims without consent is likely to cause more harm than sharing images of a person using a toilet because of societal attitudes tying women’s sexuality to shame, and punishing women for sexual behavior.³
 - In our experience, the majority of images involved in this type of abusive behavior involve sexual images rather than images of toileting. The new offence should clearly target this behaviour.

¹ As per the Victorian provision.

² See, e.g., Danielle Citron & Mary Anne Franks (2014) Criminalizing revenge porn. *Wake Forest Law Review* (49) 345–391, 351; Cyber Civil Rights Initiative, ‘Effects of Revenge Porn Survey’ (online) (2014). <www.endrevengeporn.org>

³ It has been noted by Henry and Powell that the harm caused has gendered elements because women and girls already experience outdated myths and expectations surrounding sexual norms and their role in society: see Nicola Henry & Anastasia Powell (forthcoming) *Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law*.

We suggest consideration of the following definition of “intimate image”.

‘Intimate image’ - a moving or still image that depicts

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| <p>a) a person engaged or apparently engaged in a sexual pose or sexual activity, or a person in a manner or context that is sexual, or</p> <p>b) all or part of an individual's genitals, pubic area, anal region, or the breasts of a female <u>or a transgender or intersex person who identifies as a female</u> [our emphasis]</p> |
|---|

The proposed additional reference to transgender or intersex victims (underlined above) reflects terminology used in the ACT’s ‘intimate observations or capturing visual data etc’ offence.⁴

We also consider that an objective test regarding community standards should be incorporated into the definition of intimate image, as per the recently amended South Australian definition.⁵ The following factors would be relevant to that test:

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| <p><i>In deciding whether the image is an ‘intimate image’ community standards of acceptable conduct must be taken into account, having regard to</i></p> <ul style="list-style-type: none">- the nature and context of the image- the circumstances in which the image was created or distributed, and- the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image, including the degree to which their privacy has been affected. |
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Reference to cultural context

Legal Aid NSW’s Domestic Violence Unit provides services at locations where there are a high proportion of clients from culturally and linguistically diverse backgrounds. In our experience, the non-consensual sharing of intimate images involving such clients have involved images where the victim is either engaged in sexual activity or is partially or fully naked. As such, our practical experience has not identified a particular need for a reference to “cultural context” beyond the extent to which it would already be covered in the community standard test proposed above. However, we would defer to the views of stakeholders representing culturally and linguistically diverse communities concerning this issue.

Question 2: Definition of distribution

Legal Aid NSW supports a wide definition of “distribution” based on the Victorian provision. The definition of “disseminate” in section 91H of the *Crimes Act* also appears to be sufficiently broad, subject to it covering “upload.”

⁴ *Crimes Act 1900* (ACT) section 61B (5)

⁵ New section 26A (3) of the *Summary Offences Act 1953* (not yet commenced)

Question 3: taking/recording of an intimate image without consent

Legal Aid NSW does not support extension of the new offence to the taking or recording of an intimate image without consent.

The conduct sought to be addressed by the new offence primarily concerns the sharing or threatening to share intimate images without consent, particularly in the domestic violence context. To be most effective, as well as for educational purposes, the provision should target this behaviour.

Consideration of appropriate responses to conduct involving the taking of images without consent should occur in another forum, bearing in mind the recommendations concerning serious invasions of privacy of the Australian Law Reform Commission, the NSW Legislative Council Standing Committee of Law and Justice and the Commonwealth Senate Committee inquiry. Any consideration of the voyeurism provisions within the *Crimes Act* should occur in that context.

Question 4: fault element

There are four aspects to the fault element of any new offence:

- Knowledge of an alleged offender as to whether the image was intimate,
- Intention as to the physical act of distribution or sharing of the image,
- Intention or motivation as to this act's impact on the victim (that is, harm caused), and
- Knowledge as to the victim's consent for sharing of the images.

The offence should clearly distinguish between each aspect, including the mens rea for the absence of consent to share the images.⁶ Across Legal Aid NSW there is also a common view that:

- the physical act of distribution should be intentional, and
- an element of recklessness as to whether consent was given should not be included.⁷

Legal Aid NSW's Criminal Law Division considers that the fault element should expressly encompass an actual intention to cause harm by the act of distribution or threatened distribution but with no requirement for proof of actual harm. That is, that the defendant intended, by distribution or threatened distribution of the image to coerce, control, humiliate or intimidate the victim. This is similar to the offence of stalk/intimidate offence in section 13

⁶ This is the approach adopted in the South Australian offence. A similar approach is taken in Canada where proof of harm is not required, and the offence is linked to the offender's knowledge or recklessness regarding consent: see *Criminal Code* (Canada) section 162.1(1).

⁷ See Discussion Question 4(b)

of the CDPV Act. Any lower threshold would be disproportionate in light of the serious consequences of contravention of the provision, potentially capturing behaviour involving less serious moral culpability than the offence seeks to target. In this respect, the range of motivations for the “revenge porn” behaviour identified by the Discussion Paper justifies, rather than obviates, a need for specific intent.⁸ The experience of lawyers who represent defendants charged with stalk/intimidate offences does not bear out the proposition that removing the mens rea in relation to harm constitutes a “loophole” for defendants.⁹

On the other hand, those who work on behalf of victims of domestic violence support the fault element being expressed in terms of intention to distribute the images and knowledge of consent based on the South Australian provision, which focuses on ‘knowing or having reason to believe’ rather than recklessness. Inclusion of a fault element in relation to intention to cause harm, embarrass or humiliate is opposed on the basis that the offence would be unduly onerous to prove.

Question 5: Definition of consent

Legal Aid’s NSW supports a broad definition of consent consistent with the definition under the Victorian provision, where “consent” is defined to mean “free agreement.”¹⁰ Consent should be vitiated in relation to vulnerable persons as defined in the *Criminal Procedure Act 1986*.

This definition would give a court sufficient flexibility to determine, on a case by case basis, for example, whether consent is negated in the context of the controlling behavior of a domestic violence perpetrator, or where consent has been withdrawn following the end of a relationship.

Legal Aid NSW opposes including a requirement of written consent.¹¹

Including a reference to implied consent as per the Victorian provision is opposed by Legal Aid NSW’s Domestic Violence Unit due to the very nature of the images being intimate. In their view, the default expectation should be that intimate images have a private quality such that an individual would reasonably expect them not to be shared. To allow implied consent focuses on the actions of the victim rather than those of the perpetrator and may lead to further victim blaming.

⁸ Citing the Senate Committee (at page 9)

⁹ Cf Evidence provided to the Senate Committee page 4 (relied on at page 9 of the Discussion Paper)

¹⁰ Section 40 of the *Summary Offences Act 1966* (Vic)

¹¹ As is the case in the Philippines.

Question 6: threats to share intimate images

Legal Aid NSW supports the new offence including a threat to share an intimate image.¹²

The harm caused by threats to distribute images is acknowledged and criminalised in Victoria.¹³ It has recently been introduced in South Australia.¹⁴

Research demonstrates that when such threats are made, they are often acted upon. For example, a 2013 study found that one in ten ex-partners had threatened to distribute intimate photos online, and that such threat was carried out 60% of the time.¹⁵ Further, threats to share intimate images without consent is becoming increasingly prevalent, with recent research finding of the one in ten Australians who had experiences relating to private sexual images being shared without consent, 9.6% had received threats to share such material.¹⁶

In our experience, the distress and harm caused by threats to distribute can be as significant as any actual sharing. The victim can live in a constant state of fear, often feeling powerless to stop the perpetrator, and can become more vulnerable to other forms of blackmail or coercion. This is powerfully demonstrated by the following case study:

Case study: Threats to distribute images

Thi is from Vietnam. She married Dan in Vietnam and came to Australia on a temporary partner visa. Her two teenage children still live in Vietnam with her sister.

When Thi came to Australia, Dan became physically violent towards her. He would also make Thi send naked photos of herself to him. When Thi initially objected to doing this, Dan became physically violent and told her if she didn't send him photos, he would send her back to Vietnam. She agreed to send the images to him out of fear.

Police were called by a neighbour and an ADVO was made for her protection. Despite the AVO, Dan started messaging Thi's relatives in Vietnam, including her sister and children, telling them Thi was a "slut" and sending the images. In the messages it says, "*you tell Thi to drop this charges or these go public.*" Thi is traumatised because she fears her children have seen these images.

Thi reported this to Police who took a statement from her. Thi showed Police the images which caused her a great deal of distress and unease, especially as the officers involved were male. No charges were laid as Police said they needed to interview her relatives in Vietnam for a statement, but this was not done.

¹² As per recommendation 2 in the *Report on the phenomenon colloquially referred to as 'revenge porn'* by the Senate Legal and Constitutional Affairs References Committee

¹³ *Summary Offences Act 1966* (Vic) section 41DB.

¹⁴ The *Summary Offences (Filming and Sexting Offences) Amendment Bill 2015* was enacted on 29 June 2016 and will commence on proclamation.

¹⁵ McAfee, 'Love, Relationships, and Technology survey' (online) (2014) <http://promos.mcafee.com/en-us/lp/6211_ex.aspx>

¹⁶ Anastasia Powell & Nicola Henry, 'Digital Harassment & Abuse of Adult Australians: A Summary Report', *RMIT University* (2015) (online) <https://research.techandme.com.au/wp-content/uploads/REPORT_AustraliansExperiencesofDigitalHarassmentandAbuse.pdf>

Dan also took over Thi's Facebook and WhatsApp accounts and changed the passwords. He also changed Thi's profile pictures to images of her in her underwear and left offensive comments on her friend's Facebook pages.

Police did not initially take action in respect of Dan's conduct, telling Thi there was nothing they could do as the phone was in Dan's name. They suggested she contact the social media outlets concerned. Feeling helpless and without support, Thi had a breakdown at the Police station. Police called an ambulance and Thi was scheduled under the Mental Health Act.

As a result of Legal Aid NSW's subsequent intervention, Police ultimately agreed to charge Dan and to seek a variation of the ADVO to prohibit further actual or threatened distribution of the images.

Defining the fault element of an offence of threatening to share an intimate image

Legal Aid NSW supports the offence of threatening to share an intimate image modelled on the Victorian offence under section 41DB of the *Summary Offences Act*, and including an element of reckless indifference. The Victorian provision is simpler and clearer than the new section 26DA of the *Summary Offences Act 1953* (SA). The Victorian provision also includes reference to threats to distribute images of third persons. This would address the scenario where, for example, a domestic violence victim is faced with a threat to distribute an image of her child or new partner.

The offence should apply irrespective of whether the intimate images exist. It is the experience of Legal Aid NSW that women are often unaware of whether or not the threatened image exists. This situation often arises in circumstances where the other party has threatened to share intimate images that were filmed without knowledge or consent. The fear and distress experienced by these women is real, even if the image is not.

Finally, Legal Aid NSW supports threats being defined to include both explicit threats and threats implied by any conduct. In our experience, threats to share intimate images are often implicit rather than direct. This is demonstrated by the following case study:

Case study: Implied threats

Grace was in a violent relationship with her husband Steve for 25 years. They have three adult daughters who live with Grace. Grace has cancer and is currently undergoing treatment. Steve moved out of their house a year ago but continues to turn up at the home uninvited. Neighbours have told Grace they often see Steve hiding behind bins outside her house and watching her from a car parked outside the house. Grace receives large volumes of harassing and controlling messages from Steve. She is worried he has covert access to her devices as the messages he sends her often contain information she has never told him about.

When Grace separated from Steve, he withdrew all of their joint savings including money Grace had saved for a cancer related medical operation. Steve came to the house and told Grace he would give her back the money for her surgery if she agreed to get back with him. When Grace declined Steve's offer, he kicked in a door which fell on Grace, causing her injury. Steve has also sent Grace intimate images she had on her private phone that she had sent to a new boyfriend.

Grace is scared Steve has covert access to her phone and photos. He has not sent her direct threats, but has sent the images of her. Grace believes that sending her these photos is an implied threat to share them.

The DVU social worker assisted Grace to get a safe phone. However, Grace reconciled with Steve because she was scared of his threatened actions, including that he would distribute the intimate images.

Question 7: Children

Children as victims

Legal Aid NSW supports the new offence applying to images of children aged between 16 and 18. The possession and distribution of images of children aged under 16 should continue to be dealt with under existing child abuse material offences in Division 15A of the *Crimes Act*.

The original South Australian provision did not apply to victims under 16. It was intended that images of children should be dealt with as child exploitation offences under the *Criminal Law Consolidation Act 1935 (SA)*. As a result of recent amendments however, the South Australian offence provision will apply to victims of any age. This amendment was intended to provide prosecuting authorities with greater flexibility and a wider range of charging options to better reflect the nature of the offending conduct in a particular case.¹⁷

¹⁷ The Hon J Rau MP Second Reading Speech for the *Summary Offences (Filming and Sexting Offences) Amendment Bill 2015*

In our view, however, having two types of offences which cover the same criminality will mean that outcomes will depend on the discretion of police or prosecutors in deciding which offence to charge. This may lead to inconsistency and potential unfairness to both victims and accused. The absence in NSW of a defence to child abuse material offences for consensual sexting influences our view on this issue. In this context, introducing a further offence that criminalises what is increasingly common teenage behaviour is opposed.

Should an offence be introduced that applies to images of children of any age, the legislation should specify that consent to the distribution of an image cannot be given by a child under 16. However, if the offence applies to child offenders (see further discussion below) then we note long-standing concerns expressed by the Legal Aid NSW Children's Legal Service and others about the need for law reform to protect children involved in consensual sexting behavior. A similar age consent defence should be available: that is, a child under 16 who is not more than 2 years younger than the alleged offender should be able to consent to the distribution of the image. This is consistent with the exemption to child pornography offences in Victoria.¹⁸

Juvenile offenders

In any event, Legal Aid NSW strongly opposes the application of the offence to juvenile offenders. In the vast majority of cases, the sharing, consensual or otherwise, of intimate images between minors does not occur in the power dynamic that typifies intimate partner violence between adults. The non-consensual sharing of intimate images is primarily another tool of coercion and power used by a domestic violence perpetrator. As noted at the outset, addressing this aspect of power and control should be the very essence of the new offence. It is less likely to be present in adolescent sexting type behavior, including where images are shared without consent.

It is well accepted that young people do not have the same capacity to fully appreciate the impact of their actions on themselves or others. This limitation is even more apparent in young people's use of social media and with respect to group dynamics amongst adolescents. It is also relevant that remedies for the removal of images of minors are already available in respect of minors, through the Commonwealth Children's eSafety Commissioner.

Should this submission not be accepted, in the alternative the offence should be worded so as to allow a sentencing Court to use sentencing options under the *Young Offenders Act*.

Whether or not the offence includes offenders under 18, Legal Aid NSW strongly opposes the offence being classified as a registrable offence for the purposes of the *Child Protection (Offenders Registration) Act* and the *Child Protection (Offenders Prohibition Orders) Act 2004*, or triggering the Working with Children Check.

¹⁸ Section 70AAA *Crimes Act 1958*.

There is no evidence to support the view that non-consensual sharing of intimate images by children presents a risk of sexual offending against other children. The behavior sought to be addressed by the new offence is quite different from exploitative conduct involving production or dissemination of child abuse material. Further, exempting at least children from sex offender registration and its consequences is consistent with well accepted rehabilitative principles that guide the children’s criminal jurisdiction.

Question 8: Penalties

Legal Aid NSW submits that the offence should be an indictable one, carrying a maximum penalty of imprisonment for 2 years or 20 penalty units, or both.

Like other indictable offences carrying a similar maximum penalty¹⁹ the offence should be classified as a Table 2 offence under Schedule 1 of the *Criminal Procedure Act 1986* (NSW). As an indictable offence, it will attract search and seizure provisions to support charges being laid for those cases where evidence may be difficult to obtain. In this regard, Legal Aid NSW understands concerns have been raised about the inadequacy of the Victorian and South Australia summary offences. We also submit the offence should be classified as a personal violence offence under section 4 of the CDVP Act so it attracts the protections for victims of an ADVO and the victims support scheme.²⁰

As noted at the outset, the offence should be inserted in the CDPV Act to emphasise its role in the domestic violence context. There is also a good argument that an appropriately targeted new offence would be limited to those parties who are, or have been, in an intimate personal relationship.

A maximum penalty of 2 years’ jail reflects the seriousness of the offence and the potentially significant impact on its victims. In Legal Aid NSW’s experience, the actual or threatened sharing of intimate images is often used as a means to force women to stay in violent relationships. It can cause extreme emotional distress, impacting a person’s functioning and leading to suicidal ideation. It can jeopardise a person’s employment and lead to significant financial loss. The harm caused can be continuous: once an image is online, it is difficult to remove, so the fear of it resurfacing persists. Research also suggests that the actual or threatened sharing of intimate images can make a victim more susceptible to stalking and physical violence.²¹

Finally, the proposed penalty will help to ensure that the behavior encapsulated in the new offence type and its impact on the victim is not minimized, and may encourage reporting of domestic violence. Legal Aid NSW notes that reporting of technology facilitated abuse is often minimised and trivialised by police and others. It is often perceived as less

¹⁹ For example, common assault in section 61 of the *Crimes Act 1900* (NSW).

²⁰ For a victim to be eligible under the Scheme, they must be a victim of an act of violence, as defined in section 19 of the *Victims Rights and Support Act* (NSW).

²¹ Danielle Citron & Mary Anne Franks (2014) Criminalizing revenge porn. *Wake Forest Law Review* (49) 345–391, 351.

serious²² and blame is often shifted onto the victim. This can lead to inadequate responses from law enforcement, the community and the victims themselves.²³

Other court powers

Legal Aid NSW supports the Court being able to order a convicted individual to take down or remove the images in question. This power has been legislated in Canada.²⁴ Failure to comply with a takedown order could be dealt with under the contempt powers of the Court.²⁵

We also support the development of a standard order on ADVOs in similar terms to the new offence provision. Pending the new offence provision, such an order could be framed as follows:

“The defendant must not directly or indirectly publish, share or threaten to publish or share images or recordings of the protected person of an intimate nature.”

Any breach of that order would be subject to the contravene AVO provision in section 14 of the CDPV Act. If an interim order is breached, a faster means of deterring ongoing distribution of images pending resolution of the offence proceedings would also be available. Further breaches of the ADVO would be considered an aggravating factor on sentence by reason of the prior breach of the interim order.

Question 9: statutory defences

As noted at the outset, the creation of a new offence of this type may risk inadvertent and detrimental impact on freedom of expression, including artistic expression, or may be used to target behaviour involving relatively minor moral culpability. This risk is higher if an offence is introduced that seeks to address behavior beyond the domestic violence context in the absence of an element of specific intent to cause harm. It is therefore important that any new provision include statutory defences protecting innocent distribution and distribution for public interest purposes including:

- Where a person is sent unsolicited intimate images (as a form of sexual harassment or otherwise) and the person then shares that image. For example, many women who are the victims of online trolling, are sent explicit images (“dickpics”) as a form of harassment. Some women then publish those images to “out” the sender. The new offence should be framed to exclude distribution in these circumstances

²² See, e.g., Tammy Hand, Donna Chung & Margaret Peters, ‘The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation’ Australian Domestic & Family Violence Clearing House, Stakeholder Paper 6 (online) (2009) www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20Paper_6.pdf.

²³ Women’s Legal & Human Rights Bureau, Inc. ‘Women, privacy and anonymity: More than data protection’ in D. Sarbanes Plou (ed), *Critically Absent: Women’s Rights in Internet Governance* (APC: 2012) <www.genderit.org/node/3548>

²⁴ Canada’s offence also contemplates ‘prohibition orders’ allowing a court to prohibit the offender from using the Internet for a specified period of time if convicted see section 162.2 Criminal Code (Canada)

²⁵ A conviction for contempt carries a maximum penalty of 20 penalty units or 28 days jail: section 24 of the *Local Court Act 2007*; section 199 of the *District Court Act 1973*.

Where a person finds an image online, for example, with no knowledge and no basis to believe it is an image that has been obtained without consent, and that person shares the image

- The defences contained in sections 26C and 26E of the *Summary Offences Act 1953* (SA)
- A defence protecting distribution of images in pursuance of genuine artistic or journalistic purposes. We note the UK provision contains a defence concerning ‘*the publication of journalistic material that is reasonably believed to be in the public interest*’.²⁶

Conclusion

Model of new offence

In summary, Legal Aid NSW would support an offence provision modelled on the Victorian provisions, but including an additional element of intention to cause harm (as broadly defined) along the following lines:

A person (A) commits an offence if:

A intentionally distributes (or threatens to distribute²⁷) an intimate image of the other person (B):

- *without the consent of B; and*
- *where A intends, by such distribution or threatened distribution to coerce, control, humiliate etc B, or to cause B to be fearful.*

In the alternative, the new offence should be modelled on the Victorian offence incorporating an express standard of “community standards of acceptable conduct.”

In either case, the offence should apply to victims above 16, but should not apply to offenders under 18. Further, it should be inserted in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Legal Aid NSW submits that any new offence provision should be independently monitored and then evaluated 2 years after its commencement to ensure it is working effectively and as intended.

Measures beyond a criminal offence provision

As noted at the outset, the offence should be introduced in conjunction with other civil and non-legal interventions required to respond effectively to this issue, both within and beyond the domestic violence context. The law, and in particular the criminal law, is a blunt tool to address what is a complex and multi-faceted social issue. Without such measures, any new offence may prove as ineffective as existing offences in the

²⁶ Section 33(4) of the *Criminal Justice and Courts Act 2015* (UK).

²⁷ Noting our submissions on the other elements in relation to threats proposed on page 10.

Commonwealth *Criminal Code Act 1995* and the CDPV Act in meeting the needs of victims of technology-facilitated abuse.²⁸

In particular Legal Aid NSW supports the following measures.

First, consideration should be given to long-standing recommendations for a statutory cause of action and/or other civil remedies for serious invasions of privacy, most recently recommended by the Senate Standing Committee on Legal and Constitutional Affairs' Report on the '*phenomenon colloquially referred to as revenge porn*'.²⁹

Second, as noted above, the prescribed orders for AVOs should be reviewed in light of any new offence provision. We note that plain English AVOs will soon be introduced in NSW. An additional condition should be included on the standard AVO form that explicitly prohibits the threatened or actual distribution of intimate images without consent. In our experience, the views of Magistrates and police vary on whether a condition of this nature is necessary or appropriate, even in the face of strong evidence of non-consensual sharing of intimate images in the domestic violence context. A standard order prohibiting behaviour consistent with the elements of any new offence would shift these responses.

Third, Legal Aid NSW supports the Senate Standing Committee on Legal and Constitutional Affairs' recommendation³⁰ that police undertake, at a minimum, basic training in relation to this issue and any new offence. Extensive education and training regarding any legislative reform in this area should target not only at NSW Police, but also social workers, the legal profession and judiciary, young persons and the community more broadly. Education and training should also focus on shifting victim blaming attitudes and addressing underlying issues of gender inequality.

Fourth, consideration should be given to how the powers of the Children's eSafety Commissioner could be extended to assist adults. Extending the eSafety Commissioner's powers could provide a cheap, quick, accessible resolution pathway for take down orders and other remedies, including apologies.

Finally, there should be a well-funded awareness campaign of the laws, including educational material provided in alternate formats and community languages. When the UK introduced its "revenge porn" laws in 2015, a "revenge pornography" hotline was developed and a widespread information and education campaign was launched. A similar approach should be taken in NSW through the establishment of a clearinghouse or hotline to assist and advise victims, promote awareness and to undertake research and data collection concerning legislative developments in this area.

²⁸ Section 474.17 and section 13 respectively

²⁹ Recommendation 6

³⁰ Recommendation 8 of the *Report on the phenomenon colloquially referred to as revenge porn.*"