



21 October 2016

Justice Strategy and Policy
NSW Department of Justice
GPO Box 6
Sydney NSW 2001

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

Dear Madam/Sir,

Response to Discussion Paper on the sharing of intimate images without consent – 'revenge porn'

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to the NSW Justice Department's inquiry into the sharing of intimate images without consent, the phenomenon colloquially referred to as 'revenge porn'.

KLC considers that current laws do not sufficiently address the sharing of intimate images without consent, and supports the introduction of new offences to specifically address this issue.

KLC notes there has been a notable increase in the use of technology, specifically the non-consensual sharing of intimate images, to facilitate domestic violence, stalking and sexual assault. Perpetrators often use intimate images to threaten, harass or embarrass victims. This behaviour can cause victims to live in extreme fear and generate long-term mental health and employment problems. We believe addressing this issue through the criminal law is an appropriate measure to deter these acts and change the behaviour of perpetrators in the long-term. We also believe that criminal remedies offer a better outcome for the victim as opposed to civil remedies, which are often financially inaccessible to victims.

We consider the term 'revenge porn' inappropriate for two reasons. The sharing of intimate images is not always motivated by revenge and may be an element

of domestic violence. Furthermore, labelling intimate images shared without consent as ‘pornography’ is likely to further offend and humiliate the victim. We support using the wording of “non-consensual sharing of intimate images”.

Kingsford Legal Centre

Kingsford Legal Centre is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney since 1981. Kingsford Legal Centre provides general advice on a wide range of legal issues, including family and domestic violence, sexual harassment, sexual assault and Apprehended Violence Orders. We also undertake casework for clients, many of whom would be unable to afford a lawyer. In 2015, KLC provided 1710 advices and opened 282 new cases.

In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Discussion Question 1: Definition of ‘intimate image’

KLC supports the new offence capturing images of a sexual nature. KLC submits that images of a non-sexual nature should also be included in the definition of ‘intimate image’, if those images may cause harm to the person depicted and there was a reasonable expectation of privacy when the image was taken or recorded. This is particularly important in the context of domestic and family violence, when non-sexual material may be used to threaten, harass or embarrass the victim. A definition that goes beyond images of a sexual nature recognises that images of a non-sexual nature may still cause harm to the person depicted when shared without their consent.

We support a definition including reference to images that may be considered ‘intimate’ according to the cultural context. This will allow the cultural background of the person depicted in the image to be taken into account.

We support a definition that is inclusive of sex and gender identity.

Recommendation

KLC recommends that the definition of intimate image should include images of

a sexual and a non-sexual nature, where the image was intended to be private, and there is a subjective risk of harm should the image be distributed.

Question 2: Definition of 'distribution'

Distribution should be defined to include sharing and showing of images to any third party by physical, electronic or online means. Distribution should be defined widely, to include publishing, exhibiting, communications, sending, supplying, uploading, transmitting to any person, and to making available for access by another. Distribution should cover circumstances where the third party does not retain a copy of the image. This will help to cover the gaps in existing Commonwealth legislation, being limited to distribution by telecommunications carrier or postal service.

Recommendation

Distribution should be defined to include sharing and showing of images to any third party by physical, electronic or online means. Distribution should cover circumstances where the third party does not retain a copy of the image.

Discussion Question 3: Taking or recording an intimate image without consent

The taking and recording of intimate images without consent should be included in the new offence. This is to protect the subject from harm, as the existence of images even without distribution can cause distress to the subject if they did not consent to the image being taken. Current civil protections provided by trespass or nuisance do not apply effectively to the use of new technologies and the situations in which images may be taken or recorded.

We submit that the existing criminal offences, regarding sharing of intimate images for sexual gratification, should be amended to include other motivations for distribution. This is particularly relevant in the context of domestic violence, where images may be used to intimidate, threaten, coerce, harass or embarrass the person depicted as a continued act of violence, capable of being perpetrated at a distance and not covered by existing Apprehended Violence Order protections.

Recommendation

The taking and recording of intimate images without consent should be included in the new offence.

Discussion Question 4: Fault element

KLC supports the proposed fault element of ‘knowingly or recklessly sharing an intimate image without consent’, with the issue being the offender knew the subject didn’t consent, or was reckless about the subject’s consent. Including recklessness is important to reinforce the need for express consent from the subject.

We agree that there should not be an element of intent to cause harm to the victim, as there are many other motivations for distribution of an intimate image that will cause harm to the subject. A need to prove intent to cause harm could lead to difficulty in prosecuting the offence.

Recommendation

We recommend the fault element of ‘knowingly or recklessly sharing an intimate image without consent’. There should be no element of intent to cause harm.

Discussion Question 5: Consent

As mentioned above, consent should be defined to reinforce a requirement for express consent, similar to s61HA of the *Crimes Act 1900*. Consent should be defined to require an express statement for the particular circumstances of distribution, and consent should not be allowed to be implied for further situations.

It should be assumed that all consent given in the context of a relationship is withdrawn when that relationship ends. We propose that it should be an offence, at any point of a relationship, to distribute an image to a third party without consent. Distribution to a third party should always be an offence, unless the subject gave express consent.

The onus of proof should be framed appropriately to reflect the victim’s vulnerable position - holding the person posting and sharing the images

accountable for their wrongful actions. We propose that if the alleged perpetrator claims that they had consent to share the image, the onus of proof should be on them to show they had consent.

Recommendation

Consent should be defined to require an express statement for the particular circumstances of distribution, and implication of consent for further situations should not be allowed.

Discussion Question 6: Threats to share intimate images

A threat to share or record an intimate image without consent should be included in the new offence. KLC does not support the inclusion of a requirement that the threat be intended to cause fear in the victim. This does not encompass the range of behaviours or motivations that may be present in a domestic and family violence context, where a threat may be used to blackmail, coerce or control a victim. Even if the image does not exist, a threat to distribute should still be an offence, as the person being threatened is unlikely to have means of confirming the existence of the image. A threat to record an intimate image without consent should also be included for the same reasons, as there are many situations, particularly in the context of domestic and family violence, where an image could be recorded without consent and then used to manipulate the subject.

Recommendation

Any threat to distribute an intimate image that would constitute an offence if actually distributed should be an offence, whether or not the image actually exists.

Discussion Question 7: Application of offences to young people

We do not believe minors should face criminal penalties when there was sharing of intimate images between people under the age of 18 without the consent of the Attorney-General.

In cases where there is sharing of images between minors, we believe that the consent of the Attorney-General should be required to prosecute, to give consideration to the nature and circumstances of the alleged offending, and to

act as a safeguard against the unnecessary prosecution of minors for actions such as sexting. The Attorney-General should consider prosecuting where the conduct of distributing the image was malicious or exploitative.

We believe this should be differentiated from situations where there is sharing of images between a minor and an adult. In this circumstance, we do not believe consent from the minor is sufficient to remove liability, and the adult involved should be criminally liable for distribution of intimate images of a minor.

Recommendation

It should be an offence for an adult to send an intimate image to a minor, or to invite the sending of an intimate image of a minor, or to record or distribute an intimate image of a minor.

Recommendation

Prosecuting minors under these new offences should require the consent of the Attorney-General.

Discussion Question 8: Appropriate penalties

KLC supports the introduction of penalties for offences of distribution of an intimate image and threats to distribute an intimate image. NSW should introduce summary offences to address the non-consensual distribution of intimate images, in line with the maximum penalties available under the Victorian legislation (2 years imprisonment for distribution and 1 year imprisonment for threats of distribution).¹ KLC supports harsher penalties for offences involving distribution, or threats of distribution, of images of minors, in line with the maximum penalties available under the proposed South Australian legislation (4 years imprisonment for distribution and 2 years imprisonment for threats of distribution).²

Recommendation

NSW should introduce summary offences to address the non-consensual distribution of intimate images, and threats to distribute intimate images.

¹ *Summary Offences Act 1996* (Vic), sections 41DA, 41DB.

² *Summary Offences (Filming and Sexting Offences) Amendment Bill 2015* (SA), proposed section 26DA.

'Take down' and 'deliver up' orders

KLC supports the introduction of 'take down orders' for intimate images of adults, similar to those available to the Office of the Children's eSafety Commissioner for images of children displayed online. We also support the introduction of 'deliver up' orders to require the perpetrator to produce any physical copies of the images in existence to the Court to be destroyed. The introduction of criminal offences reflects that this is a serious issue, and the distribution of images causes harm to adults as well as children. The Court should have the power to order intimate images of adults to be removed or delivered up to the Court as an enforcement tool to prevent further harm. Failure to comply with a take down or deliver up order should be a further offence.

Recommendation

Take down or removal orders for intimate images should be introduced as an enforcement tool to prevent further harm. Failure to comply with a take down or removal order should be a further offence.

Additional Comments

Apprehended Violence Orders

KLC submits that the additional orders available in Apprehended Violence Orders should be expanded to include suggested orders for the prevention of the proposed new offences of distribution and threat to distribute intimate images. This will help to address a significant issue for domestic and family violence survivors.

Recommendation

The additional orders available in Apprehended Violence Orders should be expanded to specifically prevent the proposed new offences of distribution of intimate images and threats to distribute intimate images.

The introduction of a tort for serious invasions of privacy

KLC supports a new cause of action in tort for serious invasions of privacy at the Commonwealth level. KLC notes that Article 17 of the International Covenant

on Civil and Political Rights, of which Australia is a signatory, states “no one shall be subjected to arbitrary or unlawful interference with his privacy...” and requires governments to enact laws to give persons protection against such interference.³ We believe a new cause of action in tort for serious invasions of privacy would cover the non-consensual sharing of intimate images.

Recommendation

KLC supports the creation of a new tort for serious invasions of privacy.

Funding for community legal education in schools and training of police

KLC recommends that the NSW government provide funding for school programs to educate young people on the potential consequences of sharing intimate images, and the possibility of them being distributed without their consent. This education should be based in a human rights framework, avoiding placing blame or shame on minors for the taking and sharing of images, but rather alerting them to the consequences of distributing these images. We support additional training of police officers if the proposed offences are legislated, including specific training on how to deal with non-consensual sharing of intimate images in domestic and family violence situations.

Recommendation

The NSW government should provide funding for school programs to educate young people on the sharing of intimate images.

Recommendation

The NSW government should provide funding for additional training of police officers in the proposed offences.

Thank you for the opportunity to make submissions on this issue.

Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

Yours faithfully,

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art. 17.

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