

9.0 SCOPE OF CONDUCT

The phrase non-consensual sharing of intimate images encapsulates a broad range of conduct and suggests a motive. As discussed above, it is more appropriate to describe the offensive conduct as non-consensual sharing of intimate images. It is a growing problem that requires legislative action. It frequently emerges in circumstances where the first person (the victim) willingly participates in the production of intimate images but does not consent to sharing them with another or others. The conduct that ought to be captured by the offence includes when the second person (the first offender) deliberately or recklessly shares those images with others (distribution or publication), possibly using a publication point such as a social media platform (the secondary offender). Consideration must be given to the scope of the conduct to be captured by any offence, including the mental requirements. The mental element of the offence ought to be considered and ought to capture inadvertent publication, and further, any aggravating or ameliorating elements.

The Committee also considered related issues such as whether the offence should include intimate images obtained without consent of the victim. Importantly, the offence ought not require the existence of a relationship between the victim and the offender as the Committee considers it is irrelevant that the victim consents to the initial creation of the images. Non-consensual production and distribution of intimate images such as third parties secretly recording otherwise consensual activity or the recording of sexual assault ought to also be caught within any offence provisions. Additionally, publication is not the only offence as threats to publish can cause significant harm to a victim and ought to be captured within an offence.

9.1 Application to children and young people

Given the prevalence of this behaviour among young people, there is no basis for excluding juveniles from being captured by a non-consensual sharing of intimate images offence. In circumstances where the victim is a child, there are already offences that would attach to the creation and possession of images. There are already specific offences in relation to creation, possession and distribution of images of people under the age of 18.

As the offence being contemplated is in relation to non-consensual sharing, consensual sharing of intimate images between people under 18 years of age ought not to be caught. If, however, the sharing of the images is not consensual, the offence should apply notwithstanding that the person sharing the images is under 18 years. Consideration ought to be given to the relative age of the offender and victim, particularly in cases where the perpetrator is over the age of 18 years and the victim is not. In that circumstance, the victim's age may be an aggravating factor.

Where the offender is a juvenile, they would be dealt with under the *Youth Justice Act* (NT).

The Committee considers that persons under the age of 18 who engage in the non-consensual sharing of intimate images should be referred to diversion (including family conferencing) in the first instance, and that the laying of charges should only be undertaken as a last resort. Accordingly, the offence of non-consensual sharing of intimate images should not be prescribed as a 'serious offence' for the purpose of section 39 of the *Youth Justice Act* (NT).

9.2 ‘Intimate Image’

The image(s) that would attract the offence could be both still (photographs) and/or moving (film or video). Where image(s) are altered to look like the victim (i.e. using a non-private depiction of a person’s face in an altered image of another consenting person or publicly available pornographic image(s)) should also be covered by the offence. As noted above, the Committee uses the term ‘image’ throughout this discussion in the broader sense.

It is important to define the bounds of the ‘intimate images’ that would attract sanction. Of relevance is whether the images need to have a sexual content or is it sufficient that the images are offensive? Is it necessary that the images contain nudity, which is not always offensive or sexual, or can the images be merely embarrassing?⁵³

The South Australian provisions relate to an ‘invasive image’ which includes images of genitalia or a person engaged in a ‘private act.’ The definition of private act includes ‘a sexual act not ordinarily done in public.’ This seems broader than the Victorian provisions which have a sexual nexus or exposure of the genitals. For the purpose of the recommended Northern Territory offence the Committee is of the option that the critical consideration is whether when the images were captured, the victim had a ‘reasonable expectation of privacy’. Thus, while the image of a person exercising at the gym may be embarrassing, it is not sufficient to fall within the proposed offence.⁵⁴ The Committee also concluded that images of transgender individuals should not be overlooked and that, in the recommended Northern Territory offence, it was necessary to modify the Victorian provisions to ensure that transgender victims are also protected.

The Committee considered that the offence ought to be confined to sexual images and include where a person is depicted:

- naked or partially naked (irrespective of whether genitals are exposed or the type of pose);
- engaged in a sexual activity;
- in a way that suggests the image is of an intimate or private nature (for example, wearing lingerie or adopting a sexual pose); or
- which exposed the genitals, anus or breasts.

Recommendation 3

The term ‘intimate image’ should be defined to mean a moving or still image that depicts:

- (a) a person engaged in a sexual activity; or**

⁵³ Note the ‘fat shaming’ incident of 19 July 2016 where a Playboy model Dani Mathers, posted a picture of a woman in a change room at her gym with herself in the foreground hand clasped over her mouth in mock horror with the caption ‘if I can’t unsee this then you can’t either’ <http://thenewdaily.com.au/entertainment/celebrity/2016/07/19/dani-mathers-snapchat/>.

⁵⁴ In response to the news that a website was sharing the intimate images of over 500 South Australian women a furore erupted when Sunrise Twitter post asked ‘when are women going to learn not to share these images’ which created a victim blaming backlash from Clementine Ford. <http://www.news.com.au/entertainment/tv/morning-shows/feminist-clementine-ford-adds-nude-post-accusing-sunrise-of-being-run-by-a-sexist-parade-of-morons/news-story/410cf98dffe515150f8c08e82ecc20c3>.

- (b) a person in a manner or context that is sexual; or**
- (c) the genital or anal region of a person, or in the case of a female or a transgender or intersex person who identifies as female, the breasts.**

9.3 Distribution

It is recommended that an offence be created to proscribe the publication and distribution of 'intimate images.'

The *Criminal Code Act* (NT) section 125A defines 'publish' as including:

- (a) distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire;
- (b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a); or
- (c) print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the purpose of doing such an act.

Consideration was given to the need to create an offence in the Northern Territory that would capture the conduct of a secondary offender, such as the website host. Importantly, such a provision would be relatively unenforceable. It was concluded that the Commonwealth provisions adequately addressed this conduct, and similarly, such conduct ought to be explicitly excluded similar to section 26A of the *Summary Offences Act* (SA) discussed above which states: 'but does not include distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider'.

The Committee was mindful that 'distribution' should include both physical and cyber forms of distribution so as to include, for example, the sharing or sending of a hard-copy photograph to another.

9.4 Consent

Consent should be the central tenet of any non-consensual sharing of intimate image offence. The offence should capture the intentional distribution of an intimate image. The offence should not apply where the subject of the image is an adult who consents to the distribution. It is important to emphasise that it is the consent of the subject to the distribution that renders publication lawful or criminal. The consent to the creation of the image is immaterial and consent must be both to the publication of the intimate image and to the specific manner in which the intimate image is distributed. It is also recommended that there be a rebuttable presumption that consent for intimate images to be created or disseminated during the course of a relationship terminates upon the conclusion of the relationship.

It is recommended that consideration be given to a defence of consent with the onus resting on the defendant to prove, on the balance of probabilities that consent was given by the victim. To establish the defence, the defendant ought to be required to establish explicit consent to each particular image and its publication or distribution. It is not relevant to the offence that the victim

consented to the creation of the image; however, the defence must establish that consent was provided both for the creation and distribution of the image or images. There are challenges that would present to establishing such consent existed. However, at the time of establishing intent to publish or distribute, it is irrelevant that the alleged offender did not turn their mind to the presence or absence of the victim's consent. Thus it is that recklessness would be a preferable fault element in this case.

There is no requirement that the offence include 'an intent to cause harm' or 'proof of harm' element. The perpetrator's intentions and whether or not the victim is actually harmed are not pertinent – the act of non-consensually taking and/or sharing intimate images should be sufficient for an offence to have been committed.

9.5 Threats

In light of the serious harm that can result, threats to publish intimate images must also be proscribed. In that circumstance, it is sufficient to threaten to distribute or publish intimate images of the victim whether or not those images exist.

9.6 Defences

It is accepted that some instances ought to be excluded from the offending provision. Similar to the proposed Commonwealth provisions, specific public benefit defences should be included. It is recommended that conduct be defined as being of public benefit if it was necessary for or of assistance in:

- (e) enforcing a law of the Commonwealth, a State or a Territory; or
- (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
- (c) the administration of justice; or
- (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.

Similarly, there ought to be an exclusion for persons that collect, prepare or disseminate material having the character of news, current affairs, information or a documentary or material consisting of commentary or opinion of this material.

Recommendation 4

Legislation should include specific public interest defences. It is recommended that conduct be defined as being of public benefit if it was necessary for or of assistance in:

- (a) enforcing a law of the Commonwealth, a State or a Territory; or**
- (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or**
- (c) the administration of justice; or**

- (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.**

There should also be an exclusion for persons that collect, prepare or disseminate material having the character of news, current affairs, information or a documentary or material consisting of commentary or opinion of this material.

9.7 Penalty

In line with other Australian jurisdictions, the offence of publication ought to attract a maximum penalty of two years imprisonment. It is acknowledged that there may be circumstances where the volume or nature of the offending ought to attract a greater penalty, however, the power to impose either partially or wholly cumulative sentences as derived from section 51 of the *Sentencing Act* (NT) provides adequately for this.

Recommendation 5

Legislation should make it an offence to:

- (a) publish, by any means, intimate images of a person without that person's consent. It is not relevant to the offence that consent was given to create the images. The onus for establishing that consent was given for the publication should rest upon the person publishing the intimate images; and**
- (b) threaten to publish intimate images.**