



20 October 2016

The Hon. Gabrielle Upton MP
Attorney General
C/O Justice Strategy and Policy
NSW Department of Justice
GPO Box 6
Sydney NSW 2001

Email: policy@justice.nsw.gov.au

Dear Minister Upton,

RE: The sharing of intimate images without consent - 'revenge porn'

Thank you for the opportunity to respond to the discussion paper, *The sharing of intimate images without consent - 'revenge porn'*. As the NSW peak body for young people and the services that support them, our response largely concerns the impacts of possible legislative measures for this cohort – young people aged 12 to 25.

Measures regarding 'revenge porn' will impact on young people. The consensual sharing of intimate images is understood to be relatively commonplace amongst young people, although research in this area varies on how prevalent it is. A 2015 survey of 2000 young people aged 13 – 18 found 'almost half reported having sent a sexual picture or video of themselves to another party, while two-thirds had received a sexual image.'¹ The same survey found that most young people surveyed believed that these images were seen by people other than who they were sent to, however that only a small portion that had sent or received an image shared it digitally.² Importantly, the survey also found 'very

¹ M Lee, T Crofts, A McGovern, & S Milivojevic, 'Sexting among young people: Perceptions and practices', Trends and Issues in Crime and Criminal Justice, No. 508, November 2015, accessed via <http://www.aic.gov.au/publications/current%20series/tandi/501-520/tandi508.html>

² M Lee, T Crofts, A McGovern, & S Milivojevic, 'Sexting and Young People', Report to the Criminology Research Advisory Council, November 2015, p. 42, accessed via <http://www.criminologyresearchcouncil.gov.au/reports/1516/53-1112-FinalReport.pdf>



little evidence of peer pressure or coercion to engage in sexting. Rather, young people reported engaging in the practice as a consensual and enjoyable part of their intimate relationships'.³

Therefore, in reviewing regulatory measures there are a few core principals that must be the foundation of any reform. Firstly, the ability to develop a healthy sexuality is an essential component of an individual's mental and physical wellbeing. Young people should have the freedom to experience their individual sexual development at their own pace and in a way that is clearly led by independent and informed thinking. Sharing intimate images is increasingly a part of young peoples self-expression and sexual agency.

Furthermore, we highlight the human rights considerations with regards to young people and their sexual health and development. Such consideration extends to the right to information, to access sexual health services, and to freedom of expression.⁴ These rights also apply to young people under the age of 18. Although states have the obligation to protect young people from harm, this must be balanced with the need to provide young people with the information and education necessary for their development and evolving capacities, including their sexual identity and health.⁵

We also point to the relevant rights in relation to children and young people and the law, which include:

- the least restrictive sanction is to be applied against a child who is alleged to have committed a crime;
- criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter;
- arrest and detention of children should only be used as a measure of last resort;

³ M Lee, T Crofts, A McGovern, & S Milivojevic, 'Sexting among young people: Perceptions and practices', Trends and Issues in Crime and Criminal Justice, No. 508, November 2015, accessed via <http://www.aic.gov.au/publications/current%20series/tandi/501-520/tandi508.html>

⁴ WHO, 'Defining sexual health', 2016, viewed 18th January 2016, accessed via: http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/

⁵ WHO, 'Sexual health, human rights and the law', pp. 19-20.



- children convicted of offences must be treated in a way that is appropriate for their age; and
- children have the right to express their views—and to have their views taken into account—in all matters affecting them.⁶

We believe that there remain gaps and legal inconsistencies in the form of protection and address for young people who victim to non-consensual sharing of intimate images, and that legal and policy responses to such cyber-bullying and revenge porn should be strengthened, including powers for NSW Police to issue 'take down' notices, a range of diversionary options for young people who engage, as well as a suite of options for redress.

We believe in this context that the Department needs to find a balance between preservation of protection for young people in relation to issues of child exploitation and pornography, and indeed non-consensual sharing of intimate images, and avoiding the unnecessary criminalisation of young people.

There are existing offences in relation to images of children and young people, however they do not respond well to relations between young people. Currently, young people under the age of 18 who send or receive an intimate image are committing a criminal offence, regardless of whether it is consensual or not. This is despite that in NSW the legal age of sexual consent is 16. The consequences are very strong, long term and have irreparable impacts on young people such as registration on the Child Protection Register. Section 474.19(1) of the Commonwealth Criminal Code 1995 (using a carriage service for child pornography material) carries a maximum penalty of 15 years imprisonment and is a registrable offence under the Child Protection Register. While courts can alter the penalty, it is understood that they cannot use discretion to avoid registration. While this may have originally intended to protect children and young people, it is criminalising their healthy sexual development.

⁶ National Children's and Youth Law Centre (NCYLC), 'New voices/new laws: school-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour', Law Reform Research Report, *Legal Aid NSW*, November 2012, accessed via http://www.lawstuff.org.au/_data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf



It is also understood that police often exercise discretion in this regard, but it is inconsistent, resulting in young people being charged with such offences.

While a different offence for young people who share intimate images without consent could avoid them being charged under commonwealth law and placed on the child protection register, it may reverse progress made with regard to police discretion and use of diversionary measures.

We support the Senate Committee suggestions that:

- legislation should ensure that the actions of minors are dealt with appropriately and not under child pornography offences
- cases where both parties are minors should be distinguished from cases where the offender is over the age of 18 years and the victim is not.

We believe that young peoples stage of life and developing capacity influence motivation for sharing images. We would therefore also suggest that contextual and nuance evidence is applied in relation to an offence, if any, such as whether those involved were close in age, what the intent was, what power relations were in play, and what would be the best outcome for both the victim and the offender.

We suggest that at the very least take down notices feature as part of the response. The National E-Safety Commissioner has power under the *Enhancing Online Safety for Children Act 2015* to issue take down notices, however it is not known to us as to how often this is used or how effective it is. It is unclear whether this Act involves the power to search for and seize non-consensual images. Any such mechanism for young people should be youth friendly and immediate, however reliance on young people to bring a matter to court and to await for a court to issue a notice may not be a quick enough response.

We also suggest that if an offence applies to a young person, it should be dealt with under the Young Offenders Act, to allow for appropriate and alternative measures.



If any changes in legislation are made, young people must be educated in turn. Emphasis should be placed on respectful relationships, ethics and consent, rather than an approach that promotes simply refraining from sexting. This could be included in current sex education programs and/or syllabus.

Youth Action is supportive of the Department of Justice's work to provide an appropriate response to young people who share images without consent, and those who are victims. We believe the response should be age appropriate, recognise the current contradictions in NSW and Commonwealth Law, and intend to provide the best possible outcome for both those who offend and who are subjected to the sharing of their images. We do not want to see more young people coming into contact with the justice system if there is an alternative option to ensure that a young person doesn't repeat their crime, and a good outcome is obtained by the victim.

We look forward to continuing to work with the Department on these matters. Should you have any concerns or further questions, please contact Katie Acheson, Chief Executive Officer, on (02) 8354 3702.

Sincerely,

A handwritten signature in black ink, appearing to read "Katie Acheson".

Katie Acheson
CEO
Youth Action