



YWCA
CANBERRA

Submission on the Invasion of Privacy & Technology- Facilitated Abuse

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1. Opening remarks

YWCA Canberra welcomes the ACT Greens initiative to strengthen the law to address the evolving issue of non-consensual sharing of images and technology-facilitated abuse. We thank the ACT Greens for the consultative process and the opportunity to make a submission on this crucial issue.

It is with our long history working with both women and young people of the Canberra community that we approach this submission.

YWCA Canberra has extensive experience working with young people, providing outreach services and youth engagement programs, predominantly run across the South Tuggeranong region of Canberra.

YWCA Canberra also runs a broad range of leadership and empowerment programs targeting young women, including Y Aspire, a program that builds the positive self-esteem and resilience in girls aged 9 to 14 years old. We also run a suite of young women's leadership programs including She Leads High, She Leads College and She Leads Conference, which aim to kick-start young women's leadership journeys.

YWCA Canberra draws on its experience in designing and delivering online safety curricula to young people across the ACT. Our Respectful Relationships curriculum aims to equip them with the tools and support to develop, promote and perpetuate equal, safe, and respectful relationships. A core component of this program is about promoting respectful communications online.

YWCA Canberra recently delivered a series of Cyber Safety workshops, developed in partnership with Legal Aid ACT and the Youth Law Centre ACT. The workshop aims to educate and engage year 9 and 10 students on the law surrounding social media including Facebook privacy, cyber bullying, and sexting.

In preparing this submission, YWCA Canberra consulted closely with its Youth Engagement Team, as well as a broad range of youth stakeholders including the Youth Coalition of the ACT, who coordinated a focus group discussion with other stakeholders. The five youth workers present represented a broad range of perspectives including youth in prison, children and young people at risk, youth and homelessness, and young women. Their perspectives and insights have been central to the drafting of this submission.

It is widely cited that the evolution of technology has redefined personal relationships and how intimacy is expressed¹. The darker side of these technological advances, is that social media

¹ Powell, A, 2010, *Safe Sext? Young People, Technology and Sexual Violence*, p. 1, http://research.techandme.com.au/wp-content/uploads/Powell-2010_SafeSext.pdf

platforms have become the new frontier in the way that women experience violence and sexual abuse².

YWCA Canberra takes a human rights approach to this submission, recognising that at the heart of the issue is the delicate balancing of the right to self-expression, with the right to a life free from violence, and to security and liberty of person.

This is an issue that particularly affects young women. In 2014, YWCA conducted a nation-wide survey of young women and girls aged between 15-30 years, called She Speaks. Out of the 1600 respondents, 34 per cent said they had received uninvited and/or unwanted indecent or sexually explicit text messages. Further, 30 per cent said that they felt unable to seek help when experiencing violence in their relationships³. The sharing of intimate images is by nature gendered, with issues of power, violence, and consent all central to its discussion.

This submission is concerned with two pertinent implications of the proposed law, as they relate to young people, in particular, young women:

1. When consent has been provided: with the proposed changes, young people and children to the downward age of 10 will be able to provide consent. Issues arise around young people's exposure to and knowledge of 'consent'.
2. When consent is not present: how can young people gain access to justice, is it accessible and what are the appropriate mechanisms to deter, rehabilitate, and provide justice for the victim?

Consistent with submissions made in other jurisdictions including Youth Action (NSW) and Equality Rights Alliance (Commonwealth), we believe there is a need to differentiate between the consensual sharing of images that is part of sexual expression, with the non-consensual sharing of images, particularly with those incidences where "malice" is clearly present. The specific cultures and contexts that the incident takes place, as well as to the intention of those involved, are crucial considerations that guide where legal intervention is required⁴.

Finally, in recognising that the law can often be a blunt instrument when pursuing justice and insufficient in tackling the underlying causes of technology-facilitated abuse, YWCA Canberra advocates for a uniform and holistic approach to sexuality education in the ACT. Broader awareness raising with the relevant stakeholders, including schools and the police, will also be key to challenging the culture that perpetuates these crimes and ensuring that the law is effectively implemented.

² Henry, N, Powell, A, Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women, *Australian & New Zealand Journal of Criminology*, March 2015, 48, p. 104-118.

³ Institute of Social Science Research & YWCA Australia, *She Speaks 2014: A Survey of Girls and Young Women*, p. 37, <http://www.ywca.org.au/sites/ywca.org.au/files/docs/She%20Speaks%20Survey%202014%20Final.pdf>

⁴ Albury, K, Crawford, K, 2012, Sexting, consent and young people's ethics: Beyond Megan's Story, *Continuum*, 26:3, p. 463-473.

2. Key Recommendations

R1: Given the two-year age difference cannot be presumed to equate to consensual equal relations, a range of factors need to be considered. This includes the developmental stages of the young persons implicated, vulnerabilities, and potential power discrepancies.

R2: Distinguish between cases with two consenting individuals under the age of 18, with circumstances where one person is over the age of 18.

R3: Provide individuals with the legal right to retract consent by requesting the deletion of intimate documents, therefore providing them legal recourse if the other person refuses to delete the document.

R4: Include a definition in the Exposure Drafts to include text messages, which should cover all digital text formats, including SMS, private messaging apps, and email.

R5: Where the purpose is to humiliate, threaten, intimidate, or punish the individual, these cases must be distinguished as “aggravated” incidences, and be accompanied with higher or maximum penalties.

R6: A suite of measures to respond to image-based assault, including school-based alternative justice mechanisms in some instances.

R7: A far reaching public awareness campaign on the laws relating to the non-consensual sharing of images. This needs to be supported by a holistic approach to sexuality education in schools that broaches consent, respectful relationships and communications, and underpinned by a gendered approach.

3. Consent and young people

YWCA Canberra supports the proposed changes to the laws surrounding the age of consent and the introduction of a “Similarity of Age” provision, present in other jurisdictions such as Victoria. This two-year age gap is a positive step towards law being responsive to the evolving standards of society. It also signals the acceptance that image sharing between two consenting young people, can be a normal, contemporary form of sexual expression in romantic and other relationships⁵.

As the law currently stands, young people who consensually share intimate documents that are then distributed without their consent, have no legal recourse or outlet to seek justice without fear of being charged with child pornography themselves. One of the distorted outcomes of this disproportionate response is that it has deterred young people from seeking justice and the police from following the due legal process. We hope that these amendments will provide a more responsive and accessible mechanism for victims to seek legal recourse.

The current amendment provides that a two-year rule applies to any young person between the ages of 10 and 18 years that consensually share images. With these suggested changes, understandings of consent are central to the discussion, given that this can vary dramatically across this wide age bracket, and that recognising that the distinction between consent and coercion is not always a straightforward one⁶.

Young people increasingly rely on the internet, the media and their peer networks for information on sex⁷. While the national curriculum intends to provide sexuality education, a survey undertaken by Equality Rights Alliance in 2016 found that the current education system was failing young women, with 76 per cent of respondents reporting that they had not learnt anything from their sex education classes, and nearly two-thirds of the women and girls aged 16 to 21 said they had not been taught about consent⁸.

Knowledge around sexuality is not age-specific but is formed through social interactions, region, culture and the family life of a young person. Indeed, research has found that certain young people are more vulnerable to sexual solicitation or exploitation. Young people who have been sexually abused are particularly vulnerable⁹. Recent research shows that image-based abuse is

⁵ Cooper, K, et al, 2016, Adolescents and self-taken sexual images: A review of the literature in Computers, *Human Behaviour*, 55, p. 709

⁶ Powell, A, Henry, N, 2014, Blurred lines? Responding to ‘sexting’ and gender based violence among young people, *Children Australia*, 39:2, p. 119-124.

⁷ Brown, J, Keller, S, Stern, S, 2010, The Prevention Researcher Sex, Sexuality, Sexting, and SexEd, *Adolescents and the Media* 16:4, p. 12.

⁸ Equality Rights Alliance, *Let’s Talk Final Report*, <http://www.equalityrightsalliance.org.au/wp-content/uploads/2016/10/Lets-Talk-Final-Report.pdf>

⁹ Cooper, K, et al, 2016, Adolescents and self-taken sexual images: A review of the literature in Computers, *Human Behaviour*, 55, p. 706–716.

more common among vulnerable groups, including: Indigenous Australians, those with a disability, young adults, as well as lesbian, gay, and bisexual members of our community¹⁰.

In the absence of holistic sexuality education that covers topics such as consent, defining boundaries and sexual assault, young people often do not have the knowledge requisite in making informed decisions or navigating difficult relationships, and can therefore be vulnerable to exploitation and coercion¹¹.

Finally, age can be understood as just one measure of the vulnerability or agency of an individual; that the pace of emotional, cognitive and physical development varies widely across the adolescent years, the relationship between two young people who are close in age, cannot be assumed to be one that is equal.

Given the two-year age difference cannot be presumed to equate to consensual equal relations, YWCA Canberra proposes that a range of factors are considered. This includes the developmental stages of the young people implicated, vulnerabilities, and the potential power discrepancies based on these differences. Given that the age of a child, as defined by Children and Young People Act 2008, is a person who is under 12 years old¹², one suggestion is for the age of consent to be brought in line with this.

YWCA Canberra agrees that one safeguard would be to distinguish between cases with two consenting individuals under the age of 18, with circumstances where one person is over the age of 18.

YWCA Canberra also believes that individuals should be able to retract their consent of another person having access to their intimate document. This would bring the consent laws regarding intimate documents in line with sexual consent laws, whereby consent can be withdrawn at any time.

Providing individuals with the legal right to request the deletion of intimate documents would add an element of prevention to the law and allow individuals to exercise control in negative situations that are escalating, such as a breakup or a violent encounter, and provide them legal recourse if the other person refused to delete the document.

¹⁰ Henry, D, Powell, A, Flynn, A, May 2017, *Not Just 'Revenge Pornography: Australians' Experience of Image-Based Abuse, A Summary Report*, RMIT, p. 7.

¹¹ United Nations Population Fund, <http://www.unfpa.org/comprehensive-sexuality-education>

¹²ACT Government, Community Services, 2014, *Keeping children safe & young people safe: A shared community responsibility*, http://www.communityservices.act.gov.au/_data/assets/pdf_file/0017/5660/Keeping-Children-and-Young-People-Safe.pdf

4. Defining intimate documents

The current Exposure Draft defines an intimate document as something that “shows, visually or otherwise- (a) the person engaged in sexual activity; or (b) the person in a sexual manner; or (c) an intimate body area; or (d) an area of the person’s body that, in the person’s circumstances, is private in nature.” And lists examples of documents as “a digitally altered image, a text image, an audio recording.”

It is not clear by the above definition or the examples provided, whether a text message would also constitute as an intimate document. Texting is often the preferred form of communication and acts as a social and emotional pick-me-up, to remind both parties that someone is thinking of them¹³. The expansion of the definition to include SMS’s is critical, as “the primary use of text messaging is to begin, maintain, escalate or in other ways impact interpersonal relationships.”

Just as an individual can be identified via their voice, individuals can also be identified by their writing, their electronic signature, and/or by having their name or other personal details accompanying the intimate text they have written.

YWCA Canberra would advocate for the inclusion of a “text message” to be defined in the Exposure Draft that covers all other digital text formats, including SMS, private messaging apps, and email.

5. Sentencing

YWCA Canberra endorses the proposal to move away from “intention or harm centric” towards an activity- centric conception of behaviour. This could act as an important deterrent by sending a message that regardless of the outcome of the incident, all non-consensual sharing of images will be subject to criminal law. It also recognises that despite the intention of the perpetrator, the impact on the victim can be the same.

A clear distinction should be made between an individual showing an intimate document to a friend without first seeking consent, compared to an individual gaining financially from sharing the image, or publicly identifying the victim with the intentions of encouraging public shaming and harassment (commonly referred to as virtual mobbing), or the intentional release of personal information (doxing¹⁴).

Where there is a clear indication of malice and where the purpose is to humiliate, threaten, intimidate, or punish the individual,¹⁵ these must be distinguished as “aggravated” incidences, and be accompanied with the higher maximum penalties.

¹³ Winkelman, S.B, Smith, K.V, Brinkley, J, Knox, D, 2014, Sexting on the college campus. *Electronic Journal of Human Sexuality*, 17.

¹⁴ Douglas, D.M, 2016, Doxing: a conceptual analysis, *Ethics and information technology*, 18:3, p. 199-210.

Access to justice

Through consultation with youth workers, two main barriers were discussed in accessing justice: firstly, young people's understanding of the law is limited and victims may not identify their own incident as being against the law. One youth worker commented that for young women who had been victim to the non-consensual sharing of images, there was a fair amount of self-blame, where they "just needed to get over it". This speaks to the victim blaming and internalisation characteristic of other instances of rape and sexual assault.

From victims of sexual assault, seeking redress from the justice system can be harrowing experience of re-victimization¹⁶. Parallels can be made with other forms of sexual assault with a tendency towards victim blaming. Previous scenarios of technology-facilitated abuse have demonstrated that the police have been less sympathetic to a woman when she has originally taken the photo¹⁷.

Another common occurrence was that young people were unlikely to pursue legal channels, from shame and humiliation of admitting to parents and authority figures that the individual had consensually taken photos. The current severity of the penalties was also discussed as deterring factor, with young people not wanting to send the perpetrator to jail or put them on a sex offenders list.

While prosecuting offenders is required, and it must send a strong message to potential perpetrators, a strong case can be made for having a suite of measures in responding to image-based assault, including the provision of alternative justice mechanisms.

In the case of children and young persons, sentencing must adhere to the Human Rights Act (2005) in providing a procedure that takes into account the child's age and desirability for rehabilitation¹⁸. We support Youth Action's recommendations of some core justice principles put forward in their submission to the NSW inquiry into Revenge Porn "that children convicted of offences must be treated in a way that is appropriate for their age" and that the law must avoid the unnecessary criminalization of young persons¹⁹.

Particularly for school-aged young people, the youth workers suggested that in some circumstances, restorative justice processes integrated through the school system, could form an appropriate alternative response that provide young people with an alternative channel to seeking justice outside of criminal proceedings.

The development of juvenile conferencing in Australia that is informed by restorative justice theory is one of such models. There must be clear parameters around restorative justice

¹⁶ Daley, K, 2001, *Sexual Assault and Restorative Justice*, https://www.griffith.edu.au/_data/assets/pdf_file/0006/50289/kdpaper11.pdf

¹⁷ Powell, A, Henry, N, 2017, *Sexual Violence in the Digital Age, The Potentials and Limitations of the Law*, p. 227.

¹⁸ ACT Parliamentary Counsel, Human Rights Act, 2004, Section 23, <http://www.legislation.act.gov.au/a/2004-5/current/pdf/2004-5.pdf>

¹⁹ Youth Action, Oct 2016, *Submission in response to the sharing of Intimate images without consent - 'revenge porn'*; <http://www.youthaction.org.au/submission-to-revenge-porn-sharing-of-intimate-images-without-consent-discussion-paper>

processes, including the explicit consent from the victim, who would be empowered to decide between a face to face apologies or choose community service for the offender. But when done effectively, conferencing has proved to have the “potential to offer victims a greater degree of justice than court”²⁰.

A clear benefit of this approach would be to send a clear message in schools that digital forms of abuse carry severe consequences, helping to deter this behaviour whilst contributing to a longer term cultural shift in schools and amongst young people.

Recognising that there are significant barriers to young people seeking legal help, soft entry points are needed including the ability to access confidential, free legal advice, ideally in an outreach model that is both accessible and non-intimidating to this group.

6. Measures for implementation

Victim protection

YWCA Canberra advocates that any individual seeking legal recourse against a perpetrator for the sharing of intimate documents should be afforded the same anonymity they would be granted for other sexual crimes.

Victims of image based abuse report as suffering from a range of psychological symptoms consistent with other forms of sexual abuse: 80 per cent of people who had experienced “sextortion” reported high levels of psychological distress, consistent with moderate to severe depression and/or anxiety disorder, with 46 per cent also feeling highly fearful for their safety²¹.

Ensuring that victims of cyber-facilitated assault requires immediate support is key, whether that’s help navigating the removal of those images, or similar to other instances of sexual assault, access to trauma-related counselling and advocacy.

If a victim’s identity is not kept anonymous, and/or if identifying details souring the nature of their documents are released, members of the public may seek out the intimate documents, furthering the distress and harm caused of the victim. Anonymity is crucial to protect victims as well as ensuring reporting and prosecution of perpetrators.

²⁰ Warner, K, Bartels, L, 2015, Juvenile Sex Offending: Its Prevalence and the Criminal Justice Response, *University of New South Wales Law Journal*, 38:1, p. 48.

²¹ Henry, D, Powell, A, Flynn, A, May 2017, *Not Just ‘Revenge Pornography: Australians’ Experience of Image-Based Abuse, A Summary Report*, RMIT, p. 7.

Prevention strategies and early education interventions

The sharing of images largely imitates the gender dynamics in relationships and can serve to reinforce negative gender stereotypes. Young women have expressed a great deal of pressure to share images of herself. The young man then shares these images with his friends or on digital platforms, as a demonstration of his masculinity and power. As such, broader measures are required to tackle the structural and systemic causes of gender inequality and the objectification of women's bodies.

Given the current lack of understanding of the law amongst youth workers and young people themselves, any changes to the law will require a full-scale public awareness campaign if they are to be effectively implemented. Particularly given the new complexities pertaining to the rolling age of consent, consideration onto how this can be effectively communicated to a young audience will be key.

To society, it is clear that messages of abstinence not only do not work, but they can be damaging²². In the context of abstaining from intimate images, recent anti-sexting campaigns have targeted women not to share photos rather than educating about consent²³. One youth worker commented that "The No means No campaign" was crucial in emphasising consent and tackling a culture of women being responsible. We need something similar for digital spaces".

More broadly, cyber safety and the law needs to be consistently taught in schools. In the Victorian Parliaments inquiry in sexting, one of the recommendations was that schools "adopt holistic, integrated programs" for internet and communications technologies awareness and safety into the school curriculum, and that teachers undergo more training on cyber safety."²⁴

Currently there is an ad hoc approach, with many schools choosing to bring in outside providers to relay messages around cyber safety and sexting. To ensure consistency, this should be taught as part of a broader syllabus that takes a holistic approach to gender equality that challenges damaging gender norms that support and perpetuate violence against women and girls is key to any curriculum trying to tackle digital forms of abuse. Providing teachers with the adequate training and resources to deliver age appropriate content, is also key to its effective implementation. As sex educators, parents also require resources and support in understanding the law relating to intimate image sharing and how to communicate this to their children.

²² Kay, J.F, 2008, *Sex, Lies & Stereotypes: How abstinence-only programs hard women and girls*. Harvard School of Public Health & Legal Momentum.

²³ Powell, Henry, 2014, *Blurred Lines? Responding to 'Sexting' and Gender-based Violence among Young People*, p. 12

²⁴ Parliament of Victoria Law Reform Committee, *Report of the Law Reform Committee for the Inquiry into Sexting*. Parliamentary Paper No. 230, p. 68-69.