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Justice Strategy and Policy  
NSW Department of Justice  
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Sydney NSW 2001  
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Sent by email: [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au)

To whom it may concern,

**Re: The sharing of intimate images without consent – ‘revenge porn’**

We are writing in response to the Attorney General’s announcement that the NSW Government is proposing new and specific criminal offences to address the non-consensual sharing of intimate images in NSW. We provide the following feedback to the Department of Justice’s discussion paper ‘*The sharing of intimate images without consent – ‘revenge porn’*’.

ACON is New South Wales’ leading health promotion organisation specialising in HIV prevention, HIV support and lesbian, gay, bisexual, transgender and intersex (LGBTI) health. Established in 1985 as the AIDS Council of NSW, our mission is to enhance the health and wellbeing of our communities by ending HIV transmission among gay and homosexually active men, and promoting the lifelong health of LGBTI people and people with HIV.

**Legal and policy space**

Most discussion on the sharing of explicit images has been centred around cisgender heterosexual subjects (Albury and Byron, 2014, 138). In the policy arena, sharing intimate images is situated as a ‘heterosexual practice that poses specific legal and reputational risks for young women and a different set of risks (primarily legal) for young men’ (Albury and Byron, 2014, 139). Existing research and policy on the exchange of intimate images has focused on risk and not reflected the understandings and experiences within the participating subcultures.

Sharing of intimate images has been treated as ‘moral crisis’ (Hasinoff, 2012, 2) and sought to place responsibility upon women for the harms from non-consensual sharing and shame women for their own consensual sexual behaviour (Karaian, 2014, 282). In particular, discourse on young people’s sexting practices has emphasised narratives of young women’s innocence and role as gatekeepers of sexuality. Policy interventions such as *Megan’s Story* (co-produced by the Australian Federal Police) have aimed to discourage women from documenting their own sexual selves.

ACON welcomes a policy focus on the non-consensual sharing and distribution of intimate images rather than on their consensual production. However we note that this phenomenon is a manifestation of much larger social issues, including gender-based violence, cyberbullying and rape culture, and requires a holistic and preventative response.

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Research into gendered cyber hate has called for institutional and legal responses instead of relying on individual women to respond through individual means of online 'feminist digilantism', where women 'call out' or 'name and shame' on social media (Jane, 2016). We also emphasise that non-consensual sharing of images can be a practice of homophobic and transphobic violence. There are specific issues for LGBTI people when their intimate images are shared publicly that means our communities are at higher risk of outing, violence and abuse.

### **Moving away from 'revenge porn'**

We also note that the term 'revenge pornography' is an imprecise and inaccurate term co-opted by media which does not capture the wide variety of motives and circumstances in which a person may non-consensually distribute intimate images. The concept of 'revenge' suggests some responsibility on the part of the media user – either for taking explicit images of themselves, for leaving a relationship, for using dating or hook-up apps in the first place, or for not disclosing one's intersex status or trans experience.

By using the term 'revenge' and suggesting the perpetrator has been aggrieved, discourse continues to place blame and responsibility on the victim and also suggests there is a 'corrective' element to the non-consensual distribution of images. This is reminiscent of the ways in which lesbian women around the world continue to face 'corrective rape' as a form of punishment for their sexual orientation. Because pornography is not inherently harmful or exploitative, the use of the term 'porn' is also misplaced, and victims do not necessarily view the creation of their own images as pornography.

Referring to 'porn' also obscures motivations of humiliation or abuse in the distribution of these images. The term 'revenge porn', originally coined by perpetrators, is not only inaccurate and inappropriate, but it perpetuates victim-blaming and 'slut-shaming' narratives that do not recognise bodily autonomy. The focus on intimate relationships also masks the myriad situations in which non-consensual distribution of images may occur, particularly in situations of homophobic or transphobic violence.

### **LGBTI people and intimate images**

LGBTI people participate in consensual creating and sharing of intimate images as part of relationships, sexual culture, dating and hook-up cultures. A 2015 study published by the Australian Institute of Criminology found that 'sexting' was 'prominent among homosexual and bisexual respondents' (Lee, Crofts, McGovern and Milivojevic, 2015, 1). In the study, '...male respondents identifying as gay were significantly more likely to have sent or received a sexual image (81%) (2015, 4). The authors describe gay and bisexual participants as 'overrepresented' in sexting culture, in part due to the proliferation of applications such as Grindr, SCRUFF and GROWLr, which 'play some role in normalising the exchange of sexual images' (2015, 6). In the 2016 report *Intersex: Stories and Statistics from Australia*, intersex people also list sexting and taking selfies among sexual behaviours engaged in (Jones et al, 183).

A 2014 study by Dr Kath Albury and Paul Byron from the University of New South Wales found that the practice of sexting among young same-sex attracted people aged 18 to 26 was experienced as 'ordinary and unremarkable' (2014, 142). Participants developed strategies for negotiating safety and risk as well as rules of etiquette for where and how images could be shared. Albury and Byron cite further research that contextualises sexting within LGBTI communities: Sharif Mowlabocus' research on gay men's use of Gaydar indicates that sharing intimate photographs can be a means of 'identify formation' and involve a degree of trust (Mowlabocus, 2010, 201, 207).

Lesbian, queer and bisexual women also create explicit media as a means of self-representation and experimentation (Driver, 2007). Kane Race describes the use of hook up apps in gay culture as 'affording novel ways of arranging sex, intimacy and sexual community' (Race, 2015, 496).

### **Using Apps to abuse**

LGBTI people are at higher risk of having their images shared non-consensually where they use Apps specifically designed for the sharing of images. Such Apps often have geo-location technologies built into them and invite users to provide details about their sexual preferences or their HIV status. Transgender people are further invited to disclose their gender experience. Visible tracking of one's proximity, connected with intimate photographs and health information, means people using dating and hook up apps are at increased risk of identification and more vulnerable to homophobic or transphobic abuse, violence, stalking and outing.

The following excerpts from Albury and Byron's focus groups among people aged 18-26 illustrate young people's concerns about the consequences of the anonymity and visibility of Apps and their risk of violence (2014, 143):

F2: My friend is so scared of being outed that he – because he's always on [Grindr] and you always know which 500 people are the closest proximity to him at all times. Sometimes he'll be at university and he'll see someone in the same classroom with him. And if they're online he just hides his profile or blocks that person instantly ...

M1: in the school yard, it could be very easily used to out someone, because a gay kid could have it. You can easily download it off another phone. It tells you how close the people are. It's off proximity, so a bully could easily download it and see who's around.

M2: I've actually been seen, because I have [Grindr] on my phone and I've actually been seen on it by someone, and someone said 'oh, what's that?' I'm like 'Oh, it's just a talking app like Facebook' ... so I'm, like, phew. But it's very ... the dangers are – I mean, in this day and age, homophobia is pretty high, sadly.

This is not to present the use of Apps as a 'risky' behaviour. Indeed, social media and online space have been important points of belonging and connection for LGBTI people where visible public space can pose dangers. Rather, perpetrators are using and exploiting these means of intimate connection for purposes of harassment, outing and violence.

### **Non-consensual distribution, homophobia and transphobia**

LGBTI people face increased risk of harm associated with the non-consensual sharing of intimate images because of widespread stigma and discrimination. Those at highest risk include trans people, particularly women and men of trans experience who are either living stealth or who are not 'out', for whom disclosing their trans experience could bring discrimination and violence.

Even for those who are out, increased potential for public scrutiny and the experience of misgendering (such as using incorrect pronouns) could also have a direct impact on a person's mental health, specifically for those trans people experiencing gender dysphoria. Sharing unauthorised images of a trans person represents a social and cultural practice that does not value or honour the autonomy of trans

bodies. It can be used as a deliberate act of transphobia to humiliate a person, exercise power over them and ensure the victim feels unsafe.

Specific risks of harm facing LGBTI people include increased physical, verbal and financial violence (such as bribery or blackmail), rejection from families, friends, networks (resulting in loss of support structures), discrimination in employment, at school, in public and/or when accessing services (bringing isolation). A 2015 report by the Australian Research Centre in Sex, Health and Society, *A Closer Look at Private Lives 2*, addressing the mental health and well-being of LGBT Australians, indicates that 49.2% of trans women and 55.3% of trans men experience verbal abuse, social exclusion and having rumours spread about them (2015, 28). People with intersex variations are at risk of similar harm. Perpetrators of domestic and family violence have used knowledge of a person's intersex as another means of power and control over them.

### **Comments on legislative proposal**

While we appreciate the intention of this proposal to address threatening and harmful behaviour, we urge the Department to carefully consider the potential for peripheral behaviours and practices to be unintentionally captured by this legislation. Historically, LGBTI people have had a fraught relationship with the law of consent and community standards, which has been embedded in heteronormative values. The law has deemed gay men unable to consent to certain homosexual and BDSM activities.

People between 16 and 18 may be sharing images through hook up Apps as a way to meet each other. We note that there is a discrepancy between the ages that people can consent to sex and the age that people can consent to taking or sharing images. In Australia people can consent to sexual activity at the age of sixteen or seventeen depending on the jurisdiction, however by taking photographs of themselves ('selfies') and sharing them with others, people under the age of eighteen are legally producing, possessing and distributing child pornography. We note that the 2016-17 review by the Department of Justice into child sexual assault offences will address the issue of sexting, and will consider whether legislative change is needed to address the fact that by sexting children may be producing, disseminating or possessing child abuse material under s91H of the *Crimes Act 1900 (NSW)*.

We also recognise the need for practical remedies to address the immediate problems for victims. Historically, victims of sexual assault have experienced being 're-traumatised' by the criminal justice system. We note the need for victims services to assist people seeking to take down content, to access victims compensation, the ability to prosecute anonymously, and the ability to give evidence via video-link instead of facing the accused in court. We agree that judges should be able to order the take down of images (although we query what then happens to the original image).

### **Limitations of criminal law solutions**

While we welcome this step towards addressing non-consensual behaviour, we emphasise that criminal law is but one instrument in addressing cultures of non-consent. Digital images are merely the medium facilitating and exacerbating broader systemic societal issues around misogyny, homophobia and transphobia.

LGBTI young people in Australia lack culturally appropriate sex education and information (Robinson et al, 2014). A longer term solution addressing the root cause of this phenomenon requires funding and investment in education around sexual ethics, respect, relationships and consent. In her work, Moira

Carmody argues that anti-violence strategies should focus on sexual ethics among young people, including teaching skills to negotiate sexual intimacy and non-violent relating (Carmody, 2005). Ongoing institutional cultures of homophobia and transphobia exacerbate an environment in which intimate images of LGBTI people can be shared as a form of abuse, with significant consequences for that person's safety.

While law reform remains an important 'piece of the puzzle', we cannot simply legislate against attitudes and behaviours without a more holistic response to the non-consensual sharing of intimate images. The practice of non-consensual sharing of images does not graduate from other forms of privacy offending (such as stealing online passwords), but rather escalates from other forms of gender based offending (such as using misogynist or transphobic language). This is not merely an issue about privacy or cyber-safety that can be addressed by technological or legislative solutions. It is about historical power hierarchies in relationships, gender and sexuality and requires systemic cultural shifts.

Thank you for the opportunity to have input into this important process and we look forward to reviewing a draft of the proposed legislation.

If you would like to discuss our submission further please do not hesitate to contact ACON's Policy Advisor, Zahra Stardust, on (02) 9206 2085.

Kind regards

A handwritten signature in black ink, appearing to read 'Nicolas Parkhill', with a horizontal line extending to the right and a small dot at the end.

Nicolas Parkhill  
**Chief Executive Officer**

## References

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