

The Director, Online Content  
Department of Communication and the Arts  
GPO Box 2154  
Canberra ACT 2601

6 July 2017

## **Submission to the Commonwealth consultation on the 'prohibition of and civil penalties regime for non-consensual sharing of intimate images'**

Thank you for the opportunity to make a submission on the prohibition of non-consensual sharing of intimate images.

The Young Women's Advisory Group (YWAG) of the Equality Rights Alliance is a group of ten women under the age of 31. We are young women from across Australia, and both urban and rural contexts, who aim to bring young women's voices and perspectives to the national policy space.

In 2015, YWAG surveyed over 1000 young women aged 16-21 across Australia about their experiences of sexuality and relationships education at school. From the survey, in 2016 we published a report entitled *Let's Talk: Young Women's Views on Sex Education*<sup>1</sup> which details our findings, and which we have attached to this submission.

In mid-2016, YWAG launched a companion report entitled *A Whole Generation Out of Date*<sup>2</sup>, which analyses three focus groups which were run concurrently to the *Let's Talk* survey in collaboration with local youth organisations in Queensland and the Australian Capital Territory. During these focus groups, topics of discussion including young people's experiences and stories of the non-consensual sharing of intimate images.

Young women, like all young people, have agency, and can contribute analysis and perspectives from a particular set of life experiences that need to be both respected and included in national conversations and the development of equitable policy. YWAG emphasises the importance of including young women's voices at the level of federal policy and legislation. Our recommendations are supported by both evidence-based secondary literature, and the views of the young Australian women who participated in our surveys and focus groups.

### **Summary**

YWAG supports the criminalisation of non-consensual sharing of intimate images in Commonwealth Law, reflected in consistent and uniform State and Territory laws. We refer the Department to Australian Women Against Violence Alliance's (AWAVA) submission to this inquiry, who note that

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<sup>1</sup> See attached, or YWAG. *Let's Talk: Young women's views on sex education*. Equality Rights Alliance 2016. Available from <https://www.equalityrightsalliance.org.au/wp-content/uploads/2016/10/Lets-Talk-Final-Report.pdf>.

<sup>2</sup> See YWAG. *A Whole Generation Out of Date: Young People's Stories of Sex Education*. Equality Rights Alliance 2016. Available from <http://reports.equalityrightsalliance.org.au/ywag/lets-talk/>.

“Penalties for the offence should be substantial, reflecting the harm caused and the need to deter potential offenders”.

In this context, we welcome the move by the Commonwealth to impose civil penalties for the non-consensual sharing of intimate images, intended to complement, but not replace, emerging criminal law at both a Commonwealth and State and Territory level. We acknowledge that the current inquiry is specifically considering the topic of a civil penalty regime, rather than further moves to criminalise the non-consensual sharing of intimate images, and the rest of our comments in this submission relate only to that focus and the discussion paper.

In informal consultation, young people have shared with us stories of the fun side of sharing images, namely flirting or in healthy relationships, the risky and negative side, where they may have felt harassed or had their consent violated and trust broken by partners and friends, and the strategies they use to protect themselves, including watermarking images or not including identifying features<sup>3</sup>. Based on our research and consultation with young people, particularly women, YWAG therefore supports the view that the consensual sharing of intimate images is part of a spectrum of normal sexual practices engaged in by both adults and young people<sup>4</sup>. Such a position has two implications, firstly, in regards to young people, and secondly, in regards to the non-consensual sharing of intimate images as a form of abuse.

Young people's experiences and perspectives on the sharing of intimate images are not well represented in Australian policy or legislation at present. It emerged from consultations with young people in focus groups for YWAG's *A Whole Generation Out of Date* report that the sharing of intimate images is considered a normal part of contemporary sexual activity, relationships and dating for young people, a finding that is supported by academic literature<sup>5</sup>. It is therefore important that laws on the sharing of intimate images are reflective of this reality, and do not lead to young people being criminalised for engaging in normal, healthy and consensual sexual behaviours, for example through prosecution for child pornography and child exploitation material charges.

The context of intimate image sharing is therefore crucial, and the non-consensual sharing of intimate images should be understood as an act of technology-facilitated sexual harassment, violence or abuse. We note that a recent report from RMIT found that young people and lesbian, gay and bisexual people, are particularly at risk of image-based abuse<sup>6</sup>. Moreover, we note that like other forms of sexual violence, the non-consensual sharing of images is gendered, as it is primarily perpetrated by men, and because the social costs to women are greater when their images are shared<sup>7</sup>. As such, YWAG strongly

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<sup>3</sup> See also Albury, Kath, Kate Crawford, Paul Bryon, and Ben Mathews. 2013. *Young People and Sexting in Australia: Ethics, Representation and the Law*. Sydney: UNSW, ARC Centre for Creative Industries and Innovation.

<sup>4</sup> See Yeung, Timothy H., Danielle R. Horyniak, Alyce M. Vella, Margaret E. Hellard, and Megan S. C. Lim. 2014. Prevalence, correlates and attitudes towards sexting among young people in Melbourne. *Sexual Health* 11:332-339.

<sup>5</sup> See Walker, Shelley, Lena Sanci, and Meredith Temple-Smith. 2013. Sexting: Young Women's and Men's Views on Its Nature and Origins. *Journal of Adolescent Health* 52:697-701.

<sup>6</sup> Henry, Nicole, Anastasia Powell, and Asher Flynn. 2017. Not just 'revenge pornography': Australians' experiences of image-based abuse. Victoria: RMIT.

<sup>7</sup> See Henry, Nicola, and Anastasia Powell. 2014. Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women. *Australian & New Zealand Journal of Criminology* 48 (1):104-118; Walker, Shelley, Lena Sanci, and Meredith Temple-Smith. 2013. Sexting: Young Women's and Men's Views on Its Nature and Origins. *Journal of Adolescent Health* 52:697-701 and Powell, Anastasia, and Nicola Henry. 2014. Blurred Lines? Responding to 'Sexting' and Gender-based Violence among Young People. *Children Australia* 39 (2):119-124.; Henry, Nicole, Anastasia Powell, and Asher Flynn. 2017. Not just 'revenge pornography': Australians' experiences of image-based abuse. Victoria: RMIT.

supports moves for Commonwealth civil penalties for the non-consensual sharing of intimate images, in addition to a consistent approach to criminalisation across the States and Territories.

### **Specific comments**

#### *Definition of consent*

As previously indicated, YWAG views the exchange of intimate images as part of a spectrum of sexual practices, and the non-consensual sharing of such images as sexual violence and abuse. We therefore support a definition of consent that is consistent with the definition used for sexual offences. In particular, YWAG emphasises the importance of affirmative, explicitly-given (whether verbal or otherwise), free and voluntary agreement to a definition of consent, and supports the position of the AWAVA that the threshold of offense be that a perpetrator has been “reckless as to a subject’s lack of consent”<sup>8</sup>. The burden of proof in relation to such offences should be on the perpetrator, and not on the survivor.

YWAG strongly recommends a definition of consent that acknowledges that consent must be sought for each new context in or party with which an image is shared, and rejects the view that a person may have reasonable belief of consent when consent has been freely given before<sup>9</sup>. In viewing the sharing of intimate images as a sexual practice, the context in which an image is shared, namely whether consent was obtained and whether there is intent to cause harm, is crucial to defining whether they are considered healthy or abusive. Any definition of consent should also consider factors impacting the capacity to give consent, including disability, cultural and linguistic differences, intoxication from the use of alcohol or drugs, and coercion of the survivor to comply.

#### *Definition of intimate image*

As we have previously stated in this submission, YWAG emphasises the importance of context of non-consensual sharing of intimate images and technology-facilitated abuse. As such, the prohibition should include intimate images in which the subject is not readily identifiable, or that have been manipulated in some way, for example, by photoshopping the subject’s face on to a sexually explicit image. Such acts use the image of the survivor without consent, and the purpose of such images is to cause harm and humiliation to the subject. We emphasise that it is important to account for the degree to which a perpetrator is reckless to the consent of the subject, and their intent to cause harm to the subject.

It is particularly important for young people that any definition of intimate image should not be limited to images taken in intimate relationships. Sexual abuse and violence occurs both within intimate relationships, and in peer or dating relationships. Indeed, young people may be at greater risk of image-based abuse from their peers or family, than from intimate partners<sup>10</sup>. It is important that the non-consensual sharing of intimate images by a third party is also considered a form of sexual violence, and as reckless in regards to the consent of the survivor.

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<sup>8</sup> AWAVA. 2016. Submission to the Senate inquiry into “the phenomenon colloquially referred to as ‘revenge porn’”.

<sup>9</sup> We support the definition of sexual consent articulated by Planned Parenthood, see *All About Consent*. 2017. Planned Parenthood. Available from <https://www.plannedparenthood.org/learn/teens/sex/all-about-consent>

<sup>10</sup> Henry, Nicole, Anastasia Powell, and Asher Flynn. 2017. Not just 'revenge pornography': Australians' experiences of image-based abuse. Victoria: RMIT.

*Definition of sharing*

Non-consensual sharing of intimate images should be seen in a broader context of technology-facilitated sexual activity, abuse and violence. YWAG therefore supports a broad definition of sharing that includes a range of digital and non-digital means, including through text messages, social media platforms such as Facebook, Messenger or Instagram, web platforms such as Tumblr and other blogs, and other apps and technologies, as well as the sharing of images in 'hard copy', namely if images are printed out and distributed. We note that any laws introduced also need to be adequately flexible to capture emerging and future technologies.

*Severity of penalties for non-consensual sharing of images involving minors*

When two minors are involved in a case of intimate image sharing, the legalities of consent render the case particularly complex. YWAG is concerned that at present, young people are liable for prosecution with child pornography and child exploitation materials offences when in the possession of consensually shared intimate images of other minors. We note that such charges can have a serious and detrimental impact to a young person's future. We also note that the non-consensual sharing of intimate images of a young person is particularly serious, that young people are at particular risk of technology facilitated abuse and violence, and that young women bear greater social costs from such abuse<sup>11</sup>.

Although young people aged below 16 years are unable to legally give consent for sexual activity, it is generally acknowledged that sexual activity and exploration by young people is a healthy and normal part of their sexual development<sup>12</sup>. The sharing of images between two young people in a healthy and intimate relationship is vastly different in context to the sharing of intimate images of a minor by a legal adult. Indeed, the World Health Organization defines child sexual abuse as "between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person"<sup>13</sup>. Therefore, we emphasise that inequality in age, development, and responsibility and power is central to the nature of child pornography and exploitation, and distinct from equal sexual relationships between young people.

YWAG's consultations with young people have found that young people are often unaware that they can be prosecuted for child pornography offences when in possession of intimate images of other young people, that such a law is disconnected from their realities, in which sending and receiving intimate images is a normal sexual practice, and that young people have concerns about the implications of such a law<sup>14</sup>.

As we have emphasized, the non-consensual sharing of intimate images should be viewed as part of a spectrum of sexual practices, and as problematic and harmful to a survivor because of the context of abuse or coercion in which the sharing takes place. That is to say, if an image is shared without

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<sup>11</sup> Henry, Nicole, Anastasia Powell, and Asher Flynn. 2017. Not just 'revenge pornography': Australians' experiences of image-based abuse. Victoria: RMIT.

<sup>12</sup> UNESCO. 2009. International Technical Guidance on Sexuality Education: An evidence-informed approach for schools, teachers and health educators. France: UNESCO.

<sup>13</sup> World Health Organization. 1999. Report of the Consultation on Child Abuse Prevention. Geneva: WHO, pp.15-16.

<sup>14</sup> See also Albury, Kath, Kate Crawford, Paul Bryon, and Ben Mathews. 2013. Young People and Sexting in Australia: Ethics, Representation and the Law. Sydney: UNSW, ARC Centre for Creative Industries and Innovation.

consent, namely that sharing is reckless in regards to the subject's consent, or with intent to cause harm, then it constitutes sexual violence and abuse.

We recognise the complexity of legislation in regards to minors, but suggest that the Commonwealth takes the following points into consideration:

- I. It is normal and healthy for young people to be sexually active, although the legal age for consent is governed at the State level (and is 16 years in most states and territories, but 17 years in others). Sharing intimate images is a normal sexual practice for young people.
- II. The context of non-consensual sharing of intimate images determines the abusive nature of the practice, namely when the perpetrator is reckless in regard to a subject's lack of consent, or acts with the intent to cause harm.
- III. That a prohibition should recognise the differences between young people, who are unable to legally consent but who are sharing images as part of a healthy relationship, versus the sharing of intimate images of a minor, by another minor or legal adult, in a way that is reckless in regard to a subject's lack of consent, including due to inequalities of age, power and responsibility, or with the intent to cause harm.

#### *Hierarchy of penalties and re-traumatisation of survivors*

YWAG is concerned at the proposition of a hierarchy of penalties, and urges the Commonwealth to consider the possibility of re-traumatising survivors if such a hierarchy were to increase the number of times a victim were to appear before a court. The experience of reporting cases of sexual assault and abuse can cause further distress for survivors. Previous cases in the United States where the non-consensual sharing of intimate images have caused extreme distress and impacts for young women have been documented<sup>15</sup>, and YWAG is concerned about the further traumatisation of survivors through additional court proceedings.

Thank you again for the opportunity to provide consultation to the Commonwealth on the prohibition of non-consensual sharing intimate images. We also endorse the submission of Australian Women Against Violence Alliance (AWAVA). YWAG would welcome the opportunity to provide further information about the views and information presented in this submission.

For further information or to discuss the content of this submission, please contact Hannah Gissane, Projects Coordinator for the Equality Rights Alliance, at [era.projects@ywca.org.au](mailto:era.projects@ywca.org.au).

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<sup>15</sup> See Crimmins, Danielle M., and Kathryn C. Siegfried-Spellar. 2014. Peer attachment, sexual experiences, and risky online behaviors as predictors of sexting behaviors among undergraduate students. *Computers in Human Behavior* 32:268-275.