

# Chapter 3

## Legislative responses

3.1 The importance of enacting laws to criminalise non-consensual sharing of intimate images was highlighted by most submitters to the inquiry. In particular, organisations working directly with victims of non-consensual sharing of intimate images asserted that legislation in this area would send a strong message that this type of conduct is unacceptable and serve to deter potential perpetrators from offending.<sup>1</sup> Overall, most submitters supported the introduction of legislation at the Commonwealth level to address non-consensual sharing of intimate images, for example, the Commonwealth Director of Public Prosecutions (CDPP) submitted that legislation in this area would 'fill a gap within the existing law'.<sup>2</sup> The Law Council of Australia (LCA) advocated that legislation addressing the problems of non-consensual sharing of intimate images 'would be a positive step in combating violence against women'.<sup>3</sup>

3.2 The Top End Women's Legal Service (TEWLS) discussed the potential contribution of legislation to reducing the impact of non-consensual sharing of intimate images:

criminal offences effectively serve as a symbolic and educative function for society...by providing a tailored offence for criminal porn, this behaviour would be appropriately identified to the public and would clearly highlight and reinforce the 'wrongfulness' of revenge porn.<sup>4</sup>

3.3 The broader benefits of criminalising non-consensual sharing of intimate images were also articulated by the Queensland Law Society (QLS):

If people become aware that they may be committing an offence by sharing things they might become a little bit more discretionary about what they share and in what circumstances. With a public awareness campaign maybe less of it will happen, because they will be thinking, "Hang on, I'd better be damn sure that I've got consent before I pass this on".<sup>5</sup>

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1 See, Australian Women Against Violence Alliance (AWAVA), *Submission 19*, p. 1.

2 Commonwealth Director of Public Prosecutions (CDPP), *Submission 24*, p. 5.

3 Ms Pauline Wright, National Criminal Law Committee Member, Law Council of Australia (LCA), *Committee Hansard*, 18 February 2016, p. 35.

4 Top End Women's Legal Service (TEWLS), *Submission 1*, p. 4.

5 Mr Shane Budden, Senior Policy Adviser, Queensland Law Society (QLS), *Committee Hansard*, 18 February 2016, p. 40.

3.4 Submitters and witnesses also told the committee that enacting legislation at the Commonwealth level is unlikely to be the only measure needed to address the problem.<sup>6</sup>

3.5 Most submissions advocated specific legislation at a Commonwealth level, rather than relying on legislation enacted by the states and territories. A range of reasons were raised. For example, Domestic Violence Victoria (DVV) discussed its concerns about the adequacy of state based legislation to address non-consensual sharing of intimate images, noting that it is common in relationship breakdown, particularly in cases of domestic violence, for one partner to move interstate:

A Commonwealth law against 'revenge porn' would allow for a consistent response across states and territories in recognition that this issue—often in digital form—crosses physical borders. This will be essential to ensure congruency with stalking, harassment and other laws, as well as the national domestic violence order scheme and parenting orders.<sup>7</sup>

3.6 There is also often an international element in non-consensual sharing of intimate images cases, for instance, where the images are posted on a website hosted outside Australia. The committee was advised that addressing this international element of non-consensual sharing of intimate images would be challenging, even with Commonwealth legislation in place, and 'complications around the transnational nature of technology-facilitated crimes, in that the owners of the site may not reside in Australia and thus not subject to its laws'<sup>8</sup> would persist.

3.7 Recommendations from submitters and witnesses in relation to amending existing or implementing new Commonwealth legislation are discussed in the following sections.

### **Commonwealth legislation**

#### ***Is existing legislation being used and working?***

3.8 According to the Australian Federal Police (AFP), the Commonwealth legislation (section 474.17 of the criminal code) has not been used in relation to non-consensual sharing of intimate images. However, it has been used by the ACT Director of Public Prosecutions in a related case that involved the non-consensual filming of sexual activity and 'the use of the telecommunications service to broadcast that to the people watching it in another location was the misuse of the carriage service'.<sup>9</sup>

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6 Ms Katherine McLachlan, Quality and Research Manager, Victim Support Service, *Committee Hansard*, 18 February 2016, p. 4; Mr David Adsett, Deputy Director, CDPP, *Committee Hansard*, 18 February 2016, p. 53.

7 Domestic Violence Victoria (DVV), *Submission 4*, p. 2.

8 Drs Henry, Flynn and Powell, *Submission 9*, p. 8.

9 Mr Shane Connelly, Assistant Commissioner, Australian Federal Police (AFP), *Committee Hansard*, 18 February 2016, p. 50.

3.9 The submission from the CDPP identified a number of issues with the current Commonwealth legislation in terms of how effectively it could be applied in the context of non-consensual sharing of intimate images offences.

3.10 As discussed in chapter 1, section 474.17 of the Criminal Code provides for the criminalisation of conduct relating to the misuse of a telecommunications service. However, in the context of a potential non-consensual sharing of intimate images offence, section 474.17 does not address:

consent of the victim, nor does it define what might constitute an offensive communication, in the context of disseminating intimate, personal or sexual material electronically.<sup>10</sup>

3.11 According to the CDPP, other aspects of a non-consensual sharing of intimate images offence that are 'not contemplated' in the current legislation, include whether the victim 'held and maintained an expectation of privacy in relation to the image' and the fact that this part of the Commonwealth offence relates to the misuse of a telecommunications service, and would not extend to non-online conduct, such as distributing hard copy images.<sup>11</sup>

3.12 The CDPP stated that a fundamental issue in evaluating the adequacy of the current legislation is that section 474.17 is not being used in relation to non-consensual sharing of intimate images, meaning that there has not been an opportunity to test the law. However, it was noted that there are 'evidentiary difficulties in isolating the use of the telecommunication service. Is it one push of a button, and how is that recorded electronically? Evidence-gathering issues associated with that are considerable'.<sup>12</sup>

3.13 The CDPP opined that amendments to the criminal code to create a new Commonwealth offence targeting non-consensual sharing of intimate images would be beneficial if they clarify issues 'in relation to the sort of material it applies to and the circumstances in which it applies'.<sup>13</sup>

### ***Constitutional issues***

3.14 The Attorney General's Department (AGD) discussed aspects of Australian Constitutional law of relevance to future non-consensual sharing of intimate images legislation. Under the Australian Constitution, powers are distributed between the Commonwealth and the states and territories<sup>14</sup>.

3.15 Where the Commonwealth has 'legislative power regarding a subject matter, it can create criminal offences in respect of the subject matter'.<sup>15</sup> Under section 51(v) of

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10 (CDPP, *Submission 3*, p. 3.

11 CDPP, *Submission 3*, p. 3.

12 Mr David Adsett, Deputy Director, CDPP, *Committee Hansard*, 18 February 2016, p. 43.

13 Mr Adsett, CDPP, *Committee Hansard*, 18 February 2016, p. 50.

14 Sections 51 and 52 of the *Commonwealth of Australia Constitution Act 1901* (Cth) describe the scope of Commonwealth powers.

15 Attorney-General's Department (AGD), *Submission 28*, p. 5.

the Constitution, the Commonwealth has authority to make laws with respect to postal, telegraphic, telephonic, and other like services. This has been interpreted as giving the power to make laws with respect to 'carriage services', including telecommunications networks and the internet.

3.16 Noting that state legislation has already been enacted in response to non-consensual sharing of intimate images, the CDPP considered potential Constitutional issues and suggested that 'it is preferable that any Commonwealth law not operate to exclude or limit the concurrent operation of those State laws':<sup>16</sup>

To maximise coverage of the State laws that have been enacted, it is preferable that any Commonwealth law not operate to exclude or limit the concurrent operation of those State laws. To this end, it is recommended that a provision stating Parliament's intent in this regard be included (for example, a provision similar to s 300.4 and 370.3 of the Code).<sup>17</sup>

3.17 The reasons why this could be problematic were outlined by the Director of Public Prosecutions (DPP) Tasmania:

If the Commonwealth does decide to legislate in this area, I would suggest that such legislation provides that it is to act in conjunction with State legislation and not to replace any such legislation for the same types of behaviour. The reason for this is that often such conduct...can be involved with other State-based offences against the victim. Therefore, if any Commonwealth legislation were to replace the State-based legislation it would make it difficult to prosecute offences under both Commonwealth and State legislation. Further, often for these victim-type offences the offence would be investigated by State-based police.<sup>18</sup>

3.18 Women's Legal Services NSW and the LCA highlighted a gap in the current legislation around non-consensual sharing of intimate images in hard copy, for example, 'if an image was left at someone's door or passed from person to person, but not through an electronic device'.<sup>19</sup>

3.19 The LCA discussed the need for criminalisation of non-consensual sharing of intimate images to include physical and non-online forms of action, but raised a concern that 'Commonwealth legislation may be restricted to online forms for Constitutional reasons, and this issue would therefore need to be addressed in State legislation':<sup>20</sup>

We also see that state and territory legislation is also needed to address the issue of non-consensual sharing of images beyond carriage service

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16 CDPP, *Submission 3*, p. 5.

17 CDPP, *Submission 3*, p. 5.

18 Director of Public Prosecutions (DPP) Tasmania, *Submission 26*, p. 2.

19 Ms Janet Loughman, Principal Solicitor, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

20 LCA, *Submission 10*, p. 4.

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providers and postal services, such as person-to-person sharing of images or leaving an image at someone's doorstep.<sup>21</sup>

## Key elements of potential future legislation

### Definitions

3.20 As discussed in chapter 2, a number of submitters and witnesses outlined concerns with the term 'revenge porn', recommending terms such as 'non-consensual sharing of intimate images' to describe 'revenge porn'.<sup>22</sup> Definitional issues associated with a number of other terms were also brought to the committee's attention.

3.21 For example, it was highlighted that the Victorian non-consensual sharing of intimate images legislation uses the term 'intimate image' and defines it as:

a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or content that is sexual; or (c) the genital or anal region of a person, or, in the case of a female, the breasts.<sup>23</sup>

3.22 The Victorian legislation also states that community standards of acceptable conduct must be taken into account. This includes the nature and content of the image, the circumstances in which it was captured and distributed, and the circumstances of the person who is the subject of the image, including the impact on their privacy.<sup>24</sup>

3.23 Noting that non-consensual sharing of intimate images legislation enacted by jurisdictions at the state level in Australia, as well as overseas, has defined the material differently, the CDPP submission recommended that it would be helpful:

if the types of subject matter depicted was clearly defined and less open to interpretation... material which is intimate, but not sexual, may be capable of causing a victim distress if disseminated without their consent. Further, what might be considered to be sexual, personal or intimate will differ within Australian society.<sup>25</sup>

3.24 The AGD described this point in more detail, noting that some parts of the community would be likely to take a broader view about what constitutes non-consensual sharing of intimate images:

beyond images that are strictly of a "sexual" nature; intimate, non-sexual images (for example, of a Muslim woman without her hijab) distributed without consent can be equally as damaging and traumatic for a victim and can be used in much the same way as a sexual image by a perpetrator of abuse.<sup>26</sup>

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21 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

22 Sexual Assault Support Service (SASS), *Submission 11*, p. 2.

23 *Summary Offences Act 1966* (Vic) section 40, cited in: Drs Henry, Flynn and Powell, *Submission 9*, p. 5.

24 Drs Henry, Flynn and Powell, *Submission 9*, pp 5–6.

25 CDPP, *Submission 3*, p. 4.

26 AGD, *Submission 28*, p. 4.

3.25 It was brought to the attention of the committee that under the current Victorian non-consensual sharing of intimate images legislation, 'distribute' is defined as 'publish, exhibit, communicate, send, supply, or transmit to any other person, whether to a particular person or not'.<sup>27</sup> However, Drs Henry, Flynn and Powell indicated in their submission that under this definition it was not clear whether 'communicate' could mean 'showing' someone an image, for example, a printed hardcopy or an image on a screen, and that any 'new offence should clearly state that distribution can mean sharing and showing, and that it is irrelevant whether it is distributed to one person or millions of people'.<sup>28</sup>

3.26 Assistant Professor Terry Goldsworthy et al noted that:

Great care must be taken when drafting legislation to combat an issue such as "revenge pornography". For example, what does it mean to distribute? Does showing a friend or work colleague an image stored on an electronic device, such as a mobile phone constitute distribution? What about instances where the image is, instead of stored on a mobile phone, merely retrievable via an online "cloud"-like application? What if the image is not deliberately/intentionally distributed? It is submitted that any legislation that is drafted should include both terrestrial and cyber forms of distribution so as to include, for example, the sharing or sending of a hard-copy photograph to another.<sup>29</sup>

It is plausible that a person ('A') may lose, sell or otherwise transfer their electronic storage device (e.g., mobile phone, camera, laptop) to another person ('B') and B may distribute an intimate image of C. Should A be criminally liable for the distribution of C's image? Relatedly, A's electronic storage device system may be exploited (i.e., hacked) by another person and images stored on that device may be distributed. In all of these instances: loss; sale; transfer; and exploitation; person A may have, although unintentionally, recklessly distributed another person's image. A may not have, for example, purchased adequate anti-viral software on his or her computer.<sup>30</sup>

3.27 The Office of the Director of Public Prosecutions in NSW (ODPP NSW) stated that the term 'image' should include still (photographs) and moving (film/video) images.<sup>31</sup> Further, a 'reasonable expectation of privacy would include such things as, an image in which':

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27 Drs Henry, Flynn and Powell, *Submission 9*, pp 5–6.

28 Drs Henry, Flynn and Powell, *Submission 9*, pp 5–6.

29 Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj, *Submission 31*, p. 5.

30 Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj, *Submission 31*, p. 6.

31 Office of the Director of Public Prosecutions (ODPP NSW), *Submission 24*, p. 4.

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- A person is depicted naked or partially naked, irrespective of whether their genitals are exposed and irrespective of the type of pose the person has adopted;
  - A person is depicted engaged in a sexual act/activity, irrespective of whether their face is visible;
  - A person is depicted in a way which, by the context or content, would suggest that the image is of an intimate or private nature such as images depicting a person dressed in lingerie, or in a sexual pose.<sup>32</sup>

3.28 It was suggested that photo-shopped images should also fall within the scope of future legislation, and that the Victorian legislation 'fails to consider instances where real images may be doctored or fabricated so as to appear "intimate", despite their lack of authenticity'.

### ***Consent***

3.29 Consent was described by witnesses as a key aspect of legislation addressing non-consensual sharing of intimate images, and the importance of careful drafting was highlighted, as any ambiguity in this area may favour the perpetrator:

If consent is left vague or open to argument, it certainly will be argued. It is our view, as we have stated there, that certain categories a person, even if they give consent, some should be deemed unable to consent, such as those under 18.<sup>33</sup>

3.30 The LCA made it clear that any consent given for intimate images to be created in the course of a relationship should cease at the conclusion of the relationship: 'Consent to having intimate images taken or disseminated within a relationship should be taken to have terminated upon the conclusion of that relationship'.<sup>34</sup>

3.31 The ODPP NSW held a similar view:

Consent would need to be explicit/express and would need to be consent to that particular image at that particular time and in the manner used. The onus would be on the offender to prove consent.<sup>35</sup>

3.32 The submissions from Women's Legal Services NSW discussed whether a 'harm element' might be necessary in addition to consent. However, at the hearing Women's Legal Services NSW's view shifted and the service agreed that a lack of consent should suffice:

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32 ODPP NSW, *Submission 24*, pp 4–5.

33 Mr Budden, QLS, *Committee Hansard*, 18 February 2016, p. 36.

34 Ms Pauline Wright, Member, National Criminal Law Committee, LCA, *Committee Hansard*, 18 February 2016, p. 39.

35 ODPP NSW, *Submission 24*, p. 4.

In our submission to the committee we have been open to supporting in principle a harm element to an offence. But, on reflection, we now hold the view that absence of consent should be sufficient. We see consent as a core issue. It should be explicitly stated in legislation that consent to make the image of itself does not include consent to distribute an image.<sup>36</sup>

3.33 It was also emphasised that the legislation must make clear that consent must be provided for the creation *and* distribution of images:

Separate consent is required for distribution [and there should be]...explicit and express consent for the sharing of that particular image at that particular time, and the onus should be on the offender to prove such consent was given.<sup>37</sup>

And:

Those two things should not be muddled; they are very different. Someone may consent to a photograph being taken and being kept by the taker as a private memento, but they may not consent at all for that to be disseminated in any way, shape or form beyond that one-to-one situation.<sup>38</sup>

### ***Intent***

3.34 Drs Henry, Flynn and Powell submitted that legislation should clarify the intent of a perpetrator and exclude third parties who collect or distribute images without knowing how it was created: 'Although that behaviour is abhorrent, an offence should only apply if the person knows, or has reason to know, that the other person did not consent to the distribution of the image'.<sup>39</sup>

3.35 However, this was not supported by other submitters. Victorian Women Lawyers (VWL) stated that 'the behaviour of distributing sexual material without consent should be a key focus. In particular, that then takes away the onus on the victim to prove that they have established harm'.<sup>40</sup> This was supported by the Sexual Assault Support Service (SASS):

We believe that the proposed provisions should not rely on an intent to cause harm. We believe that there are a lot of problems with this because, as I talked about in my opening statement, there is a range of motivations for the behaviour. We are very concerned that if there is a provision that talks about an intent to cause harm it may create a bit of a legal loophole whereby perpetrators can basically say that they did not intend to cause any

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36 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

37 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

38 Ms Wright, LCA, *Committee Hansard*, 18 February 2016, p. 38.

39 Drs Henry, Flynn and Powell, *Submission 9*, p. 7.

40 Ms Amy Johnstone, Law Reform Committee Co-chair, Victorian Women Lawyers (VWL), *Committee Hansard*, 18 February 2016, p. 24.

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harm or distress to the victim, that they just thought it was a bit of a laugh and that they were trying to entertain their mates, or something like that.<sup>41</sup>

3.36 The ODPP NSW submission was emphatic on this issue in its submission to the inquiry: 'No intent should be required...there can be no innocent intent. The only inference available is that the person intends to do the harm, there can be no other reason for distributing the image'.<sup>42</sup>

### ***Recklessness***

3.37 The CDPP argued that it would be preferable for a recklessness element to be included in the provisions of any future non-consensual sharing of intimate images legislation, whether or not legislation required intent, or a lack of consent. For example, if an offence required the lack of consent of a victim, it should also include provisions covering instances where the accused was reckless as to whether consent was given.<sup>43</sup>

3.38 The CDPP discussed this position in more detail at the hearing:

In relation to the proof...it is easier to prove recklessness... I think some of the earlier discussion with other speakers has been about the difficulty of proving consent and when that stopped. That is really addressing that issue, I think, that it will be uncertain sometimes when somebody has not consented to the distribution of an image. I think somebody just ignoring that and not trying to establish that is evidence of recklessness, and that would be a preferable fault element to have applicable.<sup>44</sup>

### ***Threats***

3.39 As discussed in chapter 2, threats of non-consensual sharing of intimate images can be powerful and there is 'the potential for the person receiving the threat to be blackmailed'.<sup>45</sup> This potential has been described as becoming 'a part of the domestic violence pattern'<sup>46</sup> and a 'tool of coercion and control' that can create a 'reluctance to report to police'.<sup>47</sup>

3.40 Witnesses at the hearing stated that threats to disseminate intimate images should also be proscribed in legislation: 'It is important that there be remedies for both the actual sharing of intimate images without consent as well as the threat to do so'.<sup>48</sup> Further, 'that there should be no requirement of proof that an image actually exists

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41 Ms Martin, Policy/Research Officer, Sexual Assault Support Service (SASS), *Committee Hansard*, 18 February 2016, p. 4.

42 ODPP NSW, *Submission 24*, p. 5.

43 CDPP, *Submission 3*, p. 5.

44 Mr Adsett, CDPP, *Committee Hansard*, 18 February 2016, p. 50.

45 Electronic Frontiers Australia (EFA), *Submission 27*, p. 4.

46 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 28.

47 Ms Snell, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 28.

48 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

when a threat to share is made, as the mere threat is sufficient to cause fear, anxiety, a sense of powerlessness'.<sup>49</sup>

3.41 The CDPP submission noted in the context of current and future legislation that it envisaged situations 'where an individual...threatens to disseminate an image or recording' would form part of a typical non-consensual sharing of intimate images situation.<sup>50</sup>

### ***Anonymity for victims***

3.42 Feelings of shame, humiliation, personal violation, and powerlessness can reduce the likelihood that victims of non-consensual sharing of intimate images will come forward and make an official complaint to police. A number of submitters recommended that care should be taken to protect the privacy and anonymity of victims who are involved in the criminal justice system.<sup>51</sup>

3.43 This issue has been discussed in the United Kingdom (UK), where non-consensual sharing of intimate images legislation has already been enacted. The LCA noted that following the introduction of non-consensual sharing of intimate images legislation, 'proposals are now being considered in the UK to provide automatic anonymity to a complainant of "revenge pornography", rather than requiring specific individual suppression orders on a case by case basis'.<sup>52</sup>

3.44 Police in Australia are aware that victims can be reluctant to come forward due to embarrassment and the stress that may be caused by the court process.<sup>53</sup> The CDPP identified that section 15YR of the *Crimes Act 1914* (Cth) makes it an offence to publish any material which actually identifies a victim in certain proceedings, such as those involving vulnerable adult witnesses. It was suggested that it may be that 'the Crimes Act needs to be expanded to incorporate the victims of this type of crime under the umbrella of vulnerable adult witnesses'.<sup>54</sup>

### ***Young people***

3.45 The issue of how potential future legislation to address this issue would impact on young people was raised by the OCeSC:

Careful consideration should be given to the impact of any new criminal sanctions on young people under the age of 18, as well as consideration of diversions or alternatives which can impose immediate consequences for

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49 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

50 CDPP, *Submission 3*, p. 2.

51 YWCA Adelaide, *Submission*, p. 5.

52 LCA, *Submission 10*, p. 3.

53 NT Commissioner of Police, *Submission 25*, p. 2.

54 Mr Greg Williams, Practice Group Coordinator, CDPP, *Committee Hansard*, 18 February 2016, p. 53.

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offending behaviour while avoiding the social cost associated with the criminal justice system.<sup>55</sup>

3.46 It was also acknowledged by other submitters that young people should be considered by legislators when developing legislation in this area. The ACT Attorney-General emphasised in his submission to the inquiry that there are 'complex policy issues' associated with enacting legislation in this area, including 'how consensual "sexting" between children and young people should be considered' and that there was concern regarding the 'inappropriate application of criminal laws to children and young people'.<sup>56</sup> Electronic Frontiers Australia (EFA) submitted that 'any Commonwealth legislation should ensure that the actions of minors are addressed appropriately, and specifically that minors are not dealt with under the terms of child pornography or statutory rape offences'.<sup>57</sup>

3.47 However, the committee was told that cases where both parties are under the age of 18 years should be distinguished from cases where the perpetrator is over the age of 18 years and the victim is not. The CDPP recommended that legislation include an aggravated offence in cases where the victim is under a specific age, such as 16 years.<sup>58</sup>

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55 OCeSC, *Submission 22*, p. 7.

56 ACT Attorney-General, *Submission 7*, p. 4.

57 EFA, *Submission 27*, p. 3.

58 CDPP, *Submission 3*, p. 2.

