

Human Rights and Technology: Issues Paper

Legal Aid NSW submission to the
Australian Human Rights
Commission

October 2018

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Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal

services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Children's Legal Service is a specialist unit within Legal Aid NSW providing advice and representation to young people (under 18) involved in the criminal justice system. We also provide crime prevention focused community legal education for young people and their workers across NSW, including on technology related offences.

Legal Aid NSW welcomes the opportunity to make a submission to the Human Rights and Technology Issues Paper. Should you require any further information, please contact:

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Response to Question 2

Thank you for the opportunity to make a submission to the Human Rights and Technology Project. We will focus on answering Question Two of the Issues Paper, specifically in regards to children and young people:

What are the key issues regarding new technologies for children and young people?

Q.2 Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for these group of people (such as children and young people, older people, women and girls, LGBTI people, people of culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander peoples)?

As the Issues Paper has identified, children and young people are quick adopters of new technology and are dominant users of technology. Young people conduct a great deal of their social lives online through various social media, chat and messenger apps. Friendships and relationships are formed, developed and maintained online.

The United Nations Convention on the Rights of the Child (**CRC**) enshrines participation rights¹ for children and young people so that they can have a voice, contribute to decision-making, and engage in society as active citizens.

Our submission is that children and young people ought to be able to actively participate with new technologies and be free to express themselves with other young people through new technologies without fear of being subject to inappropriate and disproportionate criminal charges and penalties.

In NSW, it is an offence for someone under 16 years old to create, possess or distribute sexually intimate images of themselves to another young person.² Even if that other young person is their partner and both parties consent, this conduct would be characterised as a child pornography offence.³ The Commonwealth Criminal Code also sets out similar offences⁴ around child pornography, but defines this as material depicting a person under the age of 18.⁵ This creates confusion for young people.

So while young people in NSW can legally consent to physical sex at 16 years of age, they can nevertheless still face criminal charges under the Commonwealth legislation if they take an intimate image on their phone and send it to their partner before they are 18 years old. Perhaps understandably, this does not make a lot of sense to young people.

¹ Article 4 (Protection of Rights), Article 12 (Respect for the views of the child), Article 13 (Freedom of expression), Article 14 (Freedom of thought, conscience and religion), Article 15 (Freedom of Association), Article 17 (Access to information; mass media).

² *Crimes Act 1900* (NSW), s 91H.

³ *Ibid.*

⁴ *Commonwealth Criminal Code 1995* (Cth), ss 474.17, 474.19, 474.20.

⁵ *Commonwealth Criminal Code 1995* (Cth), s 473.1.

Penalties for these NSW and Commonwealth offences are severe, with maximum penalties of up to 15 years imprisonment. Young people also face the prospect of being placed on the Child Protection Register as a sex offender for these offences.⁶

We acknowledge the potential harm for young people from bullying and non-consensual sharing of intimate images. However, it is our view that where intimate images are shared consensually between young people, this criminal response is disproportionate and runs counter to principles of rehabilitation that are central to youth justice, and impinge on young people's human rights under the CRC.

We also submit that in enacting these offences, the legislature did not envisage the widespread use of technology by young people to create and share images of themselves. As a consequence, these offences now serve to criminalise behaviour that was arguably not intended to be captured by these offences, and is now increasingly common amongst young people.

We note that the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* was passed by the NSW Parliament in June 2018 and will be proclaimed in the near future, providing some beneficial law reform around this issue in NSW. Once the Act commences, the following amendments to the *Crimes Act 1900* (NSW) will take effect:

- Proceedings against a child or young person for child abuse material and child pornography offences under ss91H or 91G may only be instituted by or with the approval of the Director of Public Prosecutions.
- There will be an exemption to the offence of possession of child abuse material under s91H if possession of the material happened when the person was under 18 years old, and a reasonable person would consider the possession of the material acceptable having regard to certain factors (s91HAA).
- It will be a defence to a charge under s91H of making or sharing child abuse material if the only person shown in the material is the accused person and the offence happened when the accused person was under 18 years old (s91HA).
- It will be a defence to a charge under s91H of possession of child abuse material if the only person shown in the material was the accused person (s91HA).

Under the amendments to the *Child Protection (Offender Registration) Act 2000* (NSW) a sentencing court will also have a discretion over whether a young person should be placed on the register in specific circumstances.⁷ Until this amendment, courts have had no discretion if a person was found guilty of certain sex offences when they were a child, including those involving child pornography.

We are not aware of any move to introduce similar reforms at a Commonwealth level.

⁶ *Child Protection (Offender Registration) Act 2000* (NSW) (see the definitions of "registrable person" and "registrable offence" in ss 3A and 3).

⁷ See new s3C of the *Child Protection (Offender Registration) Act 2000* (NSW) (inserted by sch 2 [6] of the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*).

With any advancement of new technologies in the future, it is paramount that children and young people are able to participate and express themselves freely in appropriate circumstances without the risk of being prosecuted for criminal offences.