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Legal and Constitutional Affairs References Committee
Australian Parliament House

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person, without their consent, with the intention to cause that person harm – ACT submission

Thank you for your letter dated 24 November 2015 inviting the ACT Justice and Community Safety Directorate to make a submission to the Legal and Constitutional Affairs References Committee's inquiry into 'revenge porn' (the Inquiry).

At its 17 April 2015 meeting, the Council of Australian Governments (COAG) agreed that by the end of 2015 it would consider strategies to tackle the increased use of technology to facilitate abuse against women, and to ensure women have adequate legal protections.

The Law, Crime and Community Safety Council (LCCSC) is providing advice to COAG on raising awareness and increasing protections from technology-facilitated abuse, which includes consideration of how to address the posting of revenge photographs.

ACT Position

There are existing laws that can be used in the ACT to prosecute a person who posts revenge photographs online.

'Revenge photographs' generally refer to naked or semi-naked photographs taken in private, which are then publicly distributed (via technology) without the subject's consent, often in circumstances where the person posting the photo was formerly in a relationship with the subject.

The use of the internet, including through the use of a smart phone in a way that a reasonable person would consider menacing, harassing or offensive, is a criminal offence under section 474.17 of the *Criminal Code Act 1995* (Cth). The maximum penalty for this offence

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is three years imprisonment. This provision could currently be used to charge a person who posts revenge photographs.

A range of serious offences in the Criminal Code Act will also apply where a person uses the internet to post revenge photographs of a person under 18 years of age, for example, use a carriage service for child pornography material (s 474.19) or possess, control, produce, supply or obtain child pornography material (s 474.20) for use through a carriage service.

Posting revenge photographs online could also be classified as harassing and offensive for the purposes of the *Domestic Violence and Protection Orders Act 2008* (ACT), and therefore constitute a breach of a domestic violence or personal protection order under that Act. Contravention of an order is an offence with a maximum penalty of 500 penalty units, imprisonment for five years or both.

Section 35(1) of the *Crimes Act 1900* (ACT) provides an offence for a person who stalks someone with intent to, amongst other things, harass the person stalked. Section 35(2) provides that 'stalking' includes sending electronic messages about the stalked person to anyone else, making electronic messages about the stalked person available to anyone else, or intimidating or harassing the stalked person. The offence carries a maximum penalty of five years if the offence involved contravention of another order or the offender was in possession of a weapon, or two years imprisonment in other cases.

ACT sentencing data

The ACT Sentencing Database provides sentencing information for ACT offences. While 'revenge porn' offences can only be disaggregated from the more general offences manually, which is significantly resource intensive, the data provides an indication of the use of the offence provisions that could apply to 'revenge porn' situations.

The below data relates to the period between 1 July 2012 and 31 August 2015.

Stalking (s 35 Crimes Act)

- The ACT Supreme Court sentenced 1 stalking charge to a fully suspended sentence.
- The ACT Magistrates Court sentenced 20 stalking charges to the following penalties:

	<u>Charges</u>
Other Order	2
Fine	1
Good Behaviour Order	6
Fully Suspended Sentence	3
Partially Suspended Sentence	2
Imprisonment	6

Using a carriage service to menace, harass or cause offence (s 474.17 Criminal Code (Cth))

- The ACT Supreme Court sentenced 17 charges to the following penalties:

	<u>Charges</u>
Good Behaviour Order	4
Fully Suspended Sentence	1
Partially Suspended Sentence	4
Periodic Detention	1
Imprisonment	7

- The ACT Magistrates Court sentenced 25 charges to the following penalties:

	<u>Charges</u>
Other Order	2
Fine	4
Good Behaviour Order	10
Fully Suspended Sentence	4
Partially Suspended Sentence	2
Imprisonment	3

Using a carriage service for child pornography (s 474.19 Criminal Code (Cth))

- The ACT Supreme Court sentenced 27 charges to the following penalties:

	<u>Charges</u>
Good Behaviour Order	4
Partially Suspended Sentence	3
Imprisonment	4

Overall, the data indicates that there have not been a significant number of charges against these offences in the ACT over the three reporting years and that the majority of charges led to offenders being placed on Good Behaviour Orders.

This could be due to a number of factors including:

- 'revenge porn' is a relatively recent phenomenon, therefore bringing charges and prosecutions may still be in early stages;
- many victims are too embarrassed to report the offence; and
- the activity is often part of a series of abuse, harassment and intimidation measures directed at the victim, which may overtake the specific 'revenge porn' aspect.

Position in other jurisdictions

In Victoria, section 41C of the *Summary Offences Act 1966* specifically addresses 'revenge porn' by providing that "a person who visually captures or has visually captured an image of another person's genital or anal region...must not intentionally distribute that image". The maximum penalty for this offence is two years imprisonment.

South Australia has dealt with revenge photos and similar scenarios by enacting the *Summary Offences (Filming Offences) Amendment Act 2013*. That Act introduced an offence for the distribution of an invasive image of another person, "knowing or having reason to believe

that the other person does not consent to the distribution of the image or does not consent to distribution of the image generally". The penalty for this offence is a maximum of \$10,000 or imprisonment for two years (*Summary Offences Act 1953*, s 26C).

Section 227B of the *Queensland Criminal Code 1899* provides that "a person who distributes a prohibited visual recording of another person having reason to believe it to be a prohibited visual recording, without the other person's consent, commits a misdemeanour". The maximum penalty is two years imprisonment. However it should be noted that a critical element of these offences is not necessarily that the subject of the image did not consent to the taking of the image, but they did not consent to its publication.

Summary

The posting of sexually explicit photographs raises a number of complex policy issues:

- the posting of revenge photographs often occurs in the context of intimate partner violence and will be further considered through the ACT's efforts to strengthen responses to domestic and family violence;
- how consensual 'sexting' between children and young people should be considered. Concern about the inappropriate application of criminal laws to children and young people was a key concern during stakeholder engagement during the development of new offences in 2014 applying to upskirting and related offences (*Crimes Act 1900* (ACT), s 61B);
- the offences are not intended to criminalise young people who are taking part in consensual activities, however intentional or reckless posting of 'revenge porn' online has far reaching and deeply emotional consequences; and
- specific offences such as those available in Victoria and South Australia may act as a useful deterrent, and provide ready data to assist to quantify the problem locally and to consider appropriate responses.

The ACT looks forward to considering the outcomes of this Inquiry and the NSW Inquiry into remedies for the serious invasion of privacy.