



13 January 2016

Senator Glenn Lazarus
Chair
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Senator

Inquiry into the phenomenon colloquially referred to as 'revenge porn'

1. Thank you for the opportunity to make a submission to the above inquiry.
2. The Law Council acknowledges the assistance of the Law Society of South Australia, the South Australian Bar Association, the Law Institute of Victoria, and the Human Rights Committee of the Law Society of New South Wales in the preparation of this submission.
3. Attached to this letter is a copy of a Law Council submission made on 2 October 2015 to Mr Tim Watts MP in respect of a private members Bill seeking to introduce a specific offence for the phenomenon colloquially referred to as 'revenge porn' (Annexure A).
4. The attached submission may assist the Senate Legal and Constitutional Affairs References Committee's (the Committee) consideration of paragraphs (c) and (d) of the Terms of Reference for its current inquiry, namely:
 - (c) potential policy responses to [the emerging revenge pornography] problem, including civil and criminal remedies; and
 - (d) the response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions.
5. The current submission focuses on the following observations.

Criminalisation of 'revenge pornography'

6. A question arises as to whether 'revenge pornography' is adequately addressed by existing offences, including section 474.17 of the *Criminal Code Act 1995* (Cth) (Criminal Code) (using a carriage service to menace, harass or cause offence) and/or state based offences.¹

¹ For example, section 26C of the *Summary Offences Act 1953* (SA) (distributing an 'invasive image' without consent); *Summary Offences Act 1966* (Vic), section 41DA, 'distribution of an intimate image' and section 41DB, 'threat to

7. On one view, in light of these existing offences, a separate specific offence to address 'revenge porn' may be unnecessary and would potentially complicate and confuse matters.
8. The Law Council encourages the Committee to make enquiries with the Commonwealth Director of Public Prosecutions as to the number of successful prosecutions made under section 474.17 of the Criminal Code in cases of 'revenge porn' as this may indicate its effectiveness of addressing the problem.
9. As noted in the attached submission, the United Kingdom (UK) introduced a specific revenge pornography offence in April 2015, under section 33 of the *Criminal Justice and Courts Act 2015*. Since the introduction of the offence, nearly 830 cases of revenge pornography have allegedly been reported to police, with the first offender sentenced on 7 August 2015.² There have since been a number of other successful 'revenge porn' prosecutions in the UK, which have largely been resolved by pleas of guilt.³ The fact that specific offences for 'revenge pornography' have been prosecuted in such a manner in the UK may indicate its usefulness as a potential criminal response to the problem. The United States federal government has also drafted specific legislation addressing the problem and 26 states are reported to have reformed their laws in response to revenge pornography.⁴
10. As evidenced by the UK prosecutions of 'revenge pornography' to date (set out in Annexure B), it is clear that currently the majority of reported victims of 'revenge pornography' are women.
11. Technology is now being used as a tool in serious cases of gender-based violence, and to date, little attention has been given to the ways 'new technologies are used to facilitate or perpetrate technology-facilitated sexual violence or harassment against adult women'.⁵ Legislation that effectively addresses the problem of 'revenge pornography', in light of any possible barriers to prosecution under the existing offences, would be a positive step in combatting violence against women.

The Victorian and South Australian approach

12. The Law Institute of Victoria has highlighted the introduction of new offences in Victoria under the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), which address the phenomenon of 'revenge porn'. The amendments create two new offences in the *Summary Offences Act 1966* (Vic), section 41DA, 'distribution of an intimate image' and section 41DB, 'threat to distribute intimate image' in circumstances where that distribution would be 'contrary to community standards of acceptable conduct'. These standards are defined by reference to a range of factors, such as the nature and content of the image, and the circumstances in which the image was captured and distributed. The vulnerability of the subject in the image is also relevant.

distribute intimate image' in circumstances where that distribution would be 'contrary to community standards of acceptable conduct'; and subsection 578(2) of the *Crimes Act 1900* (NSW) (publishing an indecent article).

² Lydia Willgress, '[11-year-old is youngest victim of revenge porn: Nearly 830 cases have been reported to police - around 24 a week - since new laws came into force last April](#)', *Daily Mail* (online), 2 January 2016.

³ See attached table, Annexure B.

⁴ Nina Funnell, 'Revenge Porn needs more than a slap on the wrist', *Sydney Morning Herald* (online), 15 September 2015.

⁵ Nicola Henry and Anastasia Powell, Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women, *Australian and New Zealand Journal of Criminology* 2015, Vol 48(1) 104-118, 105.

13. The new offences do not apply to intimate images of adults who have 'expressly or impliedly consented, or could reasonably be considered to have expressly or implied consented' to the 'distribution of the intimate image' and the 'manner in which the intimate image was distributed'. 'Consent' is defined as 'free agreement'. Importantly, paragraph 41DA (3)(a) provides additional protection to minors by stating that the exception for consent does not apply to minors.
14. The South Australian Bar Association notes that state laws, as exist presently, including section 23C of the *Summary Offences Act 1953 (SA)*, do not adequately address all aspects of revenge porn. The South Australian legislation, for example, prohibits the publication of 'invasive' images without consent, meaning offensive or intrusive images. In many instances of revenge pornography, the capturing of the image is originally done consensually and as an expression of sexual intimacy, and therefore would not be offensive or intrusive. Also, the South Australian legislation requires proof of knowledge of or reason to believe the victim's lack of consent, whereas the South Australian Bar Association agree that the offence (as drafted in the Criminal Code Amendment (Private Sexual Material) Bill 2015) ought to extend to reckless indifference.
15. The Law Council encourages the Committee to make enquiries with the Victorian and also the South Australian Director of Public Prosecutions as to the number of successful prosecutions made under their specific offences for 'revenge porn' as this may also indicate the effectiveness of specific offences for addressing the problem.

Anonymity for Victims

16. 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.⁶ Such an approach warrants consideration. Given the public nature of the humiliation and damage that 'revenge pornography' causes, automatic anonymity for any complainant should be considered as it may assist in ameliorating factors impeding reporting to police and will generally provide ongoing protection for the complainant.

Education

17. Any legislative change to introduce new offences relating to 'revenge pornography' should be accompanied by a program of both public education, and education for police and prosecutors. Education that facilitates improved investigation of complaints relating to 'revenge pornography' should be encouraged.

Relationship between Commonwealth and State legislation

18. A uniform approach to the regulation of 'revenge porn' is warranted. In the digital age where images can be distributed and accessed instantly in any jurisdiction, it is important that uniform laws apply; otherwise anomalies and injustices may arise. For example, if different 'revenge porn' offences are created it may lead to confusion regarding the elements of the offences and whether an offence has been committed at all. While the specific offences and exceptions will need to be tailored to fit the existing laws in each jurisdiction, the aim should be to ensure that the offences and exceptions are as consistent as possible across all Australian jurisdictions.

⁶ Sarah Bell, ['Call for 'revenge porn' victims to be kept anonymous'](#), *BBC News* (online), 15 December 2015.

19. 'Revenge pornography' should not be seen as a creature solely of the cyber domain. Although it has reached its zenith in use via Facebook and Twitter for example, such humiliating actions do not require the internet. One of the recent UK prosecutions for 'revenge pornography' involved intimate images being physically distributed outside a supermarket frequented by the victim.⁷ Criminalisation of 'revenge pornography' should include physical and non-online forms of action. However, the Commonwealth legislation may be restricted to online forms for Constitutional reasons, and this issue would therefore need to be addressed in State legislation.

Civil cause of action for serious breach of privacy

20. While the Law Council's Business Law Section's Media and Communications and Privacy Law Committees have previously queried the need for a civil cause of action for serious breach of privacy,⁸ the Law Society of South Australia, the South Australian Bar Association and Law Society of New South Wales have supported giving consideration to its introduction. They have noted, for example, that the current remedies available are not specifically tailored to the circumstances of 'revenge pornography', are expensive, are difficult to access, and do not provide a preventative/deterrent effect. They also note that, given the vastly increased technological capacity for capturing images and making recordings; and for rapid and large scale dissemination of digital material, a new cause of action in tort for serious invasions of privacy are warranted and should be available where the plaintiff had a reasonable expectation of privacy.

21. The Law Council notes that, in the absence of such a cause of action, victims of revenge pornography may in some cases seek remedies in equity for a breach of confidence.

22. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* Justices Gummow and Hayne (with whom Gaudron J agreed) suggested that, rather than developing new causes of action, privacy may best be protected by 'looking across the range of already established legal and equitable wrongs'.⁹ In this case, Chief Justice Gleeson referred to the capacity of breach of confidence to protect activities filmed in private and to extend to third parties who end up in possession of the images.¹⁰ The equitable doctrine of breach of confidence has also previously been used in Australian cases to address revenge pornography cases such as *Wilson v Ferguson*¹¹ and *Giller v Procopets*.¹²

23. However, the Human Rights Committee of the Law Society of New South Wales has expressed doubts about whether relying on the equitable action for breach of confidence would provide equivalent protections against serious invasions of privacy. The significant and extensive common law developments in the UK, where the equitable action for breach of confidence has been extended,¹³ has been under the

⁷ See table, Annexure B.

⁸ Law Council of Australia, Business Law Section, Media and Communications Committee and the Working Party on Privacy Law, Submission to NSW Law Reform Commission, *NSW Law Reform Commission's Consultation Paper No 1 – Invasion of Privacy*, 18 September 2007.

⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [132] (emphasis added).

¹⁰ *Ibid* at [39], also as quoted and applied by Neave J in *Giller v Procopets* [2008] VSCA 236; (2008) 24 VR 1 at [430]–[431].

¹¹ *Wilson v Ferguson* [2015] WASC 15.

¹² *Giller v Procopets* [2008] VSCA 236.

¹³ *Campbell v MGN Ltd* [2004] 2 AC 457 as cited by the ALRC in its Report.

influence of its *Human Rights Act 1998* (UK). This Act requires courts to give effect to the protection of rights and freedoms in the European Convention on Human Rights. There is no equivalent legislative protection of human rights in the Commonwealth.

24. The Committee may wish to consider whether the development of equitable remedies is an adequate response to addressing 'revenge pornography', or whether a statutory cause of action for invasions of privacy should be introduced.

Yours faithfully

S. Stuart Clark AM
PRESIDENT