

**Submission by Professor Dan Jerker B. Svantesson to the Senate
Standing Committees on Legal and Constitutional Affairs' public
consultation as to:**

***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***

January 2016

Summary of major points

In my view:

- The phenomenon colloquially referred to as 'revenge porn' (hereinafter 'revenge porn') can only be addressed through a combination of means involving (1) appropriate regulation, (2) the effective use of technological solutions, and (3) education.
- An important step towards addressing 'revenge porn', as well as future technology uses that seriously attack the fundamental human right of privacy, is to finally adopt a statutory tort addressing serious invasions of privacy.
- As Australian 'revenge porn' content easily may be hosted outside Australia (thereby complicating enforcement), great care must be taken to properly delineate the extraterritorial reach of Australia's approach towards regulating 'revenge porn'.
- In addressing 'revenge porn', it is essential that Internet intermediaries and law enforcement develop constructive and effective means of cooperation, while at the same time respecting freedom of speech and privacy.
- It is important that the severity of the implications of 'revenge porn' are reflected in the punishment of offenders.

1. Introduction

1. I welcome the initiative taken by the Senate Standing Committees on Legal and Constitutional Affairs in seeking input on the topic of the sharing of private sexual images and recordings of a person without their consent, with the intention to cause that person harm. A solid public consultation is clearly necessary given the tremendous societal implications associated with 'revenge porn'.

2. These submissions are intended to be made public.

2. General remarks

3. These submissions deal only with a small selection of particular issues.

4. I will, however, take the opportunity to stress that, while the choice of using the term 'revenge porn' for the inquiry is natural, the term itself is inappropriate as it implies that there is some act done by the victim in relation to which the offender is taking revenge. The reality is, of course, that the victims of 'revenge porn' are just that, victims.

5. It is also important to emphasise that what is now discussed as 'revenge porn' is just one aspect of a larger phenomenon typically referred to as 'sexting'.

Consequently, it is important that we, in discussing the specific issue of 'revenge porn' take account of, and learn from, the broader discussion to-date of 'sexting'. At the same time, we must of course be careful to distinguish between consensual sexting on the one hand, and 'revenge porn' on the other hand.

3. Law is only one component of the solution

6. As with most, if not all, technology-related problem-areas, in addressing 'revenge porn' we need to turn to what I elsewhere have referred to as the holy trinity of "reg", "tech", and "ed"; that is, we need (1) appropriate regulation, (2) effective use of technological solutions, and (3) education reaching all aspects of society that can help combat the problem in question (D. Svantesson, "Sexting" and the law – 15 minutes of fame, and a lifetime of shame, *Masaryk University Journal of Law and Technology* Vol. 5 No. 2 (2011); pp. 289-303). While this may seem like little more than a truism, it is nevertheless of the greatest significance.

7. Thus, while I focus below on the legal regulation of the sharing of private sexual images and recordings of a person without their consent, with the intention to cause that person harm, I am by no means suggesting that appropriate legal regulation is the only required measure.

4. A 'tort' of privacy to create buffers

8. It is perhaps rather telling that Australia's *Privacy Act 1988* (Cth) is virtually useless in the context of the sharing of private sexual images and recordings of a person without their consent, with the intention to cause that person harm.

9. At the minimum, this fact signals a considerable gap in the protection of the Australia public's fundamental human right to privacy.

10. Australia needs a generally worded statutory tort addressing serious invasions of privacy. If properly structured, such a statutory tort could provide a tool to address serious threats arising from unforeseen technological developments; put differently, it can provide a necessary buffer against gaps in the law that we cannot foresee today as they will only become problems as our use of technology evolves.

11. In light of this, an important step towards addressing 'revenge porn', as well as future technology uses that seriously attack the fundamental human right of privacy, is to finally adopt such a statutory tort.

5. The need for 'extraterritoriality'

12. The actual enforcement of any regulation of 'revenge porn' will have to confront the technical realities of the Internet. Specifically, the fact that Australian 'revenge porn' content easily may be hosted outside Australia will complicate the enforcement.

13. In light of this, in constructing Australia's approach towards regulating 'revenge porn', great care must be taken to properly delineate the extraterritorial reach.

6. The need for constructive cooperation with Internet intermediaries

14. For victims of revenge porn, the removal of the materials is of course a priority. For this reason, the cooperation of the platforms on which 'revenge porn' is posted is of fundamental importance. Indeed, the power of the social media platforms is such that they can in some cases actually prevent the posting in the first place. It is, therefore, frustrating when decisions by social media organisations to block or allow content are opaque and inconsistent.

15. However, several social media sites have recently improved their processes and to a degree clarified their practises. For example, on March 16, 2015, Facebook

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'revenge porn'*

announced new "Community Standards" to govern the conduct of its 1.39 billion users. The policy specifically addresses revenge porn:

"To protect victims and survivors, we also remove photographs or videos depicting incidents of sexual violence and images shared in revenge or without permissions from the people in the images."

(<https://www.facebook.com/communitystandards#>)

16. Steps such as this are important, and it is essential that Internet intermediaries and law enforcement develop constructive and effective means of cooperation, while at the same time respecting freedom of speech and privacy.

7. The remedies

17. Whether regulated under specific laws, or under broader more general laws, it is important that the severity of the implications of 'revenge porn' are reflected in the punishment of offenders.

18. Australia must avoid the tendencies that are noticeable in some courts in some parts of the world. For example, in a much criticised judgment handed down by a court in Sweden, the Court awarded a 'revenge porn' victim a particularly low compensation with the justification that a strong degree of openness about sexuality was now accepted in the contemporary ethical and social standards of a large section of the public (<http://www.aftonbladet.se/nyheter/article20474821.ab>).

19. On appeal, the Supreme Court of Sweden more than doubled the compensation awarded. However, the lower court's reasoning is a dangerous example of an older generation misreading the social standards of a younger generation. Privacy – including in the sense of self-determination – still matters, not least when it comes to matters such as sexuality.