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Senate Legal and Constitutional Affairs Committee
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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

Introduction

1. I would like to take this opportunity to thank the Senate Legal and Constitutional Affairs References Committee for tabling this inquiry into the phenomenon colloquially referred to as 'revenge porn'.
2. I write this submission as an individual, as I currently work as a Solicitor with Women's Legal Services NSW, but will be soon commencing work as a Solicitor with Legal Aid NSW in their Domestic Violence Unit.
3. Through my work with Women's Legal Services NSW, I have been engaged in the ReCharge Project, which extends the SmartSafe project (www.smartsafe.org.au) Australia-wide. This project involved a National survey on technology-facilitated stalking and abuse, the development of legal guides for each State and Territory and training materials for women escaping such abuse and those assisting them.
4. In legal practice, I have assisted many women who have been victims of this behaviour in NSW and I have experienced the current limitations of the law to assist victims and to hold perpetrators to account.
5. I have also undertaken extensive research on this topic whilst preparing a chapter for publication on the intersection of domestic violence and technology and in preparation for undertaking a dissertation on this area of law.
6. Recent research has highlighted the prevalence of this phenomenon, finding one in ten Australian adults have had a nude or semi-nude image of them sent to others or posted online without their consent.¹ As such, I welcome the Government looking at this escalating issue, and believe it is time for legal reform, education and training.

¹ Anastasia Powell & Nicola Henry, 'Digital Harassment & Abuse of Adult Australians: A Summary Report', *RMIT University* (2015) (online) <https://research.techandme.com.au/wp-content/uploads/REPORT_AustraliansExperiencesofDigitalHarassmentandAbuse.pdf>

Overview

7. In summary, I recommend:
 - 7.1. The phenomenon colloquially known as 'revenge porn' no longer be referred to as such, but, for example, as 'private sexual images shared without consent.'
 - 7.2. Any future legislative reform be open to wide public consultation.
 - 7.3. Should the terminology of 'private sexual images' be introduced, it should be defined broadly and 'sexual' should be defined in similar terms to the definition in the *Criminal Justice and Courts Act 2015* (UK).
 - 7.4. Any criminal or civil actions that flow from sharing private sexual images without consent should also extend to where images or recordings are threatened to be shared without consent.
 - 7.5. Any proposed legislation should state explicitly that consent to make an image or recording does not, by itself, constitute consent to disclose that recording or image.
 - 7.6. When defining consent, surrounding factors should be considered and included in legislation to avoid uncertainty, for example, the existence of domestic violence
 - 7.7. 'Without consent' should extend to situations where a person is reckless to the subject's lack of consent
 - 7.8. Proposed legislation avoid using a legal test based on the intentions of the perpetrator and instead adopt a test based on actual or likely harm caused.
 - 7.9. Further consideration be made concerning how best to approach this issue where the perpetrator or victim is a minor.
 - 7.10. A multipronged approach is necessary to deal with this issue, including both civil and criminal legislative reform, access to quick, affordable take down options and non-legal interventions such as education and training.
 - 7.11. The non-consensual sharing, or threatened sharing of private sexual images and recordings be criminalised to fill the existing gap in our legal system and to specifically condone this behaviour. It is recommended that Commonwealth legislation relate to the use of a carriage service, while mirror uniform State and Territory law extend to technology neutral scenarios.
 - 7.12. Consideration should be made as to whether any offence should be summary in nature, given the impact on seeking warrants and seizing evidence.
 - 7.13. Further consideration be given to the resources Police require to investigate criminal matters involving online abuse.
 - 7.14. Each State and Territories' protection order legislation be strengthened to include amended definitions that specifically acknowledge this type of behavior.
 - 7.15. Each State and Territories' protection order scheme add a sample optional order on standard forms to prohibit the defendant/respondent

from 'directly or indirectly publishing, sharing or threatening to publish or share images or videos of the protected person of a sexual nature.'

- 7.16. Each State and Territories' protection order scheme allow for positive obligation orders including takedown orders.
- 7.17. Introduce a statutory tort for serious invasions of privacy.
- 7.18. Legislatively extend breach of confidence to cover damages for non-economic loss and scenarios where private sexual images are shared without consent.
- 7.19. Give further consideration to the possibility of extending the powers of the E-Safety Commissioner to allow for a quick, informal method of redress for victims.
- 7.20. Establish a clearinghouse that deals with technology-facilitated stalking and abuse which could be accessed by members of the public, community workers and professional assisting victims and which would provide training, research and telephone assistance.
- 7.21. Fund well considered education and training programs targeted at key groups including Police, social workers, members of the legal profession including the Judiciary, young persons and the general public.

a) 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

Terminology

8. Recent media coverage of this phenomenon, such as the 2015 Channel 7 Sunrise incident,² has exposed Australia's ugly and entrenched victim blaming culture, and the urgent need to shift prevailing community attitudes. To help reframe this issue, we need to seriously consider the language we adopt when a person's private sexual images are shared without consent, and question whether framing this as 'revenge porn', or even, 'the phenomenon colloquially known as "revenge porn"' is further entrenching harmful victim blaming ideologies.
9. The inadequacy of the terminology, 'revenge porn' has been well noted by academics.³ The behaviour is not always motivated by revenge, and framing it as such suggests the victim has done something to deserve or provoke

² See, eg, Sean Fewster, 'Channel Seven's Sunrise apologises for victim-blaming 400 Adelaide women, teens whose nude images were stolen by US website' *Herald Sun* (online) (June 19, 2015) <www.heraldsun.com.au/news/national/channel-sevens-sunrise-apologises-for-victimblaming-400-adelaide-women-teens-whose-nude-images-were-stolen-by-us-website/news-story/faf40585ab70725f69536b60852cba30>

³ See, eg, Anne Burns 'In full view: involuntary porn and the postfeminist rhetoric of choice' in C Nally & A Smith (eds), *First Century Feminism: Forming and Performing Femininity* (Palgrave Macmillan, 2015), 93-118; Nicola Henry & Anastasia Powell (forthcoming) *Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law*; E Rackley & C McGlynn, 'The law must focus on consent when it tackles revenge porn' *The Conversation* (online) (23 July 2014) <<http://theconversation.com/the-law-must-focus-on-consent-when-it-tackles-revenge-porn-29501>>; Danielle Citron & Mary Anne Franks (2014) Criminalizing revenge porn. *Wake Forest Law Review* (49) 345-391, 346.

being harassed, intimidated or humiliated.

10. Further, the images or recording do not necessary fit within the definition of pornography and labeling it as such may be offensive to victims. Framing this material as pornography distracts from what it truly is, that is, an act of deliberate abuse and harassment. It dangerously moves the focus to the actions of the victim rather than looking at the wrongful actions of the perpetrator.
11. I recommend we finally do away with this terminology and come up with a more direct alternative that places the blame squarely upon the perpetrator without trivialising the issue, for example, 'private sexual images shared without consent'.

Defining the scope of the behaviour

12. I note that the Committee has set limitations in trying to define this behaviour being that it involves *sharing private sexual* images and recordings of a person *without their consent*, with the *intention to cause that person harm*. While this may not be the language ultimately employed in any proposed legislation, it provides a useful framework to investigate the parameters of this behaviour.
13. Ultimately, the key terms used do not matter so much as the definitions we assign them. As such, should any legislative reform be seriously considered, it is crucial that any proposed definitions be scrutinised closely and open to further public consultation.
14. There is currently a lack of consistency and consensus across jurisdictions with the key terms used, and how they are defined. I support the enactment of specific legislation criminalising this behaviour, and will discuss the appropriateness of each key term with this in mind.

'Private'

15. The Committee has chosen to adopt the language of 'private sexual images and recordings', echoing the terminology used in recent UK legislation.⁴ This is also similar to the terminology used in the *Exposure Draft of Criminal Code Amendment (Private Sexual Material) Bill 2015*, which refers to 'private sexual material'. When considering what amounts to 'private sexual images' it is important to first consider what is considered 'private'.
16. Existing Australian legislation that criminalises the non-consensual sharing of private sexual images, refer to 'intimate images'⁵ or 'invasive images'⁶ with a privacy element within the definitions of those terms.
17. In the UK, a photograph or film is 'private' "*if it shows something that is not of a kind ordinarily seen in public.*"⁷ It has been suggested that this would not

⁴ *Criminal Justice and Courts Act 2015* (UK) s 33.

⁵ *Summary Offences Act 1966* (Vic) s 40.

⁶ *Summary Offences Act 1953* (SA) s 26.

⁷ *Criminal Justice and Courts Act 2015* (UK) s 35.

extend to acts performed in public.⁸ I believe it is important that any definition of private, should not exclude acts done in public, to capture, for example, images or recordings of sexual assaults that occur in public that are shared without consent by the perpetrator.

18. Narrow constructions of 'private' are unduly limiting and should be avoided. For example, in Colorado, 'private' is used to exhaustively specify the private regions of the body an image or recording must show to be prohibited.⁹
19. Another example of an overly restrictive approach is in North Carolina, where 'private' is used to limit the provisions to instances where there is a pre-existing relationship between the victim and perpetrator to confer an expectation of privacy.¹⁰ This ignores the reality that many private sexual images and recordings can be shared by one-off sexual partners, friends, acquaintances or complete strangers.
20. Broader approaches are taken for example in Louisiana and Washington where privacy is framed in relation to the circumstances under which the person obtained the material.¹¹ A broad approach is also used in Canada and the Philippines where what is 'private' is contingent on circumstances leading to a reasonable expectation of privacy.¹²
21. I would recommend adopting a broad definition, with a subjective element, for example, "*the material must depict something that, in the circumstances, a reasonable person would expect to be kept private.*"

'Sexual images and recordings'

22. It is also unclear as to how 'sexual' images and recordings are to be defined, should this terminology be ultimately adopted in legislation.
23. It is important that 'sexual' should not be limited to images or recordings featuring specific body parts or acts, as is the case in some US States.¹³ Such an approach is too rigid and ignores the reality that images and photos can be sexual and be used to harm, intimate, harass or humiliate victims without displaying nudity or actual intercourse, for example, where they involve sexual poses, activities or are sexual due to their overall context.
24. I recommend adopting a wide definition, similar to the UK approach. Section 35(3)¹⁴ states:
A photograph or film is "sexual" if-
(a) it shows all or part of an individual's exposed genitals or pubic area,

⁸ Professor Clare McGlynn & Professor Erika Rackley, 'Briefing', *Durham Law School, Durham University* (online) (7 July 2014), 4.

www.dur.ac.uk/resources/glad/RevengePrnBriefingMcGlynnRackleyJuly2014.pdf

⁹ See, eg, C.R.S 18-7-107(6), defining 'private intimate parts' as '*external genitalia or the perineum or the anus or the pubes of any person or the breast of a female.*'

¹⁰ G.S 14-190.5A.

¹¹ See, L.R.S 14:283.2 §283.2 & Title 9A R.C.W

¹² See *Protecting Canadians from Online Crime Act* (S.C. 2014, c. 31) & *Anti-Photo and Video Voyeurism Act of 2009* (Republic Act No. 9995).

¹³ See, eg, Delaware Criminal Code Title 11 §1335; North Carolina General Statutes §14-190.5A; North Dakota Century Code §12.1-17-07.2; Texas Penal Code 21.16. §98B.002.

¹⁴ *Criminal Justice and Courts Act 2015* (UK).

(b) it shows something that a reasonable person would consider to be sexual because of its nature, or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

25. Further, I recommend adopting a gender and sex inclusive approach similar to the ACT in its 'intimate observations or capturing visual data etc' offence.¹⁵ I therefore recommend including a further subsection that extends this definition to include breasts for a female or a transgender or intersex person who identifies as a female.

'Shared'

26. It is important to understand that harm can be caused not only by the actual sharing of private sexual images, but also the threat to distribute such material. This is reality is acknowledged and criminalised in Victoria.¹⁶ Threats are also criminalised in Texas; however, it is limited to where the threat is for a benefit.¹⁷ This is arguably already provided for by blackmail and extortion laws in Australia,¹⁸ and fails to address the fact that perpetrators can have diverse motives, including to cause harm or distress.
27. Often when such threats are made, they are acted upon. For example, a 2013 US McAfee study found that one in ten ex-partners had threatened to distribute intimate photos online, and the threat was carried out 60% of the time.¹⁹
28. Further, threats to share private sexual images without consent are becoming increasingly prevalent, with recent research finding of the one in ten Australians who had experiences relating to private sexual images being shared without consent, 9.6% had received threats to share such material.²⁰
29. The distress and harm caused by such threats can be as significant as where a victims images or recordings are actually shared, as the victim can live in a constant state of fear, often feeling powerless to stop the perpetrator, and often making them more vulnerable to blackmail or coercion.
30. In practice, I have had many clients who have felt trapped to stay in violent relationships because of threats by their abusive partner that they will release images or recordings online or to family members if they attempt to leave. I have had clients where out of fear of such recordings being released, they have refused to talk to police, and through their reluctance to explain their true circumstances, have ended up as defendants in domestic violence

¹⁵ *Crimes Act 1900* (ACT) s 61B(5).

¹⁶ *Summary Offences Act 1966* (Vic) s 41DB.

¹⁷ Texas Penal Code 21.16. §98B.002.

¹⁸ See, eg, *Crimes Act 1900* (NSW) s 249K; *Criminal Code 2002* (ACT) s 342, *Criminal Code Act 1983* (NT) s 228; *Criminal Code 1899* (Qld) s 415; *Criminal Law Consolidation Act 1935* (SA) s 172; *Criminal Code Act 1913* (WA) s 397.

¹⁹ McAfee, 'Love, Relationships, and Technology survey' (online) (2014) <http://promos.mcafee.com/en-us/lp/6211_ex.aspx>

²⁰ Anastasia Powell & Nicola Henry, 'Digital Harassment & Abuse of Adult Australians: A Summary Report', *RMIT University* (2015) (online) <https://research.techandme.com.au/wp-content/uploads/REPORT_AustraliansExperiencesofDigitalHarassmentandAbuse.pdf>

proceedings. I have noticed in practice, threats of this nature often affect vulnerable clients from culturally and linguistically diverse backgrounds where cultural shame may carry a heavy burden.

31. I strongly recommend any criminal or civil actions that flow from sharing private sexual images without consent should also extend to where images or recordings are threatened to be shared without consent.

'Consent'

32. The key factor when considering any legislation or policy relating to this behaviour is consent. Consent should only relate to the sharing of the images or recordings, and not to how they were obtained.
33. Through my practice, I have observed that many private sexual images that are actually or threatened to be shared without consent, are filmed with consent, or are taken by the victim as 'selfies'.
34. For clarity, it is important that any proposed legislation should state explicitly that consent to make an image or recording does not, by itself, constitute consent to disclose that recording or image. This approach has been taken in Vermont,²¹ Texas²² and the Philippines.²³
35. The approach in the Philippines in relation to consent goes even further, requiring written consent of the person depicted before sexually explicit images or videos can be shared on the Internet.²⁴
36. When defining consent, surrounding factors should be considered and included in legislation to avoid uncertainty. For example, in the criminal provisions in South Australia, it is noted there can be no consent where the person is under 16, mentally incapacitated or where duress or deception is involved.²⁵ These sorts of factors should be considered as well any context of domestic violence which may negate free and informed consent.
37. Further, it is important that 'without consent' extend to situations where a person is reckless to the subject's lack of consent. This is the case, for example, in Canada²⁶ and was proposed in the *Exposure Draft of Criminal Code Amendment (Private Sexual Material) Bill 2015*.

'Intention of causing harm'

38. I strongly recommend against any legislation requiring a test based on the intentions of the perpetrator. This is because a perpetrator's motives can vary widely. Perpetrators may engage in this behaviour to cause harm, to humiliate, coerce, control, gain social status, for sexual gratification, for

²¹ V.S.A. 2.13 § 2606.

²² Texas Penal Code 21.16 §98B.002.

²³ *Anti-Photo and Video Voyeurism Act of 2009* (Republic Act No. 9995).

²⁴ *Ibid.*

²⁵ *Summary Offences Act 1953* (SA) s 26E(1).

²⁶ *Criminal Code (Canada)* (R.S.C., 1985, c. C-46) s 162.1(1).

entertainment or to receive monetary reward.²⁷

39. A preferable framework would instead focus on the harm or distress actually or likely to be caused, as was proposed in the *Exposure Draft of Criminal Code Amendment (Private Sexual Material) Bill 2015*.²⁸
40. An alternative approach, should an intention element be favoured, is to adopt a similar approach to the test used for a stalking or intimidation offence in NSW, but based on 'harm' rather than the more abstract concept of 'fear of harm'.²⁹ For example, it could explicitly state, "*the defendant is taken to intend to cause harm if he or she knows that the conduct is likely to cause harm*", and further, "*the prosecution is not required to prove that actual harm was caused*".
41. Having a test contingent on the harm caused to the victim legitimises and recognises the individual and societal harms caused by this type behaviour, which should be condoned. This focus also helps to debunk the 'revenge porn' myth that such behaviour is strictly engaged in for the purpose of revenge.

b) The impact this has on the targets of revenge porn, and in the Australian community more broadly

42. The repercussions of having one's private sexual images shared without consent should not be underestimated. For example, a 2014 US study of the Cyber Civil Rights Initiative surveyed victims of this behaviour reported 93% had experienced significant emotional distress, with 82% reporting it had significantly impaired important areas of their functioning, such as socially or occupationally.³⁰
43. This behaviour can also cause financial harm. For example, a victim's employment can be jeopardised, they can incur significant costs seeking legal assistance or may become more susceptible to blackmail. It is noted that some online hosting websites require victims to pay for their images to be removed.
44. The impacts of this behaviour can have a lasting effect on a victim, in particular due to issues of redistribution. Once an image is online, it can spread, making it difficult to remove and the harm, continuous.³¹ As a result,

²⁷ See, eg, Mary Anne Franks, 'Drafting an Effective "Revenge Porn" Law: A Guide for Legislators' (online) (2 November 2015) <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf>, 6; Nicola Henry a& Anastasia Powell, 'Sexual Violence and Harassment in the Digital Age', *Presentation to Women's Legal Services NSW*, (online) (24 April 2015) <www.wlsnsw.org.au/wp-content/uploads/NSW-Womens-Legal-Services-Presentation-24_April_2015.pdf>

²⁸ See, s 474.24E.

²⁹ See, *Crimes (Domestic and Personal Violence) Act 2007* (NSW), ss 13(3) & (4).

³⁰ Mary Anne Franks, 'Drafting an Effective "Revenge Porn" Law: A Guide for Legislators' (online) (2 November 2015) <http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/08/Guide-for-Legislators_7-18-14.pdf> quoting results of the Cyber Civil Rights Initiative (CCRI) (2014).

³¹ Tammy Hand, Donna Chung & Margaret Peters, 'The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation' *Australian Domestic & Family Violence Clearing House*, Stakeholder Paper 6 (online) (2009) <www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20Paper_6.pdf>

victims can live in fear of the images resurfacing, fearing their friends, families, employers or new partners will find the images.

45. This behaviour can also lead to victims experiencing further stalking, harassment and solicitation, both online or offline. Recent research suggests victims who have their sexual images shared online are at an increased risk of stalking and physical violence.³² I have also had clients where men have come to their house, soliciting them for sex after their address and personal details were posted online along with images of them.
46. A major barrier for victims of this behaviour is the minimisation of harm and trivialisation of their experience, as these behaviours are often perceived as less serious than physical violence.³³ This can lead to inadequate responses from law enforcement, the community and the victims themselves.³⁴ Unfortunately I have had multiple clients who have attempted to seek police assistance where a person has threatened to share their private sexual images without consent, only to be told by police that there is nothing they can do to assist.
47. The current shortcomings of our legal system to address this issue and the impunity perpetrators often receive as a result causes further unique harms to victims, which Henry and Powell refer to as 'embodied harms'.³⁵
48. A further repercussion of our current legal system failing to adequately condone this behaviour is that it enables victim blaming, as perpetrators are not held accountable. This victim blaming often has a gendered element, as it has been noted in literature that women and girls are the primary targets of this behaviour.³⁶ This has negative effects for society more broadly, entrenching gender inequality, linking women's sexuality to shame and punishing women for sexual behavior. Henry and Powell also note that this behaviour can have gendered impacts because women and girls already experience outdated myths and expectations surrounding sexual norms and their role in society.³⁷
49. Shame and embarrassment can deter clients from seeking assistance, with some of my clients reporting reluctance to report to the police fearing they will be mocked, blamed for taking the photos in the first place, or further

³² Danielle Citron & Mary Anne Franks (2014) Criminalizing revenge porn. *Wake Forest Law Review* (49) 345–391, 351.

³³ See, eg, Tammy Hand, Donna Chung & Margaret Peters, 'The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation' *Australian Domestic & Family Violence Clearing House*, Stakeholder Paper 6 (online) (2009) <www.adfvc.unsw.edu.au/PDF%20files/Stakeholder%20Paper_6.pdf>; Women's Legal & Human Rights Bureau, Inc. 'From impunity to justice: Exploring corporate and legal remedies for technology-related violence against women' (online) (6 March 2015) <www.genderit.org/node/4268/>

³⁴ Women's Legal & Human Rights Bureau, Inc. 'Women, privacy and anonymity: More than data protection' in D. Sabanes Plou (ed), *Critically Absent: Women's Rights in Internet Governance* (APC: 2012) <www.genderit.org/node/3548>

³⁵ Nicola Henry & Anastasia Powell, 'Harms: gender, shame and technology-facilitated sexual violence' (2015) 21(6) *Violence Against Women* 758–779.

³⁶ See, eg, Danielle Citron & Mary Anne Franks (2014) Criminalizing revenge porn. *Wake Forest Law Review* (49) 345–391, 351; Cyber Civil Rights Initiative, 'Effects of Revenge Porn Survey' (online) (2014). <www.endrevengeporn.org>

³⁷ Nicola Henry & Anastasia Powell (forthcoming) *Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law*.

humiliated by having to show the images to Police.

50. I have observed in practice that perpetrators of this behaviour are often the current or ex-partners of my clients, and often employ this behaviour as one tactic within a wider context of domestic violence. When perpetrators of domestic violence use this behaviour, it creates a further barrier to women seeking assistance and is used to isolate, control, shame or embarrass them,³⁸ therefore compounding the harm they experience and making it more difficult to leave a relationship.
51. This echoes the findings of the 2015 SmartSafe national survey which found 98% of domestic violence workers had clients who had experienced technology-facilitated stalking and abuse.³⁹ This result is also similar to results of 2014 Safety Net Project survey which found 'offenders who misuse technology often misuse more than one type of technology and often perpetrate other forms of abuse.'⁴⁰
52. There is also a prevalent myth that the non-consensual sharing of private sexual images and recordings is more an issue of adolescents than adults. It has been noted that there has been a greater focus in literature on the impacts on young people.⁴¹ My experience working as a solicitor at Women's Legal Services NSW has highlighted this is not an age specific issue, despite often being framed this way. However, further consideration needs to be taken of how best to approach this issue where the perpetrator or victim is a minor.

c) Potential policy responses to this emerging problem, including civil and criminal remedies

53. I believe specific legislative and policy reform is necessary to demonstrate an appropriate level of social condemnation of this behaviour. The approach must be multipronged, with both civil and criminal reform, access to quick, affordable take down options and non-legal interventions such as education and training.
54. Whatever policy responses are contemplated, it is key that open public consultation is paramount in this process.

³⁸ See, eg, D Rose et al, 'Barriers and facilitators of disclosures of domestic violence by mental health service users: Qualitative study' (2011) 198(3) *The British Journal of Psychiatry* 189-194; M Fugate et al, 'Barriers to domestic violence help seeking: Implications for intervention' (2005) 11(3) *Violence Against Women* 290-231.

³⁹ DVRCV/Delanie Lockwood, SmartSafe Survey for Australian Support Workers, 2015.

⁴⁰ NNEDV, 'Safety Net Technology Safety Survey 2014; A Glimpse From the Field: How Abusers Are Misusing Technology' *Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice*

<http://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/54e3d1b6e4b08500fcb455a0/1424216502058/NNEDV_Glimpse+From+the+Field+-+2014.pdf>

⁴¹ See, eg, Nicola Henry & Anastasia Powell, 'Beyond the 'sext': Technology-facilitated sexual violence and harassment' (2015) 48(1) *Australian & New Zealand Journal of Criminology*, 104-118.

Criminal sanctions

55. In Australia, only Victoria⁴² and South Australia⁴³ have specific legislation criminalising this behaviour. NSW has an ill-equipped offence of publishing an indecent article,⁴⁴ which has novelly been applied to this scenario, with limited success.⁴⁵ Alternatively, victims can rely on stalking offences,⁴⁶ which often require a course of conduct or seek protection orders, which only become criminal once breached. Voyeurism related offences⁴⁷ and offences relating to surveillance devices⁴⁸ are only useful in very limited situations where the image or recording was made without the consent of the pictured individual, or where it involves trespass.⁴⁹ Indecency offences will normally only apply where what is depicted is against community standards, rather than merely sexual content for example, showing extreme violence.⁵⁰ Arguably, the Criminal Code (Cth), which prohibits the use of a carriage service to menace, harass or cause offence,⁵¹ should be wide enough to capture these scenarios. However, in practice it does not appear it is being regularly utilised.
56. As such, I recommend that the non-consensual sharing, or threat of sharing, private sexual images and recordings be criminalised to fill the existing gap in our legal system and to specifically condone this behaviour. A legal framework that fails to recognise this behaviour as criminal, fails to deter perpetrators and sends a message to victims that their experiences are not legitimised.
57. I recommend Federal reform through a new offence relating to the use of a carriage service to engage in this behaviour, similar to that proposed in the *Exposure Draft of Criminal Code Amendment (Private Sexual Material) Bill 2015*.
58. I also recommend uniform, mirror State and Territory legislation, which is technology neutral and which is not limited to online distribution, as is the case in some US jurisdictions.⁵²
59. Consideration should be made as to whether any offence should be summary in nature. It has been noted that there are issues in seeking warrants and seizing evidence for summary offences.⁵³

⁴² *Summary Offences Act 1966* (Vic) s 41DA.

⁴³ *Summary Offences Act 1953* (SA) s 26C.

⁴⁴ *Crimes Act 1900* (NSW) s 578C.

⁴⁵ *Ravshan Usmanov* [2011] NSWLC 40 at [10]–[11] (Magistrate Mottley). After appeal, the defendant received a 6-month suspended sentence.

⁴⁶ See, *Criminal Code Act 1983* (NT) s 189; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13; *Crimes Act 1900* (ACT) s 35; *Criminal Code 1899* (Qld) ss 359A–E; *Criminal Law Consolidation Act 1935* (SA) s 19AA; *Criminal Code Act 1924* (Tas) s 192; *Crimes Act 1958* (Vic) s 21; *Criminal Code Act 1913* (WA) s 338E.

⁴⁷ See, eg, *Police Offences Act 1935* (Tas) s 13B; *Crimes Act 1900* (ACT) s 61B; *Criminal Code 1899* (Qld) s 227B.

⁴⁸ *Surveillance Devices Act 1998* (WA) s 6; *Surveillance Devices Act 1999* (Vic) s 7; *Surveillance Devices Act 2007* (NT) ss 12 & 15.

⁴⁹ *Surveillance Devices Act 2007* (NSW) s 8.

⁵⁰ See, eg, *Criminal Code Act 1983* (NT) s 125C, cf. *Crimes Act 1900* (NSW) s 578C.

⁵¹ See, eg, *Criminal Code 1995* (Cth) s 474.17; *Crimes Act 1900* (NSW) s 578C.

⁵² See, eg, Colorado Revised Statutes 18-7-107 & Maryland Code § 3-809.

⁵³ See, eg, Department of Justice, Submission No. 29 to NSW Law & Justice Committee, *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*, 2015, 8.

60. Further consideration should also be given to the resources Police require to investigate criminal matters involving online abuse. It is important that Police are properly resourced and trained to adequately gather evidence in an admissible form that will enable charges to be laid and successfully prosecuted.
61. While criminal sanctions have an important role to play, I do not think criminal reforms alone can properly address this complex issue.

Civil remedies

Protection orders

62. In jurisdictions such as South Africa,⁵⁴ civil protection order schemes are being relied upon to try to curb this behaviour, only criminalising such behaviour if orders are breached. I disagree with this approach and believe criminal sanctions should be introduced in tandem with our existing protection order schemes being strengthened. Through reform, protection orders could be used as a powerful prevention tool and could provide a quick, cheap and accessible take down method.
63. The effectiveness of protection order legislation across each Australian State and Territories to prohibit or prevent private sexual images being shared without consent varies greatly. This is because of the varied and inconsistent approaches across jurisdictions.
64. Jurisdictions, such as Tasmania,⁵⁵ the ACT⁵⁶ and NSW⁵⁷ take a broad approach, and would categorise the threatened or actual sharing of private sexual images as 'intimidating' behaviour, potentially capable of warranting a protection order. This is contrasted to jurisdictions such as South Australia⁵⁸ and the Northern Territory,⁵⁹ where the legislation specifically states that sending offensive material over the Internet is behaviour potentially capable of warranting a protection order. I recommend adopting the latter approach across each jurisdiction to remove any uncertainty that this behaviour is the sort that can warrant a protection order to be made.
65. The standard sample conditions available in each jurisdiction also vary greatly. For example, in jurisdictions such as Tasmania, Western Australia, NSW, NT and ACT, the available orders are quite limited, but prohibit general behaviour that could be classified as threatening, intimidating or an act of domestic violence. While jurisdictions such as South Australia and Victoria contain specific sample orders on the application form that prohibits the defendant/respondent from publishing material about the protected person, including by electronic means.

⁵⁴ *Protection from Harassment Act 2010* (South Africa).

⁵⁵ *Family Violence Act 2004* (Tas) s 7.

⁵⁶ *Domestic Violence and Protection Orders Act 2008* (ACT) s 13.

⁵⁷ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.

⁵⁸ *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

⁵⁹ *Domestic and Family Violence Act 2007* (NT) s 6.

66. I recommend that each jurisdiction contain specific additional orders that prohibit. For example, prohibiting the defendant/respondent from '*directly or indirectly publishing, sharing or threatening to publish or share images or videos of the protected person of a sexual nature.*' This again sends a clear message that this behaviour will not be tolerated, and can assist victims where threats to share images have been made but not yet carried out, acting like an injunction or a take down mechanism if the images are already online.
67. While it is noted that in each jurisdiction, specifically drafted orders can be added as needed,⁶⁰ sometimes in practice it can be difficult to get orders of this nature added. Results can be inconsistent and depend upon, for example, the attitudes of the particular Magistrate or Police officer (where it is a police application).
68. In jurisdictions such as Tasmania, the NT and Victoria, positive obligations can be ordered on the respondent/defendant by the Court, for example, to attend counselling or to contact the Men's Referral Service. I recommend this be extended to other jurisdictions to also allow positive obligations such as take down order. This would provide a quick, cheap form of redress for victims where the perpetrator has failed to remove content online. This also acknowledges the reality that many victims do not have the financial resources to access other remedies via civil litigation.

Tort of Serious Invasion of Privacy

69. I support the earlier submissions of Women's Legal Services NSW to the Australian Law Reform Commission⁶¹ and NSW Senate Inquiry⁶² calling for the introduction of a tort for serious invasions of privacy. This would provide a further civil remedy which is broad enough to cover situations where private sexual images are shared without consent as well as other forms of technology facilitated stalking and abuse.

Breach of confidence

70. The availability of breach of confidence and remedies for emotional distress is uncertain in jurisdictions outside Western Australia⁶³ and Victoria.⁶⁴
71. Rather than case law developing slowly and uncertainly, it would be optimal to legislate so an action for breach of confidence is statutorily available across all Australian jurisdictions in situations where private sexual images are

⁶⁰ *Family Violence Act 2004* (Tas) s 16; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12; *Restraining Orders Act 1997* (WA) s 13; *Family Violence Protection Act 2008* (Vic) s 81; *Domestic Violence and Protection Orders Act 2008* (ACT) s 48; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35; *Domestic and Family Violence Act 2007* (NT) s 21; *Domestic and Family Violence Protection Act 2012* (Qld) s 54.

⁶¹ Women's Legal Services NSW, Submission No 57 to the Australian Law Reform Commission Discussion Paper on *Serious Invasions of Privacy in the Digital Era*, 2014.

⁶² Women's Legal Services NSW, Submission No 32 to NSW Law & Justice Committee, *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*, 2015.

⁶³ *Wilson v Ferguson* [2015] WASC 15.

⁶⁴ *Giller v Procopets* (2008) 24 VR 1.

shared without consent. Following recent case law,⁶⁵ I recommend legislatively allowing for damages to be available for non-economic loss including emotional distress.

E-Safety Commissioner

72. In jurisdictions such as New Zealand, issues such as the non-consensual sharing of private sexual images are being addressed through a new civil enforcement regime, which contains some criminal offences.⁶⁶ Matters are referred to the Approved Agency for resolution, and where matters are not resolved, the aggrieved person can make an application to court.
73. While I do not believe this is the sole solution for addressing this issue, I believe it would be useful to also have available a cheap, quick, accessible resolution pathway for take down orders and other remedies, including apologies.
74. I recommend there should be further consideration as to how the powers of the E-Safety Commissioner could be extended to function in a manner similar system to the New Zealand model. Significant amendments would need to be made to the existing legislation,⁶⁷ and further consultation sought.
75. The advantage of this option would be that the Commissioner could assist victims to have their images or recordings removed quickly through its pre-existing communication pathways with social media platforms.
76. In some circumstances where matters cannot be resolved, the existence of a less formal dispute resolution pathway such as this may also assist with evidence gathering for the purpose of facilitating other civil avenues or criminal investigations. Further consideration should be given as to whether further criminal provisions should be available under this legislation.

Clearinghouse for technology-facilitated stalking and abuse

77. I also recommend the establishment of a clearinghouse that deals with technology-facilitated stalking and abuse, which could be accessed by members of the public, community workers and professional assisting victims.
78. This clearinghouse could be a go-to specialist organisation to assist with safety planning, training and education for different sectors of the community. It could also undertake research and data collection to monitor and evaluate existing systems in addressing technology-facilitated stalking and abuse.
79. A clearinghouse could also operate a telephone helpline, similar to the UK revenge porn helpline, but with wider specialisation focused on technology-facilitated stalking and abuse more broadly.

⁶⁵ *Wilson v Ferguson* [2015] WASC 15.

⁶⁶ *Harmful Digital Communications Act 2015* (NZ).

⁶⁷ *Enhancing Online Safety for Children Act 2015* (Cth).

Training and education

80. Any legislative reform that is contemplated also must be accompanied by well funded and well considered education and training programs. This needs to be targeted at key groups including Police, social workers, the legal profession including the judiciary, young persons and the wider public. Education and training should also focus on shifting victim blaming attitudes and addressing underlying gender inequalities.