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Dear Committee Secretary

Submission to the Legal and Constitutional Affairs References Committee Inquiry into the phenomenon of 'revenge porn'.

We thank you for the opportunity to make this submission to the Committee. This submission is jointly prepared by Associate Professor Tony Krone, Associate Professor Gregor Urbas of the School of Law and Justice at the University of Canberra and Professor Douglas Boer of the School of Health at the University of Canberra.

We provide the following responses to each of the terms of reference:

- 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;***

The Committee inquiry appears to be specific to a particular aggravated form of offence. The terms of reference refer to 'revenge porn' adopting a narrow intended-harm based (or malicious use) definition that is similar to section 33 of the *Criminal Justice and Courts Act 2015* (UK) which provides:

33 (1) It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—

- (a) without the consent of an individual who appears in the photograph or film, and
- (b) with the intention of causing that individual distress.

However, matters for consideration necessarily extend from this specific form of abuse to the general problem of the misuse of intimate images or other material. This is so because of the need to place the narrow malicious use definition in perspective, taking into account:

- 1) the larger context in which revenge porn is referred to in public debate, and
- 2) the wide range of possible legislative responses that may include, but extend beyond, the narrowly defined harm identified in the terms of reference.

Before addressing these two areas in this section, we comment on the use of the term 'revenge porn'.

Reasons not to use the term 'revenge porn'

First, we caution against use of the term 'revenge porn'. While this label may seem to capture the malicious use based definition in the terms of reference, it adopts and applies the self-justifying constructs of those who would use images to intentionally cause distress.

'revenge'

- This word preserves the excuse that perpetrators use to personally justify their behaviour as something deserved because of the conduct of the victim.

'porn'

- This word reinforces social and cultural themes that deny the sexual autonomy and identity of the victim.
- Porn implies that because the victim can be characterised as being sexually available, sexually expressive, or sexually submissive, then it is the victim who should be either ashamed of this, or treated as having made themselves sexually available to the world. For this reason we would advise against adoption of the term non-consensual pornography suggested by other authors: Otero (2015) and Burris (2014).
- Similarly, references to porn do not identify the harm involved and allow efforts to restrict access to misused images to be characterised as an attack on free speech or on the freedom of the internet.

It is widely accepted that an important part of any crime reduction strategy is to remove the excuses that offenders may use to justify their behaviour. This has important implications in terms of individuals taking personal responsibility for their behaviour and for the social rejection of inappropriate behaviour. Removing excuses for unacceptable on-line behaviour is particularly important given that the rapidly changing nature of the internet - and the ways that people use it, gives rise to novel forms of misuse that are difficult to predict, or manage once established. In any event, responding to inappropriate behaviour on the internet is fraught with difficulty in part, because it is technically difficult to regulate the internet and available regulatory settings generally favour internet freedom over restriction and there may be a perception that online harms are less real: Rey & Boesel (2014).

Another reason to reject the term 'revenge porn' is the conflation of a potentially wide range of offending that is often not expressed in terms of the narrowly defined malicious use of images. To better identify the harm that is being addressed we propose that the types of behaviour that may be included in discussion be seen to lie across a continuum. The harm to be addressed extends from the malicious use of images with the intention to cause personal harm or distress, through to breaches of privacy, misappropriation of identity or infringement of personal copyright. In addition, the behaviours sought to be addressed may range from different forms of malicious use to sexting and the republication of sexting messages.

Importantly, when comparing legislative and common law approaches that have been proposed, or adopted to deal with misuse of images these may be driven by what law or politics allows, rather than by squarely identifying a particular harm and directly addressing that particular harm. In this context, initiatives in the United States can be seen to be constrained by the considerable jurisprudence developed concerning the nature and scope of the First Amendment right to freedom of expression: Genn (2014) and Calvert (2013). As a result, a range of laws have been proposed or enacted in response to problems such as the malicious use of images or sexting, relying on notions of rights to individual privacy or ownership of intellectual property. The legal responses range across different levels of criminalisation or possible causes of civil action as reviewed by Fiedler (2013).

We note that in Victoria the breach of privacy based offences were introduced following recommendations by the Parliamentary inquiry into sexting: Law Reform Committee (2013). These offences were introduced in a package that included reform of child sexual exploitation material offences to address concerns about the potential prosecution of children for sexting images of themselves to persons close to their own age. See for example, Salter, Crofts, & Lee (2013). Principally, the harm to be addressed in Victoria was sexting referring to intimate images where the distribution is 'contrary to community standards of acceptable conduct.' In the US the intersection between sexting and 'revenge porn' has also been noted with a desire to both protect children from exploitation by others and over-criminalisation for their own behaviour within the context of also dealing with malicious use of intimate images or other material: Strachan (2015), Willard (2010) and Ryan (2010).

We recommend that the problem be referred to as 'misuse of intimate images or other material' and 'malicious use of intimate images or other material'.

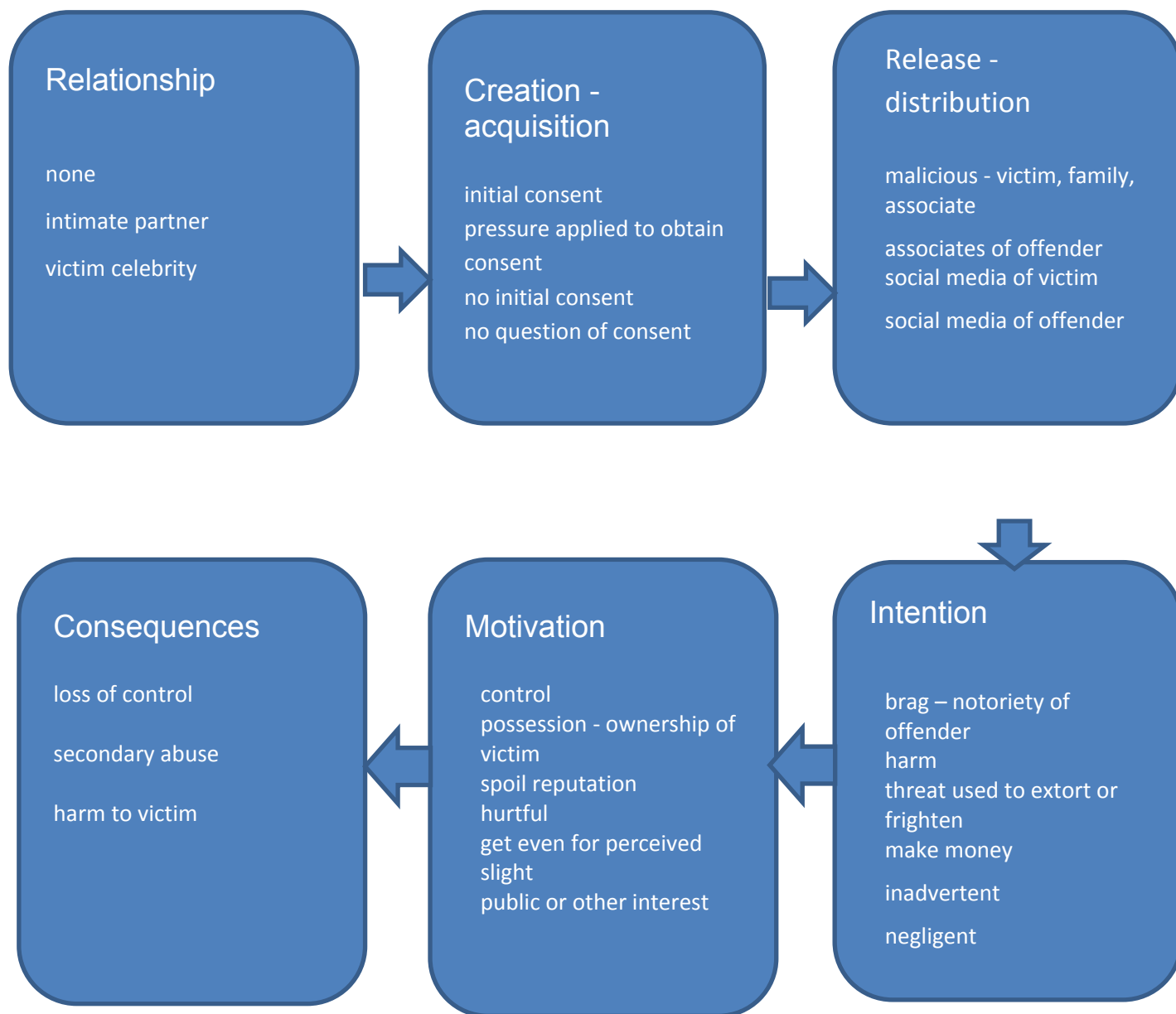
'Revenge porn' in the context of public debate

An initial review of sources surveyed to prepare this submission indicates a wide variety of differing conditions that may surround an instance of the misuse of images. In Figure 1, we map the possible ways in which images may be misused. At each step in the process are examples of issues that can be seen to aggravate the seriousness of the behaviour.

We note that the malicious use of intimate images is predominantly seen by advocates of reform in gendered terms based on examples of appalling cases of manipulation, betrayal and harm by men abusing women with whom they have been in a relationship: Kitchen (2015), Henry & Powell (2014), Richardson (2014), Salter et al. (2013), Franks (2015), Mathen (2014). For these cases, the strongest argument may be put that the actions of the offender are akin to a form of non-consensual sexual activity with the potential for victims to be harmed in ways that are similar to the harms experienced by victims of physical sexual assault: Henry & Powell (2014). An advantage in dealing with cases of this type as a form of, or akin to, a sexual offence would be the invoking of procedural protections for victims (referred to in the US as rape-shield laws): Bloom (2014).

However, we argue that it is not appropriate to simply transplant concepts developed for physical offences to online offences without very careful consideration. This is so particularly because the

Figure 1 Potential variables involved in the misuse of intimate images or other material



recorded physical sexual act is disconnected from the act of distribution that is committed without consent. There is certainly value in exploring how existing sexual assault laws might relate to any proposed new law to deal with the misuse of images. For a detailed perspective on managing the competing public interest issues involved in deciding on how to proceed with the UK malicious use offence as part of the range of possible offences, see Crown Prosecution Service (2016).

While the worst forms of cases demand an appropriate response, it is important to avoid unintended consequences, to confuse different issues, or to unrealistically raise expectations of action. In our view, the potential harms of the misuse of images can be divided into existing legal categories of criminal malicious use, criminal or civil breach of privacy, and civil copyright abuse. It is then possible to see what action might be taken in each of these areas to deal with specific identified harms.

While we advocate a graded scheme to address the wider problem of the misuse of images, we do not intend to undermine the significance of problems of gender-based violence and abuse which may lie behind any form of misuse of images. We argue that it is important to distinguish between different types of cases in which the elements shown in Figure 1 of relationship; circumstances of creation or acquisition; circumstances of release or distribution; consequences; motivation and intention may vary widely. It may be that in many cases negative attitudes towards women (in particular) create a common theme of gender-based violence. While a response is important for all forms of gender-based victimisation, not all instances can receive the same attention that we would expect in malicious use cases. However, a consistent response to gender-based victimisation does require clear and outright condemnation of efforts to blame a victim for providing an image or other material in the first place: Budde (2015), Henry & Powell (2014) cf. Calvert (2013). It is then possible to focus on the harm wrought by the person who misuses an image or material.

In addition, it is important to consider whether particular forms of misuse ought to be protected or which ought to provide a defence to the person who might be charged with misusing an image: Wragg (2014). This is an aspect of the UK provision referred to above which includes a number of defences. A simple example demonstrates the potential for unintended consequences. Where a public official sends an intimate sexual image of them self to another person, particularly in an unsolicited attempt to engage that other person sexually, then the recipient might wish to report or re-broadcast that image without the permission of the original sender and with an intent to harm. A case along these lines is that of the politician Anthony Weiner in the US: Williams (2014). Another class of potential misuse arises with so-called 'cheater sites' where a person in a relationship with one person may release sexual images of their partner with another person: Stroud (2014).

Hayward & Rahn (2015) provide an account of a range of cases involving misuse of images taken in a relationship between celebrities. The authors classify these in terms of unauthorised release (the Hilton-Salomon images); 'negotiated' release (the Anderson-Lee images) and planned release (the Laurie-Waltman images). The authors argue that the consequences could be seen to have added to the celebrity status of the participants in these cases. However, this 'status' comes at a general cost of perpetuating negative attitudes regarding gender.

Beyond relationship based scenarios, it is necessary to carefully consider how to protect individual privacy while balancing the public interest in journalism, particularly following the revelations and recommendations of the News of the World Inquiry by Lord Justice Leveson (2012). The findings of

that inquiry in relation to recorded text and voice messages also invites consideration of protection for the misuse of material other than simply images and videos.

The manner in which intimate images or other material may be obtained may involve an intimate partner gaining unauthorised access to the data or an account of their partner. Within some relationships there may not be a clear delineation of ownership of a device, or of data or a social media account and there may be casual sharing of the means to access these things. This means that hacking by a partner may sometimes be difficult to prove in terms of authority.

Instances of hacking will involve the inherent difficulty in cyber offending of proving a particular act. There is an added difficulty of proving the identity of the person who committed a particular act. Similar difficulties of attribution are likely to arise in any case in proving who released an intimate image or other material.

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

Potential Impacts of Misuse of intimate images or other material

There is no doubt that new technologies, and the affordances that they give rise to, are transforming the ways in which people interact, with impacts at both personal and social levels. This is no less the case in the area of human sexual relations: Hertlein & Ancheta (2014).

Potential impacts of the sharing of sharing private sexual images and recordings of a person (usually a woman) without their consent, with the intention to cause that person harm may be conceptualized and categorized as follows:

- (i) Effects on victims of misuse of intimate images or other material
- (ii) Misuse of intimate images or other material as a form of sexual abuse
- (iii) Misuse of intimate images or other material as a societal issue
- (iv) Support for victims of misuse of intimate images or other material: resilience and recovery

Effects on victims of misuse of intimate images or other material

Sexual images and recordings of a person may be initially obtained by consent, but it is also the case that such sexual images and recordings may have been initially obtained without the consent or knowledge of the victim (although possibly obtained in the context of a consenting sexual interaction). While obtaining such images or recordings of another person without their consent or knowledge is itself a crime, the focus of this submission is in regard to the sharing of sharing private sexual images and recordings of a person (usually a woman) without their consent, with the intention to cause that person harm. It is considered that most of such images or recordings were obtained with consent and the associated betrayal of trust and invasion of privacy that sharing of such images or recordings generally following the dissolution of a relationship is a primary criminal issue in misuse of intimate images or other material crime. For a detailed study of the effects on victims in malicious use of intimate image cases see Bates (2015).

The harms involved in the malicious misuse of images were summarised in the House of Lords debate by Lord Marks of Henley-on-Thames, as quoted in Gotsis (2015):

The widespread publication of such images causes, and is generally intended to cause, distress, humiliation and embarrassment for the victim – hence the name 'revenge porn'. She – or he – the victims are usually but not exclusively women – face the humiliation of their most private moments being exposed to family, friends, employers and the world at large. It is entirely predictable that such exposure can cause serious psychological and emotional damage even to those with robust personalities. Suicides as a result of such publications have been recorded. Worse still, the damage may often be increased because it follows the trauma of relationship breakdown and is caused by someone with whom the victim had previously been close. Publication can cause havoc in personal and family relationships and in relationships at work. The betrayal and the hurt it causes could hardly be worse. Such behaviour has been characterized by academics in the field as a form of abuse and I suggest that such characterization is entirely accurate.

In brief, Lord Marks of Henley-on-Thames noted that victims of 'revenge porn' may suffer a range of psychological and emotional problems, including: distress, humiliation, embarrassment, and more serious issues up to and including suicide. Unlike some forms of sexual assault involving strangers, many private sexual images will have been obtained in the context of some form of relationship in which trust existed at least to the point where sexual images and recordings were permitted to be obtained. The betrayal of trust experienced by the victim as a result of the perpetrator sharing such images can have a variety of effects on victims. These effects will vary across victims and will likely be dependent on many of the factors that determine the degree of impact of a contact sexual assault on rape victims. Most of these factors require very little extrapolation from the sexual assault context and, as a result, help to show how misuse of intimate images or other material can be conceptualized as a form of sexual abuse.

Misuse of intimate images or other material as a form of sexual abuse

The sexual abuse literature generally discusses the effects on victims of such abuse in terms of two general dimensions: factors that affect the victim's experience of being sexually abused; and, the variety of impacts (e.g., short and longer term psychological impacts, plus mental health and physical impacts) often experienced by victims of sexual abuse. These factors and impacts are provided along with commentary to illustrate how many of these issues apply to victims of misuse of intimate images or other material, leading to the contention that misuse of intimate images or other material is a form of sexual abuse. In addition to these impacts, there are also social, community and financial impacts and these are discussed in the next section of this paper.

The experience of every victim of any form of abuse differs in terms of possible impacts to that person. Daane (2005) cited in Boyd (2011), noted that a number of factors can affect the experience of being physically sexually assaulted, including:

- (i) the victim/survivor's relationship to the perpetrator;
- (ii) the extent and severity of any accompanying psychological abuse;
- (iii) the severity of the abuse;
- (iv) the extent of physical harm;
- (v) the length of time over which the abuse occurred;
- (vi) the responses of family and friends of the victim/survivor;

- (vii) the woman's experience of the various systems (health, police, courts etc.) with which she may have contact following the assault; and
- (viii) the personal history of victim/survivor (e.g., a prior history of being sexual abused)

It would appear that most of these factors apply to victims of misuse of intimate images or other material, other than factors (ii) and (iii) in the general case (i.e., situations in which the sexual images or recordings were obtained with consent, thus reducing the likelihood of being severely or physically harmed). In the context of casual sex or an affair, a woman may have been lured into a situation in which images or recordings were obtained with apparent consent, but the perpetrator may have orchestrated the situation in order to obtain the images or recordings for distribution. In such situations, a woman may have consenting to and participated in a sexual interaction, including the taking of images or recordings, but the 'revenge' component is then perhaps more that of betrayal, the effects being similar. In situations involving casual sex, women may also experience the fear of contracting a sexual transmitted disease.

Boyd (2011) noted a range of short term and longer term psychological and emotional sequelae experienced by victims of physical sexual assault. Again, it is apparent that many of the following psychological and emotional impacts of sexual assault also apply to victims of misuse of intimate images or other material. Some of the relevant short term and longer-term impact of sexual assault that appear relevant to victims of misuse of intimate images or other material include:

- (i) anxiety and intense fear due to the abuse;
- (ii) fears of future abuse;
- (iii) possible reaffirmation of a sense of being a devalued person;
- (iv) feelings of low self-esteem, self-blame and guilt; and
- (v) possible denial of parts or all of the abusive experience

Boyd (2011) also provided a range of mental health and physical impacts often experienced by victims of sexual abuse. While the latter group of impacts are not commonly endured by victims of misuse of intimate images or other material, given that the sexual images or recordings are generally obtained with consent, certainly there are reports indicating that such victims have been traumatized resulting in a variety of mental health problems, including:

- (i) post-traumatic stress disorder, including intrusive thoughts, insomnia, nightmares
- (ii) mood disorders such as depression
- (iii) anxiety disorders
- (iv) substance abuse

Thus it appears that in addition to the emotional and psychological issues experienced by victims of misuse of intimate images or other material, there are a range of mental health problems that such victims experience, the seriousness of which are affected by many of the factors elucidated by Daane (2005), cited in Boyd (2011). Of course, victims of actual contact offences will also experience a great deal of other effects (and more serious side-effects overall for most victims) due to the severity and extent of the physical abuse component of contact offending, but as the above analysis shows, many of the same sequelae of abuse may be present in victims of misuse of intimate images or other material. The exact degree of harm of this form of sexual abuse is of course, victim-specific and may range from no serious side-effects to being very traumatized or incapacitated.

Misuse of intimate images or other material as a societal issue

Like all forms of sexual assault, misuse of intimate images or other material can affect the way a victim can interact with others in all spheres of life ranging from intimate partners, family members, work colleagues and others in their communities. Boyd (2011) noted that sexual abuse tends to lead to a variety of negative social and community sequelae, including:

- (i) difficulties with interpersonal relationships with others, including intimate partners (including sexual relationships)
- (ii) difficulties with interpersonal communication
- (iii) difficulties with trusting others
- (iv) difficulties with enjoying social activities
- (v) avoidance of social activities involving men
- (vi) feeling vulnerable in relationships
- (vii) disruption in work situations due to avoidance of social interactions and psychological difficulties as noted above (issues related to anxiety or depression)
- (viii) negative reactions of others (e.g., friends, family members) who may underestimate, minimize or not believe the effects of the abuse on the victim
- (ix) minimization of the effects or seriousness of the effects of the misuse of intimate images or other material on the victim by the courts or mental health service providers
- (x) negative effects on those close to the victim (e.g., friends, children, parents, intimate partners) may negatively affect the victim

Boyd (2011) also noted that victims of sexual abuse suffered from a variety of financial impacts as a result of their victimization, including:

- (i) loss of paid employment
- (ii) reduced employability
- (iii) mental health care expenses
- (iv) quality of life costs

Besides these negative social, community and financial sequelae of sexual abuse, victims of misuse of intimate images or other material may also feel (or experience) that society as a whole minimizes the effect of such abuse. This may be because these persons were involved sexually with the perpetrator in a consenting relationship and the misuse of intimate images or other material was distributed (at times) out of anger. It may be the case, that some misogynist individuals may feel that such actions by perpetrators are justified and it is a worry that such attitudes may remain problematic until the legal and mental health system clearly deal with misuse of intimate images or other material as a sexual abuse issue.

In sum, the legal and mental health systems need to clearly ensure that such victims are not dealt with in a 'victim-blaming' manner as was the case for victims of contact sexual assault crimes in years gone past. Unfortunately, there are negative models that still exist which minimize the seriousness of some crimes, such as the legal treatment of perpetrators of spousal abuse (including sexual spousal abuse) in which offenders of spousal abuse crimes are often given lighter sentences than perpetrators of violent crimes against strangers. It is incumbent on societal systems to ensure that misuse of intimate images or other material is viewed as a serious form of sexual abuse to avoid

further traumatization of victims of such crimes as a result of lack of services, or the unfortunate perpetration of negative attitudes towards victims of misuse of intimate images or other material crimes.

Support for victims of misuse of intimate images or other material: resilience and recovery

Services for victims of misuse of intimate images or other material may be modelled on those services already available for victims of other forms of sexual abuse. Resilience and recovery can be promoted by a variety of factors, including:

- (i) positive support by significant others, community services, mental health care providers, and the courts
- (ii) education regarding the inclusion of misuse of intimate images or other material as a form of sexual abuse
- (iii) education regarding the effects of sexual abuse, including the effects of victims of misuse of intimate images or other material
- (iv) the development of networks of social support for victims of such abuse, including training of providers of helplines who may be the first port of call for such victims
- (v) the development of intervention frameworks for the effective removal of such images and recordings from social networks

It may be the case that while there are effective models for services and support for victims of sexual abuse, these same services may not be as accessible for victims of misuse of intimate images or other material as these persons are a relatively newly recognized cohort of victims of sexual abuse. Over time, effective education, mental health services, legal support services and social support may become easily accessed by victims of misuse of intimate images or other material, but it is not clear if this is the case at the current time.

Focus on the harm to be addressed

In relation to harmful effects, the term 'revenge porn' may itself somewhat diminish the experience of victims of such crimes in a manner similar to how the discredited term 'date rape' served to minimize the nature of sexual assault of women by men in a dating situation.

Analysis shows that victims of misuse of intimate images or other material are likely to suffer many of the same effects as other sexual abuse victims. However, the exact nature of the effects of misuse of intimate images or other material on victims will become clearer as evidence is gathered. What is clear at the present time is that victims of misuse of intimate images or other material, while spared the physical aspect of sexual assault, still suffer many of the same sequelae as victims of other forms of sexual abuse. These similarities indicate that malicious misuse of intimate images or other material might properly be recognized as a new form of sexual abuse that warrants the full attention of society and relevant agencies to ensure that victims of misuse of intimate images or other material recover effectively and that perpetrators of such crimes are dealt with in a manner that dissuades future offending through effective sentencing and treatment programmes.

Importantly, there is a disjuncture between the physical act recorded in an intimate image or other material and the release of that image or other material. The physical act and the sharing are acts that are limited in time as with physical offending. However, the cause of the harm suffered by a

victim is not bounded in time. Once an image is released online or to another person the victim is harmed by that instant, and then continuously, while the image or material is at large and available to others. The persistence of material online is a source of initial and on-going distress so that the harm is amplified by the passage of time as well as being amplified by any abuse or attention drawn to the existence of the material.

For this reason, the criminal law may be a very blunt instrument that is time-consuming, cumbersome, resource-intensive to police, and carries the disadvantage of drawing attention to the material – thereby causing further harm without addressing the dissemination of the material itself. Victims are likely to be reluctant to draw attention to misuse, and where they do; there may be additional detriment in pursuing the criminal justice process.

c. potential policy responses to this emerging problem, including civil and criminal remedies;

Potential policy responses including civil and criminal remedies

Potential policy responses can be grouped into the following broad categories:

- (i) Legal responses, including civil and criminal remedies;
- (ii) Regulatory responses, including imposition of duties on service providers;
- (iii) Educational responses, including awareness campaigns targeting potential victims and offenders.

Legal responses – civil remedies

Australian law includes civil causes of action for some breaches of privacy or confidentiality, but arguably not of sufficient generality to cover all examples of misuse of intimate images or other material and related conduct.

In particular, it has been widely noted that Australia lacks a broad civil action for serious invasions of privacy, leading to reliance instead on older remedies such as breach of confidence.¹ However, this leads to only occasionally successful redress, as noted in a recent hearing of the NSW Parliament:²

... the term 'revenge porn' is a very particular type of invasion of privacy, and it certainly would be encompassed within a more broad civil action for serious invasion of privacy. It is already, of course, known and there have been actions in law for what would be called revenge porn because generally speaking it is some sort of image or information obtained during a relationship of confidence, such as a personal relationship. So there have been cases for decades where people have taken action to stop the revelation. The trouble with the internet is that generally speaking it is up there before you can stop it, so then the question is: What is the remedy after the event? The equitable jurisdiction, which is also concerned with things like trade secrets as well as personal secrets, has not developed a

¹ See generally Australian Law Reform Commission, *ALRC Report 123: Serious Invasions of Privacy in the Digital Era* (2014): <http://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123>

² Professor Barbara McDonald, Faculty of Law, University of Sydney, appearing before the NSW Parliament's Standing Committee on Law and Justice, *Inquiry into Remedies for the serious Invasion of Privacy in New South Wales*, 30 October 2015 (transcript, p.20): [http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/5f2412d440ca5f06ca257ef30075069c/\\$FILE/Transcript%2030%20October%202015.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/5f2412d440ca5f06ca257ef30075069c/$FILE/Transcript%2030%20October%202015.pdf)

well-accepted remedy of compensation for emotional distress, which is the most common consequence of an invasion of privacy. People do not generally suffer economic loss or personal injury or actual psychiatric illness—they might do—but generally speaking they suffer just mere distress. The law is always very reluctant to give compensation just for distress in many other contexts, but it clearly is a remedy which should be given, I think, for that sort of action or revelation of personal information.

An example of a civil action in which a victim of misuse of intimate images or other material did obtain an injunction and compensation is *Wilson v Ferguson* [2015] WASC 15 (16 January 2015). In this case, after a relationship breakup, the defendant posted explicit images of the plaintiff on his Facebook page, thus making them available to approximately 300 online 'friends'. He also posted insulting messages about her, threatened to further disseminate the images using Facebook and YouTube, and sent her texts clearly indicating revenge as his primary motivation.³ Mitchell J in the Supreme Court of Western Australia accepted that the images had been shared during the relationship in circumstances importing an obligation of confidence, that this obligation had been breached by the defendant causing distress and resultant loss of income, and that appropriate remedies were injunction and equitable compensation. The reason why an injunction was seen as a practicable response in this case was because of the limited extent of distribution of the intimate images:⁴

In the present case there is no discretionary reason to deny the plaintiff the injunctive relief which she seeks. The past conduct of the defendant in publishing the images of the plaintiff gives rise to a reasonable apprehension that the conduct might be repeated. While there has been a prior publication by the defendant, it was for a short period of time. Allowing for the fact that third parties may have obtained copies of the images, there is no evidence that the distribution of the images has been so widespread that the grant of injunctive relief would serve no utility at this stage, or that the images have lost their confidential character by reason of the extent of their publication so that the grant of an injunction would not prevent further detriment to the plaintiff.

Thus, it may be that in circumstances of greater initial distribution, such as posting images on a publicly accessible website, a court may be less inclined to grant injunctive relief. As to monetary compensation His Honour adopted the approach that 'the equitable doctrine of breach of confidence should be developed by extending the relief available for the unlawful disclosure of confidential information to include monetary compensation for the embarrassment and distress resulting from the disclosure of information (including images) of a private and personal nature'.⁵ This allowed the judge to frame his orders to specifically compensate the plaintiff for her loss:⁶

Therefore, in my view, it is appropriate to award the plaintiff equitable compensation for the damage which she has sustained in the form of significant embarrassment, anxiety and distress as a result of the dissemination of intimate images of her in her workplace and among her social group. That compensation award should take account of the fact that the impact of the disclosure on the plaintiff was aggravated by the fact that the release of the

³ For example, *Fkn photos will b out for everyone to see when I get back you slappa. Cant wait to watch u fold as a human being. Piece if shit u r.: Wilson v Ferguson* [2015] WASC 15 (16 January 2015), at [30].

⁴ *Wilson v Ferguson* [2015] WASC 15 (16 January 2015), at [61].

⁵ *Wilson v Ferguson* [2015] WASC 15 (16 January 2015), at [83].

⁶ *Wilson v Ferguson* [2015] WASC 15 (16 January 2015), at [85].

images was an act of retribution by the defendant, and intended to cause harm to the plaintiff. The award should also take account of the fact that the plaintiff has not sustained a psychiatric injury, and its amount should not be disproportionate to amounts commonly awarded for pain, suffering and loss of amenity in tortious personal injury cases. In my view an award of \$35,000, to which should be added the plaintiff's economic loss of \$13,404, is appropriate.

While such an award goes some way to providing a legal response to misuse of intimate images or other material, it does depend to a large extent on the ability of an individual victim to pursue civil action, her lawyers to frame appropriate pleadings and arguments, and the court to accept those arguments and make suitable orders. It should be noted that, in this case, the defendant did not plead a positive defence.⁷

Legal responses – criminal remedies

While civil remedies can be pursued only by individual victims of misuse of intimate images or other material,⁸ or perhaps a larger class of aggrieved persons,⁹ criminal remedies provide a broader public mechanism for denunciation and punishment of offending behaviour. Whether general and specific deterrence would thereby be achieved may be debatable, but the recognition of misuse of intimate images or other material's harmful effects on vulnerable victims through the publication without their consent of intimate images is arguably sufficient basis for a criminal law response. Indeed, a range of Commonwealth, State and Territory offences already exists which may be used in prosecution of offending conduct.

Part 10.6 of the *Criminal Code Act 1995* (Cth), for example, is concerned with telecommunications offences. One offence of broad application is s474.17, prohibiting harassing and offensive misuse:¹⁰

474.17 Using a carriage service to menace, harass or cause offence

(1) A person is guilty of an offence if:

⁷ Recommendation 13-1 of *ALRC Report 123: Serious Invasions of Privacy in the Digital Era* (2014) is that: 'If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the plaintiff's emotional distress'.

⁸ See also the Victorian family law case of *Giller v Procopets* [2008] 24 VR 1; [2008] VSCA 236 (10 December 2008), in which damages for breach of confidence and assaults were ordered, but the majority stopped short of accepting the plaintiff's claim for intentional infliction of emotional distress: see the dissenting judgment of Maxwell P on this issue, at [1] – [38]. A High Court special leave application in 2009 was unsuccessful.

⁹ A class action might, in principle, be brought against the operators of a revenge porn website on behalf of all depicted persons. One such website in the United States website that resulted in criminal convictions of its operator on identity theft and extortion charges reportedly 'included photos of more than 10,000 people, mostly women. The images were often accompanied by identifying personal information and links to the subject's social media accounts': Sarah Kaplan, 'Revenge porn' Web site creator convicted; he victimized thousands of women', *The Washington Post*, 3 February 2015: <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/03/revenge-porn-web-site-creator-convicted-victimized-thousands-of-women/>

¹⁰ *Criminal Code Act 1995* (Cth), s474.17(1). Subsection (2) is omitted. The term 'carriage service' is expansively defined to include telephonic services as well as the Internet: see Gregor Urbas, *Cybercrime: Legislation, Cases and Commentary*, LexisNexis Butterworths, 2015, p.191.

- a. the person uses a carriage service; and
- b. the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years.

This Commonwealth offence has been used to prosecute Internet users who have posted obscene or otherwise offensive material on websites, or who have used mobile phones or computers to transmit threatening messages to others.¹¹

The element of offensiveness, based on the standards of a reasonable person, is elucidated by s473.4 of the Code:

473.4 Determining whether material is offensive

The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:

- a. the standards of morality, decency and propriety generally accepted by reasonable adults; and
- b. the literary, artistic or educational merit (if any) of the material; and
- c. the general character of the material (including whether it is of a medical, legal or scientific character).

In the case of misuse of intimate images or other material postings, there is little doubt that this is a misuse of electronic communications that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive', given the usual motivations of the offender and the harm and distress caused to the victim.¹² However, it is not known whether prosecutions for misuse of intimate images or other material postings have been contemplated by Commonwealth prosecutors.¹³

State and Territory offences relating to indecent publications may also be applicable. In New South Wales, for example, a man who had posted indecent photographs of a former girlfriend on his Facebook page was convicted under s578C of the *Crimes Act 1900* (NSW). He was initially sentenced to six months' home detention, but on appeal this was altered to a suspended sentence with a good

¹¹ Cases such as *Crowther v Sala* [2007] QCA 133 (20 April 2007) and *R v Hampson* [2011] QCA 132 (21 June 2011) illustrate. In the latter case, the defendant was also convicted of posting child exploitation material to websites as part of the offensive 'trolling' activities he engaged in.

¹² The case of *R v McDonald and Deblaquiere* [2013] ATSC 122 (27 June 2013) also illustrates that s474.17(1) can be applied to 'real time' filming and transmission without consent of sexual activity. In this case, two ADFA cadets were convicted in relation to webcam streaming of such activity.

¹³ Though see Lauren Wilson, *Geelong Advertiser*, 11 January 2016, 'Top prosecutor warns Australia's revenge porn laws are too weak to properly protect women': <http://www.geelongadvertiser.com.au/news/top-prosecutor-warns-australias-revenge-porn-laws-are-too-weak-to-properly-protect-women/news-story/bd0f903c98009f81827f326f11af98cc>

behaviour bond.¹⁴ This decision indicates that prosecution on summary charges may not result in a term of imprisonment being served by a convicted offender.

Victoria introduced new summary offences relating to the non-consensual distribution of intimate images in 2014, as part of a wider legislative response to the phenomenon of sexting, particularly within the context of existing laws relating to the distribution of child pornography.¹⁵ Sections 41DA and 41DB apply specifically to misuse of intimate images or other material offending:¹⁶

41DA Distribution of intimate image

- (1) A person (A) commits an offence if—
 - a. A intentionally distributes an intimate image of another person (B) to a person other than B; and
 - b. the distribution of the image is contrary to community standards of acceptable conduct.

Example

A person (A) posts a photograph of another person (B) on a social media website without B's express or implied consent and the photograph depicts B engaged in sexual activity.

- (2) A person who commits an offence against subsection (1) is liable to level 7 imprisonment (2 years maximum).
- (3) Subsection (1) does not apply to A if—
 - a. B is not a minor; and
 - b. B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to—
 - (i) the distribution of the intimate image; and
 - (ii) the manner in which the intimate image was distributed.

41DB Threat to distribute intimate image

- (1) A person (A) commits an offence if—
 - a. A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and
 - b. the distribution of the image would be contrary to community standards of acceptable conduct; and
 - c. A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.
- (2) A person who commits an offence against subsection (1) is liable to level 8 imprisonment (1 year maximum).
- (3) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit.

¹⁴ *Usmanov v R* [2012] NSWDC 290 (15 February 2012), discussed in Michael Salter, Thomas Crofts and Murray Lee, 'Beyond Criminalisation and Responsibilisation: Sexting, Gender and Young People' (2013) 24(3) *Current Issues in Criminal Justice* 301 at 311. See also Gotsis 2015.

¹⁵ *Summary Offences Act 1966* (Vic).

¹⁶ Added by the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), following a Victorian Law Reform inquiry into sexting: <http://www.parliament.vic.gov.au/57th-parliament/lawreform/article/944>

It is not known whether these new offences have been used in any successful prosecutions in Victoria. They are in addition to a range of pre-existing offences applying to voyeurism.¹⁷ Similar offences have been proposed in other States, such as South Australia.¹⁸

A difficult question is whether more serious offences should be available where the non-consensual distribution of intimate images is not only offensive according to community standards, but is deliberately done in order to humiliate or cause distress and emotional harm to the victim. This might be reflected in an aggravated form of the offence, or a factor to be taken into account in sentencing. Alternatively, it may be desirable to enact new offences relating specifically to the intended harmful effects of misuse of intimate images or other material. This option is discussed later in the submission.

Regulatory responses

In general terms, telecommunications services providers have some obligations to prevent their services from being misused for criminal activities. This is most clearly articulated in s313(1) of the *Telecommunications Act 1997* (Cth):

313 Obligations of carriers and carriage service providers

(1) A carrier or carriage service provider must, in connection with:

- a. the operation by the carrier or provider of telecommunications networks or facilities; or
- b. the supply by the carrier or provider of carriage services;

do the carrier's best or the provider's best to prevent telecommunications networks and facilities from being used in, or in relation to, the commission of offences against the laws of the Commonwealth or of the States and Territories.

Subsection (3) adds a statutory obligation to provide help to Commonwealth, State and Territory officers and authorities in the enforcement of criminal laws and safeguarding of national security. A recent inquiry into this subsection found that it was used mainly in relation to online fraud and child exploitation investigations,¹⁹ but clearly it could also apply to telecommunications misuses such as those criminalised under s474.17 of the *Criminal Code Act 1995* (Cth).²⁰ The latter legislation also has

¹⁷ *Summary Offences Act 1966* (Vic), Division 4A--Observation or visual capturing of genital or anal region and distribution of intimate images.

¹⁸ *The Advertiser*, SA News, 'South Australian Government moves to make 'revenge porn' a crime', 30 December 2015: <http://www.adelaidenow.com.au/news/south-australia/south-australian-government-moves-to-make-revenge-porn-a-crime/news-story/1b98fd867079f2369979667110888a74> ; note that South Australia already has some summary offences relating to distribution of invasive images: Gotsis 2015.

¹⁹ Parliament of Australia, House of Representatives Standing Committee on Infrastructure and Communications, *Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services*: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Infrastructure_and_Communications/Inquiry_into_the_use_of_section_313_of_the_Telecommunications_Act_to_disrupt_the_operation_of_illegal_online_services

²⁰ For example, the report noted at [2.4] that: 'The National Children's and Youth Law Centre (NCYLC) considered s.313 'an important mechanism in supporting young victims of internet-related crimes'. Section 313 provided 'a means by which to ensure internet service providers (ISPs) work with government officers and authorities to prevent the ongoing commission of crimes against children and young people in Australia''.

specific statutory reporting obligations in relation to child exploitation material, which could be extended to other forms of personally abusive and harassing online content.²¹

Mobile phone and Internet service providers, including social media operators, may already have contractual provisions specifying that users of their services are not 'to transmit, publish or communicate material which is defamatory, offensive, abusive, indecent, menacing or unwanted' or engage in similar misuse.²² Clearly, the use of communications technologies to post or distribute misuse of intimate images or other material can be in breach of such contracts. The extent to which responses such as termination of services, or warnings to desist with threat of termination, are used as a self-regulatory measure is unclear. There may also be considerable variation in the response levels of different providers.

Another approach is to focus on the harm of online distribution and persistence. Australian law allows for the Australian Communications and Media Authority (ACMA), and specifically the Office of the Children's eSafety Commissioner, to require the removal of certain material on the internet. The ACMA hotline deals with complaints about material that is in restricted categories of the National Classification Scheme and online content is investigated and actioned under the laws (collectively known as the Online Content Scheme) found in Schedules 5 and 7 of the Broadcasting Services Act 1992: OCESC (2016). The range of material that can be directed to be taken down, if hosted in Australia includes child exploitation material (as illegal content) and other sexually explicit material which may fall into the categories of refused classification or restricted (prohibited online if not subject to age-restricted access control). While not a criminal process, this regime allows for civil penalties to apply in relation to non-compliance.

The ACMA process is limited to material hosted in Australia. This reflects the general difficulty of regulating behaviour on the internet. A critical role is played by content hosts and the providers of particular applications, who in many instances, are not based in Australia or do not host the data for their services in Australia.

It is worth noting the greater responsiveness of a number of services to victim requests to remove or de-link misused images or other material. This responsiveness is a marked change from past practices for some services and is to be encouraged and promoted in the interests of users and the community generally. There remains sensitivity to restricting internet freedom but there are overwhelmingly compelling reasons to favour self-regulation of the misuse of intimate images or other material. Importantly, prompt action by a service that may be the first place such material is released is likely to have an enormous impact on the prospects of amplification of damage.

In addition to hosts and services, the browser services such as Google, Bing and Firefox are likely to play a valuable role in removing material from the results of web-searches: End Revenge Porn (2015). This is already the case in relation to the so-called 'right to be forgotten' developed as part of European jurisprudence: Kanamori, Kawaguchi, & Tanaka (2014) Bolton (2015).

²¹ See s474.25 (Obligations of internet service providers and internet content hosts), which imposes a monetary penalty of 100 penalty units for failure by an Internet Service Provider (ISP) or Internet Content Host (ICH) to report to the Australian Federal police (AFP) material reasonably believed to be child pornography or child abuse material.

²² As discussed in the 2013 Victorian Law Reform Committee's *Inquiry into Sexting*, at [7.3.1]: http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/LRC_Sexting_Final_Report.pdf

Educational responses

Some government-sponsored educational campaigns have been developed to warn those who share intimate images with others about the potential for further distribution, sometimes referred to as 'downstreaming', without their knowledge or consent: Urbas and Fouracre, 2013. An example is the Australian Federal Police / Microsoft-produced 'Megan's Story' video targeted at teenagers engaging in sexting.²³ A similar campaign in the United Kingdom promotes the message 'be aware b4 you share'.²⁴ Interestingly, neither educational campaign seeks to dissuade youngsters from sharing intimate images at all, but does direct their attention to the possible ramifications and asks them to be aware before engaging in the behaviour. Whether such campaigns have any demonstrable effects on teen behaviour is not known.

d. *the response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions*

As noted above, a number of existing Commonwealth, State and Territory offences already exist that may be applied to prosecute misuse of intimate images or other material offending, as a form of offensive online behaviour. However, none specifically targets misuse of intimate images or other material. By contrast, new laws have been introduced in some overseas jurisdictions.

In late 2014, the United Kingdom's Crown Prosecution Service (CPS) issued guidelines for prosecutors dealing with misuse of intimate images or other material cases,²⁵ and new legislation followed soon thereafter.²⁶ As noted at the beginning of this submission, section 33(1) of the *Criminal Justice and Courts Act 2015* (UK) now provides an offence specifically directed at disclosing private sexual photographs and films with intent to cause distress. Importantly, the latter intent requirement is not satisfied merely because the disclosure does in fact cause distress, in virtue of subs (8):²⁷

(8) A person charged with an offence under this section is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.

Thus, proof of the offence requires the prosecution to establish a specific intention to cause distress to the person depicted in the photograph or film.

If the Commonwealth wished to enact a similar offence under Part 10.6 of the Criminal Code, there would be two main ways in which this might be done:

²³ ThinUKnow: Megan's story: <http://www.thinkuknow.org.au/site/megans-story>

²⁴ Revenge porn: be aware b4 you share: www.gov.uk/government/publications/revenge-porn-be-aware-b4-you-share

²⁵ 'Crown Prosecution Service offers clear guidance for prosecutors on 'revenge pornography'', 6 Oct 2014: http://www.cps.gov.uk/news/latest_news/crown_prosecution_service_offers_clear_guidance_for_prosecutors_on_revenge_pornography/

²⁶ 'Revenge Porn: The Facts', with reference to the Ministry of Justice campaign 'Be Aware B4 You Share': https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405286/revenge-porn-factsheet.pdf

²⁷ Other defences and qualifications are found in subsections (2) – (7).

- (i) amend s474.17 to include an aggravated form of the offence where there is intention to cause distress or other specified form of harm; or
- (ii) enact an additional separate offence.

Of these, we recommend option (i) as the reform least likely to result in unintended consequences. The latter option has been explored in a Private Member's Bill.²⁸

An amended version s474.17 might be as follows:

474.17 Using a carriage service to menace, harass or cause offence

(1) A person is guilty of an offence if:

- a. the person uses a carriage service; and
- b. the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years.

(1A) A person commits an offence against this subsection if the person uses a carriage service as described in subsection (1) with intention to cause any other person distress or harm, including harm to that other person's mental health.

Penalty: Imprisonment for 7 years.

Note: For the meaning of *intention* see section 5.2. The terms *harm* and *harm to a person's mental health* are defined in the Dictionary.

(2) Without limiting subsection (1), that subsection applies to menacing, harassing or causing offence to:

- (a) an employee of an NRS provider; or
- (b) an emergency call person; or
- (c) an employee of an emergency service organisation; or
- (d) an APS employee in the Attorney-General's Department acting as a National Security Hotline call taker.

²⁸ Criminal Code Amendment (Private Sexual Material) Bill 2015, circulated by Tim Watts MP. See also: <http://www.abc.net.au/news/2015-09-03/labor-mps-propose-private-members-bill-banning-'revenge-porn'/6747764>

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