



Australian Women Against Violence Alliance

**Submission to the Senate inquiry
into “the phenomenon colloquially referred to as ‘revenge porn’”
14 January 2016**

Thank-you for the opportunity to contribute a submission to the Senate inquiry into ‘the phenomenon colloquially referred to as “revenge porn”, which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm’.

About the Australian Women Against Violence Alliance (AWAVA)

AWAVA is one of the five National Women’s Alliances funded by the Australian Government to bring together women’s organisations and individuals across Australia to share information, identify issues and their solutions, to respond to and prevent violence against women and their children. AWAVA’s role is to ensure that women’s voices and particularly marginalised women’s voices are heard by Government, amplifying the work of its member organisations and Friends and Supporters. AWAVA works towards this by harnessing the expertise of its members, consisting of specialist women’s services from the responding to violence against women sector, and working closely with government. Its members include organisations from every state and territory in Australia and represent organisations working on diverse issues including domestic and family violence, sexual assault, feminist pedagogy and women with disabilities.

Summary

The non-consensual sharing of intimate images is a serious and increasing problem, which disproportionately affects women and girls. It has damaging consequences that go beyond its potential impact on reputations and career prospects. Online interactions now constitute a major dimension of social life for many people, and the unauthorised sharing of intimate images can traumatise and isolate victims, which is often the intention of those who share the images. Furthermore, the non-consensual sharing of intimate images, or the threat to share such images, is increasingly used as a tactic of control in abusive relationships and in the perpetration of sexual assault. For this reason, efforts to reduce violence against women can be strengthened by legal sanctions against the non-consensual sharing of intimate images.

AWAVA supports moves to criminalise the non-consensual sharing of intimate images in Commonwealth law. The best protection in the Australian context will be achieved by a specific-purpose Commonwealth law mirrored by consistent and uniform State and Territory laws. Penalties for the offence should be substantial, reflecting the harm caused and the need to deter potential offenders. The definition of the offence should recognise that there are cultural and other differences in understandings of what is intimate or sexual. It should also focus on the potential harm caused to the victim, rather than the intention of the offender, with culpability framed in terms of recklessness with regard to the likely impacts on the victim, rather than depending on intention per se, which can be difficult to establish.

While “revenge porn” is a commonly used term, discussion for policy development should utilise clearer and less misleading terminology. As several submissions have pointed out, revenge is just one of various possible motives for the non-consensual sharing of intimate images, alongside control

and intimidation. The term “porn” may inadvertently reinforce the view that people whose intimate images are misused were somehow responsible for this misuse, because they supposedly “consented” to the creation of the image. In this submission we use the description “non-consensual sharing of intimate images”.

Our submission has been endorsed by the Young Women’s Advisory Group of the Equality Rights Alliance (ERA) (see attached letter of endorsement). Like AWAVA, ERA is one of the National Women’s Alliances funded by the Commonwealth Office for Women to provide advice and advocacy on issues of gender equality and policy development as it affects women in Australia. AWAVA also commends to the Committee the submissions made by YWCA Adelaide, Women’s Legal Service NSW and Top End Women’s Legal Service, which have helped to inform our own submission.

Specific comments

AWAVA made a submission in response to the Exposure Draft of the Criminal Code Amendment (Private Sexual Material) Bill 2015, and this submission is appended below. The comments made in that submission are relevant to the current inquiry and we ask that the Committee consider them in their deliberations for this inquiry. Additional comments are as follows.

Context: technology-facilitated abuse and violence against women

As Henry and Powell (2015) note, the non-consensual sharing of intimate images should not be seen as just an issue of “sexting” among young people.¹ Rather, it overlaps with and shares important features with technology-facilitated gender-based violence more generally. In particular, the non-consensual sharing of intimate images, and the threat to share such images, occurs in the context of the sexual double standard, which unfairly judges women but not men for enjoying their sexuality, and is often a dimension of controlling/coercive behaviour in ongoing relationships as well as relationships that are breaking down or have ended.²

In terms of sexual assault, technology is another weapon with which assault is perpetrated (as with “drug-facilitated sexual assault”). At Canberra Rape Crisis Centre (CRCC), for example, young women have now overtaken mature/older women as the largest group accessing services, due in large part to the impacts of trauma where sexual violence and technology violence are among the dynamics present. While the role of technology in domestic and family violence is becoming more widely understood, the kinds of cases to which CRCC responds are not included in domestic violence statistics, since the relationships involved are often not formal or legitimised, unlike ‘domestic’ relationships.

Throughout 2015, AWAVA’s lead agency, Women’s Services Network (WESNET), together with Domestic Violence Resource Centre Victoria, the Australian Communications Consumer Action Network and Women’s Legal Services NSW engaged in the Recharge Project. This project included a national survey on technology-facilitated stalking and abuse, which found that 98% of the 546 domestic violence workers surveyed reported they had clients who had experienced technology-facilitated stalking and abuse.³

¹ Henry, N. & Powell, A., Beyond the ‘sext’: Technology-facilitated sexual violence and harassment against adult women, *Australian & New Zealand Journal of Criminology*, March 2015, 48: 104-118.

² Ringrose, J., Gill, R., Livingstone, S. & Harvey, L. ‘A qualitative study of children, young people and 'sexting': a report prepared for the NSPCC’. National Society for the Prevention of Cruelty to Children, London, UK 2012.

³ DVRCV/Delanie, SmartSafe Survey for Australian Support Workers (2015).

As our member organisation DV Vic notes in their submission, “the dynamics around coercion and control that are particular to a family and domestic violence context may place women experiencing family violence at greater of risk of being subject to ‘revenge porn’ by their partners or ex-partners”. Therefore, they argue, “it is critical that an understanding of family violence, with its particular dynamics of coercive and controlling behaviours that undermine women, their rights and personal agency, are central to an understanding of, and responses to the issue of ‘revenge porn’.” AWAVA endorses these comments by DV Vic.

Young women

Young women are at particular risk of having intimate images of themselves shared without their consent. As YWCA Adelaide points out in their submission, women and girls are the primary targets of non-consensual pornography, and young women are more likely than young men to send explicit images of themselves, often due to pressure from peers or male partners.⁴ As noted above, technology-facilitated sexual assault against young women is also an increasing concern.

YWCA Adelaide reports on their engagement with thousands of young women annually, confirming that these young women are increasingly concerned about the sharing of intimate images without their consent, about threats of such sharing, and about their feelings of helplessness and uncertainty in these situations.

A nation-wide survey in 2014 of young women and girls aged 15-30 years (SHE Speaks), found that 34% of survey respondents said they had received uninvited and/or unwanted indecent or sexually explicit text messages, while 30% said that they felt unable to seek help when experiencing violence in their relationships.⁵

These findings highlight that the non-consensual sharing of intimate images, and technology-facilitated abuse more generally, are real threats and concerns for young women, constituting major barriers to the full enjoyment of social life and autonomy.

Consent

As we noted in our 2015 submission on the draft bill (see below), AWAVA supports a definition of the offence in which the threshold is that a perpetrator has been “reckless as to a subject’s lack of consent”.

As decades of prosecution of sexual assault cases have shown, it is often difficult to establish non-consent. While the law is gradually improving its treatment of the issue of consent in sexual assault, legislation has not kept up with technological developments. Scholars such as Michael Salter have noted that a woman’s consent to share an intimate image with another particular person or people should not be interpreted as a more general license to share the image, yet legal systems have tended to reinforce a “pejorative view of women who engage in sexual behaviour that is considered immodest or unfeminine, or even an implicit endorsement of their punishment by others.”⁶ It is vital

⁴ Citron, D. K., & Franks, M. A. (2014). Criminalizing revenge porn. *Wake Forest Law Review*, 49, 345; Henry & Powell (2015); Ringrose, Gill, Livingstone & Harvey (2012).

⁵ She Speaks Report 2014, <http://www.ywca.org.au/sites/ywca.org.au/files/docs/She%20Speaks%20Survey%202014%20Final.pdf>

⁶ Salter, M. ‘Responding to Revenge Porn; Gender, Justice and Online Legal Impunity’, *Global Criminology*, published Nov 2013 <http://www.globalcriminology.com/main/criminology-articles/cybercrime/56-responding-to-revenge-porn-gender-justice-and-online-legal-impunity-by-michael-salter?showall=&limitstart=>

that in any national legislative response, the onus of proof is not placed on victims in a way that perpetuates this misogynistic double standard.

The definition of consent should also be attentive to factors including disability, duress and deception, domestic violence context and age. More generally, as WLSNSW has noted, further consideration should be given to the impact of the legislation on minors, noting that young women under the age of 18 are increasingly at risk of technology-assisted sexual violence.

Thank-you once again for inviting AWAVA to provide a submission for this inquiry. We would welcome the opportunity to discuss the issues further. For further information or to discuss the content of this submission, please contact Merrindahl Andrew, AWAVA Program Manager, or Julie Oberin, AWAVA Chair, by phoning 0428 541 369.

Yours faithfully,

Australian Women Against Violence Alliance (AWAVA)

Merrindahl Andrew
Program Manager

Appendix

2 October 2015
Mr Tim Watts MP
Federal Member for Gellibrand
Australian Labor Party

By email: Tim.Watts.MP@aph.gov.au

Dear Mr Tim Watts and Ms Terri Butler,

Exposure Draft of Criminal Code Amendment (Private Sexual Material) Bill 2015

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AWAVA works towards this by harnessing the expertise of its members, consisting of specialist women's services from the responding to violence against women sector, and working closely with government. Its members include organisations from every state and territory in Australia and represent organisations working on diverse issues including domestic and family violence, sexual assault, feminist pedagogy and women with disabilities.

Introduction

AWAVA welcomes the opportunity to comment on the Exposure Draft of Criminal Code Amendment (Private Sexual Material) Bill 2015.

We support the intention to criminalise in Commonwealth law the non-consensual sharing of intimate images and we commend the efforts made to develop the Bill so far. The following comments are intended to further strengthen these efforts and help ensure that any legislation that results is as fair and effective as possible. We acknowledge that the opportunity for legal redress is just one of the necessary changes, and that cultural and political change will be needed whatever legal reforms might be made.

AWAVA supports the submission of our member organisation, Women's Legal Services NSW. WLSNSW's submission supports the intention of the Bill, and details a number of concerns and issues for consideration. We also commend to the Bill's sponsors the submission provided by the Sexual Assault Support Service (Tasmania), another of AWAVA's members.

The need for new legislation

The non-consensual sharing of intimate images, sometimes called 'revenge porn', overwhelmingly targets women and is part of broader patterns of male domination and misogyny. As the *Recharge: Women's Safety Technology* project has identified, digital technologies have created new means for old behaviours of control, humiliation and isolation. Like other forms of gender-based violence, the harms inflicted by the non-consensual sharing of intimate images are both consequences and causes of inequality. Therefore efforts to eliminate such image-sharing have a significance beyond just the prevention and punishment of individual offences.

Recently, governments in Australia and overseas have acted to criminalise the non-consensual sharing of intimate images. Although recourse through civil actions is already an option in many places, and has been used successfully at times, it is of limited benefit due to the high financial cost that must be borne by victims and because civil law lacks the deterrent effect of criminal law.⁷

While Commonwealth law already makes it a crime to use a carriage service to menace, harass or cause offence, this law has not been widely used to prosecute the non-consensual sharing of intimate images. New efforts to introduce relevant offences into criminal law reflect recognition of these limitations. So far in Australia, South Australia has criminalised the distribution of 'invasive images' (in 2013) and Victoria did the same for 'intimate images' in 2014. Internationally, the UK outlawed 'revenge porn' in 2015 and to date 24 states in the United States have introduced relevant laws. Legislation has been proposed to make it a federal offence in the US as well.⁸

AWAVA believes that the best protection in the Australian context will be achieved by a specific-purpose Commonwealth law mirrored by consistent and uniform State and Territory laws, to ensure laws cover situations where image-sharing occurs without the use of a carriage service as well as situations where sharing is done through a carriage service.

Terminology and focus

AWAVA commends the Bill's sponsors for making it clear that the intention is not to limit its application to 'revenge' as a motive and is instead to focus on the likely impact and harm caused by specific acts. The language with which we discuss the issue needs to shift in this direction too. As legal scholars Anastasia Powell and Nicola Henry point out:

[I]ntimate images are also being used in domestic violence and sexual assault situations to blackmail victims, or to discourage them from seeking help from the police. It's not just 'revenge' towards an ex-lover that motivates perpetrators of these harms. In many cases, it is part of a pattern of abuse against women.⁹

Defining the offence

As WLSNSW's submission also recommends, AWAVA believes consideration should be given to extending the definition of intimate images to include those of a 'non-sexual' nature, especially where the sharing of such images occurs within a domestic violence context. Such consideration would need to address the fact that there are cultural differences in what might be considered 'intimate' or 'sexual'. The definition of what constitutes intimate sexual images should also reflect the different ways in which transgender and intersex people experience their bodies.

AWAVA is concerned that the legislation as proposed appears to exclude images that have been altered. Given the nature of the technologies available and the widespread use of software such as Photoshop, we believe this exception may give perpetrators a ready means to avoid conviction, while otherwise continuing the offensive behaviour. In substantive terms, the fact that an image has been altered, or is even composed of images taken of different women, does not diminish the potential harm resulting from its dissemination.

⁷ Jessica Lake, How making 'revenge porn' a federal crime would combat its rise, *The Conversation*, September 21, 2015, <http://theconversation.com/how-making-revenge-porn-a-federal-crime-would-combat-its-rise-47557>

⁸ Lake 2015.

⁹ Anastasia Powell and Nicola Henry, More than revenge: when intimate images are posted online, October 20, 2014, <http://theconversation.com/more-than-revenge-when-intimate-images-are-posted-online-32948>

Protections for the media

Like WLSNSW, we cannot envisage a situation in which it would be justified for a media organisation to disseminate private sexual material and therefore question the need for this defence.

Consent

AWAVA supports the inclusion of image-sharing that is 'reckless as to a subject's lack of consent'. As decades of prosecution of sexual assault cases have shown, it is often difficult to establish non-consent. The definition of consent should also be attentive to factors of disability, duress and deception, domestic violence context and age. More generally, as WLSNSW notes, further consideration should be given to the impact of the legislation on minors, noting that young women under the age of 18 are increasingly at risk of technology-assisted sexual violence.

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