

DIRECTOR'S CHAMBERS



DATE
18 January, 2016

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra
ACT

By Email to: legcon.sen@aph.gov.au

Dear Ms Dunstone

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.

Thank you for your invitation to make a submission for the above Inquiry. In the Director's absence I provide the following response for the Committee's communication.

The NSW ODPP's submission addresses terms of reference (c) of the inquiry, namely, potential policy responses via criminal remedies and (d), the response to revenge porn taken by parliaments in other Australian jurisdictions and comparable overseas jurisdictions.

The ultimate position of this Office is that a specifically targeted criminal offence would fill a gap within the existing law and go some way to addressing what is a growing – and highly damaging – concern within society.

1. The “Offence”

The concept of “revenge porn” (hereafter referred to as revenge porn) involves the sharing of naked or sexual or sexually explicit images, most often by persons previously in an intimate/sexual relationship with the person depicted in the images, without the consent of that person, in order to extract “revenge” by causing, for example, humiliation and embarrassment to that person.

Where the persons involved are still in a relationship, “revenge porn” should be characterised as a form of domestic violence.

This phenomenon is largely a creation of the digital age and, in the majority of cases, involves an image taken with initial consent of the victim and then unknowingly shared by the offender to others. However occasionally, the image is taken without the consent or knowledge of the person depicted.

Revenge porn involves the dissemination or ongoing dissemination of the image, whether photograph or video, on social media (Facebook, Instagram, Snapchat, etc) or via more traditional electronic means (text or email) or by uploading to websites specifically created to host such material.

The dissemination made without the consent (or knowledge) of the victim (who is usually female), can be general or targeted, to for example, the victim's family or employer.

The aim of the dissemination, is to cause, for example, humiliation, distress, embarrassment, and shame and, often, to invite negative comments and attack or bullying from those who view the images. The result of the dissemination usually aligns with the aim. Additionally, victims often suffer anxiety related to who has seen the images, depression and other serious psychological harm.

2. The Law

Presently, options under Commonwealth legislation in relation to proceeding for revenge porn include, most relevantly, Use of a Carriage Service to Menace, Harass or cause offence, 474.17 of the *Criminal Code Act 1995*, which reads:

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.

(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.

The offence is not specifically targeted at "revenge porn" because largely it pre-dates the phenomenon. The present offence requires a reasonable person test linked to the stated harms, which are of limited scope and do not encapsulate all types of harm done by the dissemination and sharing of revenge porn, such as causing, for example, humiliation, embarrassment, distress or shame, although they could arguably be caught to some extent by the stated harms.

Sub-section (2), whilst not limiting sub-section (1), targets behaviour that would not constitute revenge porn, because it is linked to a person's occupation.

By contrast, South Australia and Victoria are local jurisdictions where laws specifically targeting revenge porn have been enacted.

South Australia introduced legislation in 2013, via s26C of the *Summary Offences Act 1953*, which relevantly reads:

26C—Distribution of invasive image

(1) A person who distributes an invasive image of another person, knowing or having reason to believe that the other person—

(a) does not consent to that particular distribution of the image; or

(b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally,

is guilty of an offence.

"invasive image" means a moving or still image of a person—

(a) engaged in a [private act](#); or

(b) in a state of undress such that the person's bare genital or anal region is visible,

but does not include an image of a person under, or apparently under, the age of 16 years or an image of a person who is in a [public place](#);

Maximum penalty: \$10 000 or imprisonment for 2 years.

The South Australia definition of “distribute” includes communicate, exhibit, send, supply, upload or transmit and make available for access by another. A “private act” means a sexual act not “ordinarily done in public” or using the toilet.

The South Australian legislation requires that the offender knows or has “reason to believe” that the victim is not consenting. In my opinion the preferable test with respect to consent should be that the image is simply sent without consent, and consent should not equate to explicit or express consent from the victim to that particular distribution at that particular time. The onus should be upon the offender to prove such consent was given.

Victoria introduced legislation in 2014, via 41DA of the *Summary Offences Act 1966*, which relevantly reads:

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.

Section 40 of the Act defines the following terms used in s41DA:

community standards of acceptable conduct, in relation to the distribution of an intimate image, includes standards of conduct having regard to the following—

(a) the nature and content of the image;

(b) the circumstances in which the image was captured;

(c) the circumstances in which the image was distributed;

(d) the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image;

(e) the degree to which the distribution of the image affects the privacy of a person depicted in the image;

distribute includes—

- (a) publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not; and
- (b) make available for access by any other person,

intimate image means a moving or still image that depicts—

- (a) a person engaged in sexual activity; or
- (b) a person in a manner or context that is sexual; or
- (c) the genital or anal region of a person or, in the case of a female, the breasts;

The concept of consent in this legislation by virtue of the victim “reasonably be considered to have expressly or impliedly consented” is not supported because it could give rise to issues where the victim has been the initial disseminator of the image. As indicated above, I believe that there has to be explicit, and expressed consent before it can be said to have been given.

At the same time s41DA was introduced, Victoria also made it an offence to threaten to distribute an intimate image. This provision supported because a threat to distribute an image which would constitute revenge porn would, I believe, cause significant emotional and psychological harm in its own right. (Section 41DB(1)).

I note that in early 2015 the United Kingdom introduced a law specifically targeting revenge porn, categorised as the disclosure of a “private sexual photograph or film” without the consent of an individual who appears and with the intention of causing distress. “Private” is defined as something not “ordinarily seen in public” and “sexual” as something that shows genitals or something a reasonable person would consider sexual because of its nature or the content taken as a whole. (s33(1) *Criminal Justice and Courts Act 2015 UK*)

The UK legislation includes intention as an element of the offence, which in my view is not considered necessary. Absent specified uses, there can be no intent other than to cause, for example, humiliation, embarrassment, distress or shame to the victim by the dissemination or distribution of the image. Specified uses would include things such as law enforcement or investigation and prosecution and perhaps medical or scientific use, although presumably consent would have been obtained in these cases.

3. What type of offence?

An offence designed to specifically target revenge porn would, in my submission, criminalise:

- The distribution of an image, without consent, to which a person depicted in the image has a reasonable expectation of privacy.
- Distribution should be given a wide definition to incorporate traditional and new technologies loosely caught by the concept of “social media” and to capture emerging technologies. Consideration could perhaps also be given to whether the situation where a person sends an image to another person, intending that that person alone sees the image, but that person shows (rather than sends) the image to others, should also be captured.
- Image should include still (photographs) and moving (film/video) images.
- Consent would need to be explicit/express and would need to be consent to that particular image at that particular time and in the manner used. The onus would be on the offender to prove consent.
- A reasonable expectation of privacy would include such things as, an image in which:

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- A person is depicted naked or partially naked, irrespective of whether their genitals are exposed and irrespective of the type of pose the person has adopted;
 - A person is depicted engaged in a sexual act/activity, irrespective of whether their face is visible;
 - A person is depicted in a way which, by the context or content, would suggest that the image is of an intimate or private nature such as images depicting a person dressed in lingerie, or in a sexual pose.
- The list of examples should be a non-exhaustive list.
 - No intent should be required. As I mentioned above, there can be no innocent intent. The only inference available is that the person intends to do the harm, there can be no other reason for distributing the image.
 - Specific exceptions, as mentioned above, would apply in order to facilitate, for example, investigation by police and prosecution of an offender.
 - The offence, in my submission, should be dealt with in the Local Court as a summary offence, with a two-year maximum penalty but any limitation period for the filing of process should be at least two years, as not all material is posted immediately upon a relationship breakdown and often, victims are not immediately aware of the distribution of the image or images.
 - Consideration could be given to having the matter dealt with on indictment for any second or subsequent offence. The offence could be the subject of an election by the prosecution.
 - Consideration should also be given to excepting the distribution of child abuse material from the offence as the Victorian and South Australian offences do.
 - In my view the criminalisation of revenge porn should be accompanied by a wide-ranging education program aimed at deterring people from committing the offence as well as warning people of the possible consequences of the sharing of intimate or sexual images or “sexting”.

In conclusion, a specifically targeted criminal offence would fill a gap within the existing law and go some way to addressing what is a growing – and highly damaging - phenomenon.

Yours faithfully

Keith Alder
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