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SUBMISSION TO

Phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm

Submitted by:	Victorian Women Lawyers Association Inc (VWL)
Submitted electronically to:	Legal and Constitutional Affairs References Committee Committee Secretary Senate Legal and Constitutional Affairs Committee PO Box 6100 Parliament House Canberra ACT 2600



About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 500 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community. VWL has undertaken research into work practices affecting women in the legal profession, and provided protocols and training to effect change.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab.

Private sexual material - overview

Since forming in 1996 VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in law and in the legal system, and achieving justice and equality for all women.

VWL welcomes the opportunity to make this submission to the Legal and Constitutional Affairs References Committee and supports the creation of specific criminal offences at the Commonwealth level to deal with 'revenge porn'. We believe that there is currently a gap in the law in relation to this issue and that it ought to be addressed in order to protect women from an emerging form of intimate partner violence.

VWL considers that revenge porn is a form of family violence and sexual assault and is therefore gendered violence.¹ VWL hopes that any law reform in relation to this issue will be inclusive and sensitive to the needs of victims. VWL also hopes that legislative change will be part of a broader policy approach including providing funding to appropriate programs, encouraging corporate responsibility, and community education to address gender violence and victim blaming.

Comments on the issues for consideration

1. 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

VWL supports the introduction of an offence in relation to threats to share private sexual material. A similar offence was introduced in Victoria in 2014 but requires the victim to believe the threat will be carried out. VWL believes that any formulation of an offence should not require the victim to establish such a belief.

VWL is not in favour of any requirement that the threat be carried out using a carriage service. This would exclude verbal threats made in an intimate relationship in order to coerce

¹ See Victorian Law Reform Committee, 'Enquiry into sexting' (2013)



or control the victim. VWL considers that consideration is required in relation to whether all threats should be included, regardless of the method of delivery.

Any offence that is introduced should be capable of application to a third party revenge porn situation. It is important that women be protected from all forms of intimidation and sexual violence, even if it does not directly involve their own sexual images.

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

VWL disagrees with any requirement to show that the victim suffered distress. VWL considers that the absence of consent should be sufficient. Further, there should be no requirement to demonstrate distress or harm as the threat to distribute should be sufficient to constitute an offence. The Victorian sexting laws do not require the demonstration of harm or distress as an element of the offence.

In prosecuting other forms of sexual assault the impact on the victim, while relevant, is not a necessary element of the offence. Providing evidence of the harm or distress also has the potential to cause further harm to the subject of the material. VWL recommends further consideration of whether the requirement to demonstrate harm or distress is necessary.

VWL has concern about the use of the term 'revenge porn'. In particular, the term 'porn' imputes a subjective meaning to private sexual material. Such a meaning may or may not be intended by the person who is the subject of the private sexual material, however that meaning should not be imputed once the material is no longer private and the material is no longer held in the context in which it was created or initially shared.

The above considerations raise potential for victims to be blamed for non-consensual distribution of what would otherwise be private material. The problem is in the practice of distribution, not the content of the material. Any legislative response should be targeted solely at the practice.

3. Potential policy responses to this emerging problem, including civil and criminal remedies

The law needs to respond to such criminal behaviour by condemning it and providing victims with suitable avenues to seek remedies which will hopefully act as a deterrent for potential perpetrators. In order to best address incidents of revenge porn, a legal approach must be found that offers both legal recourse for victims and creates law that provides a deterrent.

VWL supports the policy approach currently being considered by the Committee, namely the proposed Criminal Code Amendment to criminalise revenge porn. VWL believes that a criminal offence will offer the best type of remedy for victims and will provide greater access to justice. Furthermore, a criminal offence would provide a clear statement of condemnation of acts of revenge porn on behalf of the federal government. It would also encourage the community to become more educated about the problem. The definition and details of the offence will need to be carefully formulated in order to be beneficial for victims and provide adequate recourse. For more detail, please see Appendix 1 containing VWL's submission to



the Australian Labor Party in relation to the Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft.

By contrast, civil remedies are likely to be prohibitively expensive and inaccessible for most victims of revenge porn. A privacy tort may provide redress for some victims but VWL is of the opinion that it should not be the focus of policy development.

It must be noted that despite the need for the law to institute change and provide protection for victims of revenge porn, private actors can also play a role. Companies such as Google, Facebook and other platforms that allow for distribution of images of private sexual material, should be required to assist prosecutors of revenge porn crimes.

As mentioned above, the VWL urges legislative change to occur as part of a broader policy approach including funding appropriate programs, encouraging corporate responsibility, and community education to address gender violence and victim blaming.

4. The response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions

Australian state jurisdictions²

South Australia and Victoria are examples of jurisdictions with criminal offences specifically tailored towards 'revenge pornography'.

The South Australian legislation focuses on the consent of the person who is depicted in the private sexual material, which VWL supports.

The Victorian offence was introduced in 2014, but requires the victim to believe the threat will be carried out. VWL believes that any formulation of an offence should not require the victim to establish such a belief.

In New South Wales, whilst there are no provisions specifically directed at this issue, the criminal code provides that a 'person who publishes an indecent article is guilty of an offence'. Successful prosecution of offenders under this section includes a man who posted naked images of a former intimate partner to Facebook.³

United Kingdom

The UK criminal offence requires the offender to have the intention of causing distress to the person who appears in the photograph or film. As explained above, VWL believes the offence should focus on the practice, rather than the intended impact on the victim.

² NSW Parliamentary Research Service, *Revenge pornography, privacy and the law*, July 2015, available at: [http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/Revengepornographyprivacyandthelaw/\\$File/revenge+pornography+privacy+and+the+law.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/Revengepornographyprivacyandthelaw/$File/revenge+pornography+privacy+and+the+law.pdf)

³ *Usmanov v R* [2012] NSWDC 290.



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Japan

In 2015, Japanese law was amended to make it a crime to disclose sexually explicit images or videos of former spouses or friends who can be identified to an unspecified number of people. The law also allows internet service providers to delete suspected revenge porn images without the uploader's consent, if the images are still there two days after a complaint is made. VWL supports allowing third parties to delete suspected revenge porn images in certain circumstances.

Canada

Amendments to the Canadian criminal code in 2015 now make it an offence to publish, distribute and transmit videos or photos of a person in an intimate setting without that person's consent. VWL supports this formulation.

Israel

In 2014, new Israeli law was passed to make it an offence to post sexually explicit media without the depicted person's knowledge or consent. The law also covers content shared on social media.

The law stipulates that those found guilty of posting such content will be prosecuted as sexual offenders, while those who are targeted will be recognised as victims of sexual assault. VWL supports this formulation of offenders and victims, as it falls within a broader framework of criminal law and policy applicable to sexual offences.

Philippines

The Philippines introduced a specific revenge porn law in 2009, which applies regardless of whether the original image was taken with permission or not. VWL supports this formulation.

United States

A number of US states now have specific revenge porn legislation, but some only apply if the images were taken without the consent of the person shown. VWL does not recommend such a formulation.

5. Any other related matters.

The meaning of 'private sexual material'

Human sexuality is complicated, and the definition of private sexual material should reflect this. It needs to take into account the intent of both the creator of the material and the 'consumer'. It also needs to take into account the multicultural nature of Australian society. We note that different cultures have different definitions of sexuality and different ideas of what constitutes a sexual feature. For instance, in some cultures, a woman's hair is considered sexually attractive. Any definition of 'private sexual material' needs to recognise these differences and make sure that it protects all people from revenge porn. The phrase 'sexual pose or sexual activity' should be clearly defined to note the context of the material, including the cultural context, for this reason.



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Further, any definition of 'private sexual material' also needs to be trans-inclusive. The proposed definition contained in the Commonwealth draft bill includes material that depicts 'the breasts of a female person.' VWL queries whether this would include female-identifying people.

VWL is concerned that exceptions to any definition will encompass material that perhaps should not be excluded from the definition of private sexual material. In particular, circumstances where material from two or more sources has been combined. For example, where Person A's head or face is edited ('photoshopped') onto an image of Person B engaging in sexual activity or in a sexual pose. Given the standard of photo editing available to the general public, it is possible that those who view or distribute an edited image may not be aware that such editing has taken place. If the perception is that the image depicts Person A only, the effect on Person A may therefore be the same as or potentially greater than if it did in fact, only depict Person A. VWL recommends that consideration be given to what kinds of altered or combined images are intended to be encompassed within the definition of private sexual material.

Concluding remarks

Revenge porn is a significant issue that must be addressed as soon as possible. The repercussions of this ugly conduct towards (primarily) women is grave and needs to be remedied when it does occur. Developing the law in a broad way is necessary in order to punish, deter and respond to revenge porn. VWL believes that the focus of any government policy response should be on providing criminal remedies for victims. Whilst civil remedies would offer legal avenues for victims, they would be sought at considerable risk and expense through lawsuits, which is not an option that is available to all women.

Stephanie Milione
Convenor, Victorian Women Lawyers (VWL)

Sophie Brown
VWL Law Reform Committee



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Appendix 1

SUBMISSION IN RELATION TO

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

Submitted by:	Victorian Women Lawyers' Association Inc
Submission date:	2 October 2015
Submitted to:	The Australian Labor Party



About us

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Private sexual material - overview

Since 1996 VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, and achieving justice and equality for all women.

VWL welcomes the opportunity to make this submission to the Australian Labor Party (**ALP**) in relation to the exposure draft of the Criminal Code Amendment (Private Sexual Material) Bill 2015 (**Draft Bill**).

VWL supports the creation of specific criminal offences at the Commonwealth level to deal with 'revenge porn', as is proposed under the Draft Bill. We believe that there is currently a gap in the law in relation to this issue and that it ought be addressed in order to protect women from an emerging form of intimate partner violence.

VWL considers that revenge porn is a form of family violence and sexual assault, and that accordingly it constitutes gendered violence.¹ VWL hopes that any law reform in relation to this issue will be inclusive and sensitive to the needs of victims. VWL also hopes that legislative change will be part of a broader policy approach, including funding of appropriate programs, encouraging corporate responsibility and community education to address gender violence and victim blaming.

Comments on the issues for consideration

1. Threats to share private sexual material

VWL supports the introduction of an offence in relation to threats to share private sexual material. A similar offence was introduced in Victoria in 2014 under the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014, which amended the *Summary Offences Act 1966* (Vic) and the *Crimes Act 1958* (Vic). However, that offence requires the victim to believe that the threat will be carried out. VWL agrees with the Draft Bill's formulation of the offence, in that it does not require the victim to establish such a belief.

Nevertheless, VWL is concerned by the requirement that the threat be carried out using a carriage service. This appears to exclude verbal threats made in an intimate relationship in order to coerce or control the victim. If so, **VWL considers that further consideration should be given to including all threats, regardless of the method of delivery.**

Any offence that is introduced should apply to third party revenge porn situations. It is important that women be protected from all forms of intimidation and sexual violence, even if it does not directly involve their own sexual images.

¹ See discussion in Victorian Law Reform Committee, 'Enquiry into sexting' (2013)



2. The meaning of 'private sexual material'

The current definition of 'private sexual material' in the Draft Bill includes a number of requirements. Human sexuality is complicated, and the definition of 'private sexual material' should reflect this.

The definition needs to take into account the intent of both the creator of the material and the 'consumer' of the material. It also needs to take into account the multicultural nature of Australian society. We note that different cultures have different definitions of sexuality and different ideas as to what constitutes a sexual feature. For instance, in some cultures, a woman's hair is considered sexually attractive.

Any definition of 'private sexual material' needs to recognise cultural differences and ensure that all members of the community are protected from revenge porn, as it may be experienced by them.

In particular, the phrase 'sexual pose or sexual activity' should be clearly defined to note the context of the material, including the cultural context.

Further, any definition of 'private sexual material' should be trans-inclusive. The current definition refers to material that depicts 'the breasts of a female person.' VWL queries whether this would include a female-identifying person.

VWL is concerned that the exceptions in subsection 474.24D(4) of the Draft Bill could potentially encompass material that ought not be excluded from definition of 'private sexual material'. In particular, composite material created from the combination of material originating from two or more separate sources.

For example, where Person A's head or face is edited (or 'photoshopped') onto an image of Person B engaging in sexual activity or in a sexual pose. It appears this may not be considered private sexual material depicting Person A as it would fall within the exception set out in subparagraph 474.24D(4)(b)(iii); that is, it is only because of the combination of the two images that it depicts Person A.

Given the standard of photo editing readily available to members of the community, it is possible that those who view or distribute an edited image may not be aware that such editing has taken place. In the above example, if the perception is that the image is a depiction of Person A (and Person A only), the effect on Person A may be the same as, or potentially greater than, the effect on them where the image actually depicted Person A only. **VWL recommends that consideration be given to the kinds of altered or composite images that are intended to be encompassed within the definition of 'private sexual material'.**

3. Intentions of perpetrators and effects on victims

The proposed offence under the Draft Bill requires, as an element of the offence, that the conduct causes, or there is a risk that it will cause, distress or harm to the subject of the material. In prosecuting other forms of sexual assault the impact on the victim, while relevant, is not a necessary element of the offence. **VWL proposes that the requirement of demonstrating distress or harm be reconsidered and further, that the absence of consent should be sufficient grounds for the establishment of the offence.**

Relevantly, the requirement to demonstrate distress or harm is inconsistent with the 'threaten to distribute' offence under subparagraph 474.24F which does not require harm to be demonstrated – rather, only that the threat occurred. Another relevant comparison is the



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Victorian offence under section 41DA(1) of the *Summary Offences Act 1956* (Vic) which do not require the demonstration of harm or distress as an element of establishing the offence.

Concluding remarks

VWL supports the introduction of the Draft Bill. VWL's main concern in relation to the Draft Bill is to ensure that the broad range of conduct that may potentially constitute revenge porn is captured by the amendments to the Criminal Code.

Our suggestions above are aimed at ensuring that the concept of private sexual material appropriately reflects cultural and diverse gender and sexuality differences, that unlawful threats should not be limited by the method of their delivery and that the effect on victims should not be a factor in establishing the offence.

Victorian Women Lawyers
2 October 2015