

## INQUIRY INTO REVENGE PORN IN AUSTRALIA

# SUBMISSION TO THE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

January 2016



## Victim Support Service Inc (SA)

Victim Support Service (VSS) is a statewide, community based not-for-profit organisation in South Australia that provides practical and therapeutic support to more than 40,000 victims and witnesses of crime each year in South Australia.

VSS services include:

### Information and advocacy

- Information about victims' rights and services available in SA through a statewide victim helpline and network of service centres
- A victimology Resource Centre with free Borrowers' Club
- Consultancy, community education and training services
- Advocacy and the promotion of victims' rights

### Therapeutic Intervention

- Professional counselling and support groups
- Specialist support for adult co-victims of homicide
- Support services funded by the Royal Commission into Institutional Responses to Child Sexual Abuse

### Practical Assistance

- Assistance with Victims of Crime compensation claims
- Assistance with the preparation of Victim Impact Statements
- Court Companion Program to support victims and their families when attending court or family conferences
- Safety assessments and supports to increase personal safety and reduce fear of crime

### Support for victims of family/domestic violence

- Home security through the 'Staying Home, Staying Safe' (SHSS) program
- Statewide administration of Family Safety Framework meetings
- Women's DV Court Assistance Service

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## Overview

Revenge porn (Henry & Powell, 2015) is a term used to describe the distribution of sexually explicit or intimate images of another person without their consent.

There is much academic debate surrounding the use of the term 'revenge porn' to describe the non-consensual sharing of private images and recordings. Some researchers argue that not all acts of this kind are motivated by revenge (Henry & Powell, 2015; Henry, Powell & Flynn, 2015). Equally, other scholars argue that not all images are used for the purpose of pornography (Citron & Franks, 2014; Burns, 2015). In recognition of the Committee's use of the term 'revenge porn', we will use this term and 'image-based sexual exploitation' interchangeably in this submission.

Several VSS clients have reported perpetrators using revenge porn to threaten harm or cause actual harm, particularly in the context of family/domestic abuse. To ensure the voices of victims are heard by the Committee, we have included two case studies to demonstrate the devastating impact of revenge porn on individuals and their families.

The impact of revenge porn on victims can have long-term, catastrophic consequences for victims' emotional, physical, financial and social wellbeing. Currently the Australian criminal law does not serve victims of this form of crime well.

Going forward, legal and policy responses to the issue of revenge porn must be informed by the experiences, rights and service needs of victims.

## Recommendations

**Recommendation 1:** That States and Territories collect data on revenge porn incidents to provide an indication of the extent of the problem and allow for the effectiveness of policies and programs to be measured.

**Recommendation 2:** That all Australian jurisdictions use the term 'intimate images' in revenge porn legislation.

**Recommendation 3:** That a wide range of criminal and civil remedies are made available in response to revenge porn across all Australian jurisdictions.

**Recommendation 4:** That serious invasions of privacy are recognised in legislation in all Australian jurisdictions, with damages available for the different types of harm caused by revenge porn, including distress, humiliation, embarrassment and financial loss.

**Recommendation 5:** That primary prevention policies are developed and adopted in all Australian jurisdictions to target the promotion and availability of revenge porn as a mechanism to reduce revenge porn.

**Recommendation 6:** That adequate and ongoing training is provided to police to ensure the laws are enforced.

**Recommendation 7:** That training is provided to frontline workers in direct contact with victims of revenge porn.

## VSS response to Inquiry's 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.***

### What is revenge porn?

The growing reach of the internet, mobile information and communications technologies (ICTs) with sophisticated image recording capabilities, and the wide uptake of social media have each presented new opportunities for revenge porn, or as it is also known, image-based sexual exploitation.

Revenge porn (Henry & Powell, 2015) is a term used to describe the distribution of sexually explicit or intimate images of another person without their consent. These types of images include, but are not limited to:

- images of sexual assault
- images of a person engaged in a sexual act
- images recorded through the use of hidden devices
- images stolen from a person's device or online account
- images obtained of a person by strangers or a person known to the victim
- images of a person that have been digitally altered (pornographic or otherwise).

Revenge porn images are not necessarily sexually explicit where the person's genital or anal region is depicted. Image-based sexual exploitation can also occur where the person is undressed, or partially undressed.

### How are images obtained?

In many cases, images are obtained because the subject has shared an image with the offending party voluntarily. For example, in the context of a relationship, a subject shares a photo of their naked body with their partner via text or a social media platform such as Snapchat. When the relationship ends, the offending party disseminates the photo without the consent of the subject, or threatens to do so to pressure the subject into continuing the relationship.

In other cases, images are obtained by the offending party gaining access to, or hacking, the subject's device, social media account, or cloud storage. The hacked images can be uploaded to online databases and used as pornography by strangers. VSS understands that images stolen from victims' are also being digitally altered to depict the subject engaged in sexual acts.

### Where is revenge porn posted?

Images are often posted or linked to social media, dating sites, porn sites, specialised revenge porn websites, online message boards and chat rooms. The personal details of the victim, such as their name, address, and place of work often are uploaded with the images. Users of these platforms are encouraged to comment, share, download, and edit the images of the victim. In many cases, revenge porn images and links to these images are sent to the victim's family, friends, employers or colleagues.

## Who are the victims of revenge porn?

Data on the prevalence of revenge porn in Australia is limited. Studies in the United States (CCRI, 2014 in Henry, Powell and Flynn, 2015: 3) and Spain (Gámez-Guadix, 2015) have found that victims are disproportionately most often women. In the United Kingdom, Revenge Porn Helpline service figures show that 75 per cent of victims seeking advice and support are female (Gov.uk, 2015).

## Who perpetrates revenge porn?

According to the 'Love, Relationships, and Technology' survey undertaken in the United States (McAfee, 2013), 1 in 10 people have threatened to post images of their ex-partner online. The study found that these threats were carried out around 60 per cent of the time. Motivations for threatening, or following through on threats, to post images of an ex-partner online include being lied to or cheated on, or the subject deciding to end the relationship.

VSS is very concerned by findings of other emerging research which shows that revenge porn is being used as a coercive control tool by perpetrators of domestic and sexual abuse in which women are disproportionately the victims (Henry & Powell, 2015).

It is important to note that not all perpetrators are motivated by revenge or use revenge porn as a means to exercise control over the subject in the context of family and domestic abuse (Henry, Powell and Flynn, 2015: 2). Other motivations for image-based sexual exploitation include blackmail, coercion, sexual gratification, social notoriety or financial gain.

Equally, not all perpetrators of image-based sexual exploitation are known to the victim. VSS is aware of several cases where the victim's device, cloud storage account, email account, or social media profile has been hacked by strangers who have subsequently posted personal images of the victim to online forums.

### Case study 1: Amira's story

Amira (pseudonym) is a young Muslim woman who was in an abusive relationship with her ex-partner, Hashim (pseudonym). Amira and Hashim have an 11-year-old son.

One evening, Hashim coerced Amira into having sex with a female prostitute. Amira described being forced into sex as feeling like a 'performing donkey'. Fearing for her safety if she refused, Amira complied.

Hashim took photos and filmed the two women engaged in sexual acts. Hashim then posted the images to porn websites.

Amira was very concerned that her young son had been exposed to these images as Hashim had previously shown his son online pornography. Amira also feared that Hashim would follow through on his threats to send the images to her family and friends if she did not do everything that Hashim wanted.

With the support of VSS, Amira reported Hashim's actions to the police and contacted the website to request the removal of these images.

There were no legal consequences or penalties for Hashim as a result of Amira reporting her experience to the police.

Amira has since ended the relationship with Hashim and has remarried. Amira is still in contact with Hashim due to communication around Family Court matters regarding custody arrangements of their son.

### RECOMMENDATION 1:

**That States and Territories collect data on revenge porn incidents to provide an indication of the extent of the problem and allow for the effectiveness of policies and programs to be measured.**

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

**The impact of revenge porn on victims**

Revenge porn is generally intended to cause harm, distress, humiliation and embarrassment for the victim. It can have significant long-term social, psychological and financial consequences for the victims. Many revenge porn websites include victims' personal information, leading to further online harassment and fears for personal safety.

VSS knows that every victim of crime responds differently to their experience. Some common responses to revenge porn reported by victims include:

- changes in behavior, such as withdrawing from social interaction
- damage to their reputation at work or amongst social circles
- feeling violated, shamed, embarrassed or humiliated
- feeling anxious or worried
- feelings of anger and/or betrayal
- being fearful of the perpetrator and/or their motivations
- experiencing fear for their safety or the safety of their family
- feeling like they are being watched or are under surveillance
- feeling a loss of control.

*'Many perpetrators of revenge porn distribute images knowing that shame and stigma is more potent against some members of the community.'*

Henry, Powell and Flynn, 2015: 3

Some victims report being subsequently targeted and harassed online by strangers who have seen the images (Henry, Powell and Flynn, 2015:2).

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

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

**Revenge porn and the law**

***Criminal law***

Several countries, including Canada, the United Kingdom, Japan, Israel, the Philippines and some jurisdictions in the United States, have introduced specific legislation to make revenge porn an offence (Henry, Powell and Flynn, 2015: 3).

**Commonwealth**

There is currently no federal offence specifically targeting revenge porn in Australia. However, broader offences exist under the *Criminal Code Act 1995* (Cth), such as the use of a carriage service to menace, harass or cause offence. Some scholars argue that these laws are too broad in scope to adequately capture the harm caused when intimate images of a person are distributed online (Henry, Powell and Flynn, 2015: 3). VSS is aware that the Australian Labor Party intends to introduce

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a Bill to amend the *Criminal Code Act 1995* (Cth) and create a specific offence targeting revenge porn (ALP, 2015).

South Australia

### *Summary Offences 1953* (SA)

In 2013, amendments to the *Summary Offences Act 1953* (SA) introduced Part 5A: 'filming offences'. Three key offence types were introduced.

Under s 26B, a person who engages in humiliating or degrading filming is guilty of an offence. It is a further offence for a person to distribute moving or still images collected through humiliating or degrading filming (s 26B(2)).

In addition a new offence of distributing an 'invasive image' without consent (s 26C) was introduced. Perpetrators found guilty can be imprisoned for a maximum of two years if it can be proven that the distributor of the image knew or should have known that the victim did not consent to the distribution of the image.

Finally, 'a person must not engage in indecent filming' under s 26D of the SOA. That is, it is an offence to film another person in a state of undress in circumstances in which a reasonable person would have an expectation of privacy. Penalties are up to \$20 000 or imprisonment for 4 years, if the victim of the indecent filming was a minor. It is a further offence for a person to distribute images obtained by indecent filming (s 26D(3)).

### *Criminal Law Consolidation Act 1935* (SA)

Under s 144D, it is an offence for a person to produce prohibited material or be in possession of it with the intention of using it for a criminal purpose.

Prohibited material is defined widely to mean anything (including personal identification information) that enables a person to assume a false identity or to exercise a right of ownership that belong to someone else (s 144A). It could include a situation where a man is in possession of naked photos of his ex-partner and has threatened to post them online along with her name and personal details without her consent.

The CLCA also includes related offences such as criminal defamation (s 257). This can be associated with cases of revenge porn, such as in the case study above, where the offender has made up false accusations that the victim is a prostitute, and as a consequence her reputation is damaged.

### Case study 2: Nabiha's story

Nabiha (pseudonym) is a Muslim woman aged in her early twenties. Nabiha was married to a young Muslim man named Safdar (pseudonym).

During their relationship, Safdar took photos of Nabiha while she was semi-nude.

Nabiha says that Safdar posted these images to her Facebook page without her consent, listing Nabiha's full name and home address and a claim that Nabiha was engaged in prostitution.

Nabiha believes that Safdar posted the images from internet cafés so that the police could not trace the IP address back to him.

With the support of VSS, Nabiha reported Safdar to the police. The police contact Safdar and told him to desist from posting images of Nabiha.

Despite current criminal laws in place, there were no other legal ramifications or consequences for Safdar as a result of Nabiha reporting him to the police.



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### *Classification (Publications, Films and Computer Games) Act 1995 (SA)*

Under s 75C it is an offence to make available or supply objectionable matter on on-line service. This could include a situation where a person posted onto social media a film of his ex-partner having sex with someone.<sup>1</sup>

A less likely but still possible offence relating to revenge porn could occur where a person prints out naked photos of his ex-partner and plasters them on street poles around her neighbourhood. Under s 52, it is an offence for a person to leave a publication (can be written or pictorial) in a public place, or so it is visible in a public place or on a private premises (without the occupier's permission), where: if it if ever put before a classification board, it would be likely to be refused classification; or where it would cause offence to a reasonable adult; or where it would be unsuitable for a minor to see.

These offences only have financial penalties (\$10 000 and \$5 000 respectively), not penalties of imprisonment.

### *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*

The *Intervention Orders (Prevention of Abuse) Act 2009 (SA)* was enacted on 9 December 2011. Section 4 of this Act provides several examples of abuse against a person resulting in emotional or psychological harm. In the context of family and domestic abuse, this legislation could capture acts perpetrated against a person by their partner or ex-partner as revenge porn. For example, under s 4(j) 'emotional or psychological harm' includes the act of:

*communicating with the person, or to others about the person, by way of mail, telephone (including associated technology), fax or the Internet or some other form of electronic communication in a manner that could reasonably be expected to cause emotional or psychological harm to the person.*

### Victoria

In Victoria, it is an offence to maliciously distribute, or threaten to distribute, intimate images without consent under the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic)*. The offence carries a maximum two years' imprisonment for distribution of intimate images, and one year imprisonment for threatening to distribute images. The term 'intimate images' is also used by international jurisdictions.

VSS strongly believes that South Australian legislation, which uses the term 'invasive image', should be amended to 'intimate images'. Doing so would capture a broader range of revenge porn acts and bring perpetrators legally to account for their actions.

### *Civil laws*

Without the protection of criminal legislation, many victims of revenge porn rely on civil law to take action where their privacy has been invaded. Civil remedies can include seeking an injunction,

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<sup>1</sup> Objectionable matter includes a film that would be refused classification or rated X 18+ if it were ever put before a classification board (s 75A).

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seeking damages for a breach of confidence, claiming breach of copyright (where the subject owns the copyright of the image), or pursuing defamation proceedings (Australian Labor Party, 2015).

There is limited judicial recognition of a tort of invasion of privacy in Australia. VSS understands that the private legal sector is advocating for the creation of a civil wrong in relation to serious invasions of privacy. The Australian Law Reform Commission (ALRC), the NSW Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission have each recommended the introduction of a cause of action for breach of privacy (NSW Council for Civil Liberties, 2015: 3).

#### **RECOMMENDATION 2:**

**That all Australian jurisdictions use the term 'intimate images' in revenge porn legislation.**

#### **RECOMMENDATION 3:**

**That a wide range of criminal and civil remedies are made available in response to revenge porn across all Australian jurisdictions.**

#### **RECOMMENDATION 4:**

**That serious invasions of privacy are recognised in legislation in all Australian jurisdictions, with damages available for the different types of harm caused by revenge porn, including distress, humiliation, embarrassment and financial loss.**

### ***e) Other related matters***

#### **Prevention**

The first imperative in eliminating revenge porn is prevention. The law is not the only mechanism for addressing the issue of revenge porn. Other measures relate to changing social attitudes to revenge porn by educating the current and next generation of ICT users about the impact revenge porn can have on victims and that it will not be tolerated and will be regarded as a crime in Australia.

In addition, educating police, the courts, and other agencies within the justice system about the needs and rights of victims is key to ensuring victims can report their experiences to authorities with confidence that their concerns will be taken seriously.

#### **Helping victims move on from revenge porn**

##### ***VSS Victim Helpline***

Any adult affected by crime in South Australia can call our Victim Helpline on 1800 VICTIM. VSS provides information and practical support to victims of crime and their families. VSS also provides face-to-face and phone counselling to victims to aid their recovery from crime-related trauma.

##### ***Using new technology to support victims***

VSS is focusing on the role that digital solutions play in improving women's safety and how we can use technology to reduce the prevalence of violence against women in our community.

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VSS and Cartland Law recently won \$15,000 in grant funding to develop ALIRA (Automated Legal Information Research Assistant), a new app designed to support women who have experienced or are at risk of experiencing violence. ALIRA was announced as one of the winning entries at the 'Keeping Women Safe' D3 Digital Challenge funded by the South Australian Department of Premier and Cabinet, the South Australian Office for Women, and the Australian Government.

ALIRA will make a difference in the lives of women impacted by violence in a way that has never been done before in South Australia.

The purpose of ALIRA is to act as an interface between a woman who has experienced violence (or is at risk of violence) and frontline services that could support her. ALIRA will also maximise the time professionals can spend with victims by automating paperwork, such as the completion of risk assessment forms.

**RECOMMENDATION 5:**

**That primary prevention policies are developed and adopted in all Australian jurisdictions to target the promotion and availability of revenge porn as a mechanism to reduce revenge porn.**

**RECOMMENDATION 6:**

**That adequate and ongoing training is provided to police to ensure the laws are enforced.**

**RECOMMENDATION 7:**

**That training is provided to frontline workers in direct contact with victims of revenge porn.**

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