



CDPP

Australia's Federal Prosecution Service

**Commonwealth Director
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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

via email: legcon.sen@aph.gov.au

Attention: Ms Sophie Dunstone

Dear Madam

Inquiry into the phenomenon colloquially referred to as 'revenge porn'

I refer to your email dated 24 November 2015 inviting the Commonwealth Director of Public Prosecutions to provide a submission addressing the terms of reference in relation to the abovementioned enquiry.

THE CDPP

1. The Office of the Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecution service established by Parliament under the *Director of Public Prosecutions Act 1983* to prosecute alleged offences against Commonwealth law.
2. The CDPP prosecutes a wide range of matters including terrorism, serious drug offences, money laundering, human trafficking and slavery, people smuggling, child exploitation, cybercrime, revenue and benefit fraud, corporate and commercial offending, regulatory non-compliance, public and workplace safety, environmental crimes, corruption, unlawful disclosure of information, copyright offences, perjury, and failing to vote.

SCOPE OF THIS SUBMISSION

3. The CDPP thanks the Senate Legal and Constitutional Affairs References Committee (the Committee) for the opportunity to provide a submission in relation to the phenomenon colloquially referred to as 'revenge porn'.

4. The Committee seeks submissions in relation to a broad range of matters, namely:
 - a) the impact ... [revenge porn] has on the targets of revenge porn, and in the Australian community more broadly;
 - b) potential policy responses to this emerging problem, including civil and criminal remedies;
 - c) the response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions; and
 - d) any other related matters.

5. Having regard to the CDDP's functions, this submission provides comments in relation to:
 - a) existing Commonwealth law;
 - b) foreign criminal law provisions;
 - c) Australian State and Territory criminal law provisions;
 - d) defining material subject of 'revenge porn' conduct;
 - e) constitutional considerations; and
 - f) other considerations: child victims; intention to cause harm; consent.

SUMMARY

6. There are limitations on existing Commonwealth laws to adequately deal with 'revenge porn' conduct.

7. Two Australian States and various foreign common law jurisdictions have created criminal offences targeted at dealing with 'revenge porn' conduct. The CDDP observes differences amongst the offence provisions, as well as the maximum penalties.

8. There are potential Constitutional limitations with a Commonwealth offence and State laws which criminalise the same conduct.

9. Should Parliament opt to create a new offence criminalising 'revenge porn' conduct, an aggravated version of the offence ought to be considered where the victim is younger than a specified age (for example, 16 years).

COMMONWEALTH CRIMINAL LAW

10. Part 10.6 of the *Criminal Code* (Cth) (the Code) provides for a range of offences criminalising conduct in relation to the misuse of telecommunications services. Division 474, Subdivision C, provides for general offences relating to use of telecommunications.

11. An offence contrary to s 474.17(1) of the Code is potentially capable of capturing parts of 'revenge porn' conduct. The offence provides that 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.

12. The maximum penalty for an offence against s 474.17(1) of the Code is 3 years' imprisonment.
13. In order for the prosecution to make out an offence against s 474.17(1) of the Code, it must be proved beyond reasonable doubt that the accused intended to use a carriage service, and that the accused was reckless as to whether the use of the carriage service was in such a way that reasonable persons would regard it as being menacing, harassing or offensive.
14. Examples of using a carriage service includes, sending an SMS, uploading material to a social media website (for example, Facebook) and using the internet to transmit data via e-mail or messaging applications such as 'Kik' or 'WhatsApp'.
15. The CDPP envisages the most likely factual situation involving 'revenge porn' conduct will be where an individual disseminates, or threatens to disseminate, an image or recording brought into existence in intimate circumstances, with a view to causing distress to the person depicted in the material. In limited situations, the CDPP observes that there may be coverage of such conduct by an offence contra 474.17(1). However, such situations will be uncommon.
16. The CDPP observes that an offence contrary to s 474.17 does not address issues including consent of the victim, nor does it define what might constitute an offensive communication, in the context of disseminating intimate, personal or sexual material electronically.
17. Other aspects of 'revenge porn' conduct not contemplated in s 474.17(1) include whether the victims held and maintained an expectation of privacy in relation to the image (that is, at the time the image was taken and at the time of dissemination).
18. The CDPP observes that application of s 474.17(1) will effectively be limited to electronic communications. The Commonwealth offence does not extend to non-online conduct.

FOREIGN CRIMINAL LAW PROVISIONS

19. Several common law jurisdictions have enacted legislation in an attempt to criminalise 'revenge porn' conduct. The maximum penalty for such offences ranges from 6 months to 5 years' imprisonment.

Canada

20. Section 162.1 of the *Criminal Code* (Canada) provides that it is illegal to knowingly publish, distribute, transmit, sell, make available or advertise an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent.

New Zealand

21. Section 22 of the Harmful Digital Communications Act 2015 provides that it is an offence to post a digital communication with intent to harm a victim, and where posting the communication would cause harm to an ordinary reasonable person in the position of the victim and where posting the communication causes harm to the victim.

United Kingdom

22. Section 33 of the Criminal Justice and Courts Act 2015 provides that 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.

United States of America ('USA')

23. Approximately half of the States in the USA, including the District of Columbia, have legislated to criminalise 'revenge porn' conduct. Those offences are classified as a misdemeanour in some jurisdictions and a felony in others.

AUSTRALIAN STATE AND TERRITORY CRIMINAL LAW PROVISIONS

24. Victoria and South Australia are, so far, the only jurisdictions to have enacted offence provisions which cover 'revenge porn' conduct. Both offences attract a maximum penalty of 2 years' imprisonment.

Victoria

25. Section 41DA and s 41DB of the *Summary Offences Act 1966* (Vic) provides that it is illegal to maliciously distribute, or threaten to distribute, 'intimate images' of another person without their consent.

South Australia

26. Section 26C of the Summary Offences Act 1953 (SA) provides for an offence of distributing an 'invasive image' without consent.

DEFINING MATERIAL SUBJECT OF 'REVENGE PORN' CONDUCT

27. The CDPP observes that each jurisdiction in which 'revenge porn' offences have been enacted, define the material differently.
28. Should a Commonwealth offence be enacted, the CDPP would find it helpful if the types of subject matter depicted was clearly defined and less open to interpretation. For example, the CDPP notes material which is intimate, but not sexual, may be capable of causing a victim distress if disseminated without their consent. Further, what might be considered to be sexual, personal or intimate will differ within Australian society.

CONSTITUTIONAL CONSIDERATIONS

29. Section 51(v) of the Constitution provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... telegraphic ... and other like services.
30. The CDPP observes a potential limitation as regards section 109 of the Constitution and State laws dealing with 'revenge porn' conduct. To maximise coverage of the State laws that have been enacted, it is preferable that any Commonwealth law not operate to exclude or limit the concurrent operation of those State laws. To this end, it is recommended that a provision stating Parliament's intent in this regard be included (for example, a provision similar to s 300.4 and 370.3 of the Code).

OTHER CONSIDERATIONS

Child victims

31. Should Parliament opt to create a new offence criminalising 'revenge porn' conduct, the CDPP submits that an aggravated version of the offence be considered where the victim is younger than a specified age (for example, 16 years). Whilst 'revenge porn' conduct is sometimes associated with offences of grooming/procuring or soliciting child pornography from child victims, to date the CDPP has been limited in its ability to charge for this very serious aspect of offending, which cannot be alleged as an aggravating feature of a Division 474 offence without being separately charged, as this will offend against the principle in *The Queen v De Simoni* (1981) 147 CLR 383. Further, State offences of blackmail to cover this conduct have been rejected by the Courts in Victoria.

Intention to cause harm

32. Some of the examples of legislation (for example, the UK) require intention to cause harm as an element of the offence. If this were to be an element of any offence it would be preferable if an accused was also liable, not only where it was intended to cause harm, but also where the accused was reckless as to whether their conduct caused harm. It is noted that other offence provisions (for example, Canada) do not require proof of harm at all. That offence provision applies in circumstances where there is an absence of consent. The causation of harm is not an element.

Consent

33. If an offence provision containing an element of lack of consent is enacted, similar considerations in relation to recklessness are applicable. Either the accused was aware they lacked consent or was reckless as to whether consent had been given. It is noted that the Canadian provision includes a reference to recklessness as to whether consent had been given.

Yours faithfully

David Adsett
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