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## **Senate Inquiry into 'Revenge Porn'**

### **Sexual Assault Support Service Inc. (SASS) Submission**

**January 2016**

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## Senate Inquiry into 'Revenge Porn' SASS Submission

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### Introduction

The Sexual Assault Support Service (SASS) is a community-based service committed to providing high quality support and information services to survivors of sexual assault in Southern Tasmania, their carers and support people, professionals, and the general public. SASS delivers a 24 hour sexual assault crisis response program; 24 hour phone support and counselling service to people affected by sexual abuse; and face to face information, support, counselling, and referral services for anyone affected by sexual abuse.

SASS welcomes the opportunity to respond to this Senate Committee Inquiry. SASS previously made a submission in response to the *Criminal Code Amendment (Private Sexual Material) Bill 2015* – Exposure Draft and Discussion Paper, drafted and released by Federal MPs Terri Butler and Tim Watts. Excerpts from SASS's previous submission have been incorporated into this submission.

### SASS recommendations

1. That the terms 'image-based sexual exploitation' and 'intimate image' are used by policymakers.
2. That a specific criminal offence at Commonwealth level is created, to cover acts and threats of image-based sexual exploitation.
3. That the offence should focus on intentional acts of distribution and threatened distribution, and lack of consent.
4. That a legislative provision should address whether a target "could reasonably be considered to have expressly or impliedly consented".
5. That it is not necessary for legislative provisions to cover 'intent to cause harm'.
6. That photoshopped images; images of sexual assault; and stolen images should all fall within the scope of the legislation.
7. That acts carried out by website and online forum administrators should fall within the scope of the legislation.
8. That intimate images and recordings of image-based sexual exploitation targets should not be used in the media, and corresponding amendments should be made to the *Broadcasting Services Act 1992* (Cth) to address this aspect.

9. That appropriate funding and other resources are allocated for primary prevention strategies, including public awareness campaigns; print and online resources; and school-based Respectful Relationships programs.
10. That this policy issue has strong relevance to family violence policy, but should be addressed independently.

## Inquiry matters

- (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

In SASS's view, the term 'revenge porn' is misleading, as it implies a single motive for the behaviour. We recognise that the term is colloquial and is frequently used in the media; however, with regard to the legal context, we prefer the term 'image-based sexual exploitation'<sup>1</sup>, which does not specify a motive or intention. We recommend that policymakers adopt this term in preference to 'revenge porn', to enhance community understandings of the behaviour and adequately reflect the wide array of motives and persons affected (including intimate partners and ex partners, peers, family members, and support persons).

SASS also encourages use of the term 'intimate image', which has been adopted in Victorian legislation. With reference to the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), Drs Nicola Henry, Anastasia Powell and Asher Flynn appraise the term as follows:

[...] it captures nude (or semi-nude), sexually explicit, or otherwise private images. This wording is in line with criminal legislation in other international jurisdictions and although the term "intimate" is rather broad, the new law makes clear that community standards of acceptable conduct must be taken into account, including regard for the nature and content of the image, the circumstances in which the image was captured and distributed, and any circumstances of the person depicted in the image, including the degree to which their privacy has been affected.<sup>2</sup>

We agree with the authors that to be considered 'intimate', an image or recording of a nude, sexual, or private act need not depict a person's genitals or anal region;<sup>3</sup> and all of the following should fall within the scope of any proposed legislation:

- 'pornographic images that have been photoshopped with the victim's face;
- images of sexual assault;
- images obtained from the use of hidden devices to record another person;

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<sup>1</sup> Henry, N., Powell, A., & Flynn, A. (2015). Submission to the NSW Standing Committee on Law and Justice *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*, p.1.

<sup>2</sup> Ibid, pp 3-4.

<sup>3</sup> Ibid, p.2.

- stolen images from a person's computer or other device; and
- images obtained (consensually or otherwise) by strangers, friends, acquaintances or intimate partners.<sup>4</sup>

In SASS's view, the term 'intimate image' is inclusive of all genders and gender identities.

We do not believe that it is necessary for legislation to include wording that directs Prosecution to prove intent to cause harm. In their Exposure Draft Discussion Paper, Federal MPs Terri Butler and Tim Watts explain that:

There are a range of motivations or intentions that will influence the behaviour, including the intention to cause harm, distress, anger, grief or fear. *Perpetrators may also be motivated by the desire to gain notoriety or to entertain [our italics].*<sup>5</sup>

SASS believes that in order to send a strong message that image-based sexual exploitation is unacceptable and unlawful, it is important that legislation focuses on the behaviour itself and lack of consent, as opposed to the motivation or intentions of the perpetrator. This will be addressed further in Section (d) below. With regard to consent, we recommend that consideration should be given to whether "a person could reasonably be considered to have expressly or impliedly consented."<sup>6</sup>

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

Potential effects that may be experienced by targets of image-based sexual exploitation include:<sup>7</sup>

- Feelings of shame, humiliation, personal violation, and powerlessness;
- Fear and apprehension about personal safety;
- Sense of being watched or constantly 'under surveillance';
- Fear of being filmed or photographed during sexual activities;
- Being approached by strangers and propositioned for sexual activities;
- Hypervigilance online (e.g. compulsively checking websites to see if more images have been uploaded);
- Disruption to education or employment;
- Damage to (or concern about) reputation, personal standing in the community, current or future intimate relationships, relationships with family and friends, and/or future employment prospects;

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<sup>4</sup> Ibid.

<sup>5</sup> Butler, T., & Watts, T. (2015). *Criminal Code Amendment (Private Sexual Material) Bill 2015* Exposure Draft Discussion Paper, p.8.

<sup>6</sup> Our recommended wording is drawn from s.41DA of the *Summary Offences Act 1966* (Vic).

<sup>7</sup> See Henry, Powell, & Flynn. (2015). Also: <http://www.sbs.com.au/news/article/2015/02/19/i-had-no-idea-he-was-filming-me-shocking-trend-sees-women-raped-blackmailed> and [http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact\\_n\\_4568623.html?ir=Australia](http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html?ir=Australia)

- Social withdrawal;
- Body shame;
- Trust issues;
- Trauma symptoms (including anxiety, sleeplessness, and nightmares); and
- Suicidal ideation and/or attempts.

Unfortunately, victim-blaming appears to be a common phenomenon associated with image-based sexual exploitation,<sup>8</sup> and is likely to be highly distressing for affected individuals. Part of the victim-blaming myth of image-based sexual exploitation appears to be ignorance regarding the fact that while a person may consent to an intimate image or recording being taken, this does not mean that they give consent for it to be shared (online or otherwise).

SASS is aware of cases in which acts of sexual assault have been filmed (i.e. by the perpetrator or an associate of the perpetrator) and then shared with other parties via SMS, email, and social media. For the survivor, this type of exploitation may trigger a very real sense of being sexually assaulted again. Perpetrators of sexual assault may also use their access to images and recordings as a means to coerce their victims into performing sexual acts with them on an ongoing basis.<sup>9</sup> Another exploitative behaviour is using images and recordings to 'silence' a victim who might otherwise file a complaint with the police.<sup>10</sup>

Supporters of exploited persons may feel concerned or anxious about how to help their friend or family member, and experience secondary traumatic stress.<sup>11</sup> They may also be subjected to threatening and intimidating behaviour by the perpetrator, including blackmail.

All of the potential impacts outlined may also have implications for communities, whose members may experience increased levels of apprehension or fear as a result of the exploitative behaviour. If image-based sexual exploitation is treated as a private issue by the authorities and is unpunished, there is a risk of it becoming 'normalised' within the community at large. As women are more likely than men to be targeted,<sup>12</sup> the behaviour may contribute to the perpetuation of negative views about women, and in the context of family violence, roles of women in intimate relationships.

#### (c) Potential policy responses to this emerging problem, including civil and criminal remedies

SASS supports the creation of a specific criminal offence at Commonwealth level, in relation to acts and threats of image-based sexual exploitation. We agree with Henry, Powell and Flynn that Australia's existing laws are "arguably too broad in scope to capture the types of

<sup>8</sup> See: <http://www.abc.net.au/news/2015-07-07/revenge-porn-crackdown-hampered-victim-blaming-inconsistent-laws/6601164>

<sup>9</sup> See: <http://www.sbs.com.au/news/article/2015/02/19/i-had-no-idea-he-was-filming-me-shocking-trend-sees-women-raped-blackmailed>

<sup>10</sup> See: <http://www.standard.net.au/story/3399675/revenge-porn-government-urged-to-make-it-illegal/>

<sup>11</sup> Bruce Perry from the Child Trauma Academy (in the United States) defines secondary traumatic stress as "a risk we incur when we engage empathically with an adult or child who has been traumatized."

<sup>12</sup> See link in Footnote 10.

harms caused when intimate images are distributed online without consent.”<sup>13</sup> We believe that explicit Commonwealth legislation will reduce levels of cross-jurisdictional complication, where parties reside in different states.

While civil litigation is an option for affected individuals, this tends to be costly.<sup>14</sup> We support Henry, Powell and Flynn’s argument that relying primarily on civil laws “privatise[s] the issue”;<sup>15</sup> and we are concerned that this is likely to reinforce ‘victim blaming’ notions that aggrieved persons are partially responsible for what has happened to them and therefore, should be self-reliant in terms of taking legal action. We support Dr Henry’s stance that implementing effective criminal remedies sends a strong public message that the behaviour is unacceptable.<sup>16</sup>

We also recommend that appropriate funding and other resources are allocated for primary prevention strategies, including public awareness campaigns about image-based sexual exploitation; print and online resources (including contact options for support and legal advice); and relevant units in school-based Respectful Relationships programs.

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

For a detailed overview of the scope of relevant criminal laws in South Australia, Victoria, New South Wales, and the United Kingdom (England and Wales), SASS recommends a recent paper by Tom Gotsis (2015).<sup>17</sup> The paper also includes comprehensive information about civil law remedies, in the common law and in equity. SASS is aware that legislation to criminalise image-based sexual exploitation has also been passed in Canada, Israel, Japan, New Zealand, the Philippines, and number of states in the US.<sup>18</sup> In 2014, an article in *The Economist* explained that:

Israel has gone furthest: in January the Knesset voted unanimously to make posting intimate images without the subject’s agreement count as sexual harassment, punishable by up to five years in jail. Previously such actions were regarded as mere violations of privacy. Police rarely investigated, let alone sought to prosecute.<sup>19</sup>

As stated in Section (a), SASS holds the view that any proposed legislation on image-based sexual exploitation need not include a provision about an alleged offender’s intention to cause harm or distress. We maintain that wording should focus on acts of intentional

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<sup>13</sup> Henry, Powell, & Flynn. (2015). p.4.

<sup>14</sup> Ibid, p.5. See also: <http://www.sbs.com.au/news/dateline/article/2015/07/13/factbox-revenge-porn-laws-australia-and-beyond>

<sup>15</sup> Henry, Powell, & Flynn. (2015). p.5.

<sup>16</sup> See: <http://www.abc.net.au/7.30/content/2015/s4257906.htm> and <http://www.2ser.com/component/k2/item/18004-is-revenge-porn-a-crime>

<sup>17</sup> Gotsis, T. (2015). Revenge pornography, privacy and the law. *NSW Parliamentary Research Service*, e-brief Issue 7/2015.

<sup>18</sup> Henry, Powell, & Flynn. (2015). p.3.

<sup>19</sup> See: <http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be>

distribution, and threatened distribution. This aligns with the Victorian legislation, which does not require Prosecution to prove intent to cause harm:

- (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.<sup>20</sup>

We note that a report from the Legal Affairs and Community Safety Committee (2014) in Queensland also focused on intentional distribution and lack of consent, rather than intent to cause harm. Specifically, the Committee recommended that the Queensland government “consider the introduction of legislation to create an offence for any person to intentionally distribute an intimate image or video of a person without consent.”<sup>21</sup> If intent to cause harm or distress must be included, we suggest that a ‘reasonable person’ test be incorporated, e.g. “Any reasonable person, by their actions, would know that these actions could cause distress, harm, or humiliation”.

#### (e) Any other related matters

##### (i) Operating a ‘revenge porn’ website

SASS supports the development of laws to criminalise the actions of website and online forum administrators who upload intimate images without consent. The above-mentioned article in *The Economist* noted that there were at least 3000 pornography websites worldwide that had a ‘revenge’ function, and numbers were increasing.<sup>22</sup> Images and recordings on websites and forums are likely to be viewed by large numbers of people, with potentially devastating impacts for targeted individuals. Further, administrators of sites are able to engage in behaviour that has been referred to as “21<sup>st</sup>-century blackmail”,<sup>23</sup> i.e. demanding money from a target of image-based sexual exploitation, in exchange for deleting content from the website or forum.

##### (ii) Protections for the media

SASS agrees strongly with comments in Watts and Butler’s Exposure Draft Discussion Paper, as follows:

[...] the non-consensual sharing of private sexual images by the media may extend and prolong the damage caused to victims. The risk that private sexual images will be

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<sup>20</sup> See s.41DA of *Summary Offences Act 1966* (Vic).

<sup>21</sup> Legal Affairs and Community Safety Committee. (2014). *Inquiry on strategies to prevent and reduce criminal activity in Queensland*. Report No. 82, p.214.

<sup>22</sup> See link in Footnote 18.

<sup>23</sup> See: <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/03/revenge-porn-web-site-creator-convicted-victimized-thousands-of-women/>

shared by the media may also prevent victims from pressing charges under these offences.<sup>24</sup>

While we recognise that media representatives are motivated to generate articles and images of public interest, we believe that media pieces should not include intimate images of 'revenge porn' targets. We respectfully submit that the rights and best interests of the victim should always take precedence over media concerns and interests. By publishing an intimate image to accompany a story, the media may inadvertently aid the motives of the offender, e.g. to humiliate the person depicted; provide entertainment; or attain notoriety. We recommend that the best way to legislate on this aspect is to make appropriate amendments to the *Broadcasting Services Act 1992* (Cth).

### (iii) Family Violence policy

SASS agrees with Tasmanian Labor Senator Catryna Bilyk's recent comments in the media, as follows:

[Image-based sexual exploitation] is increasingly being used to exercise power and control over victims of family violence and to prevent victims of family violence from leaving abusive relationships. [...] We must tackle the scourge of family violence and ensure that women are not subjected to abuse, assault and harassment.<sup>25</sup>

SASS is aware that the Council of Australian Governments (COAG) has appointed an Advisory Panel on Reducing Violence against Women and their Children;<sup>26</sup> and we note Tasmanian Liberal Senator Eric Abetz's recent comments in the media that "revenge porn was [being] addressed in the [current] COAG review into domestic violence" and the issue should be kept "as a whole".<sup>27</sup> However, SASS believes that this policy issue warrants attention on its own merits, given that individuals in non-intimate relationships (e.g. young people in social groups; survivors of sexual assault by associates or strangers) are also subjected to image-based sexual exploitation, and motivations for the behaviour vary. We urge Federal MPs and Senators to treat the issue separately, bearing in mind that the finalisation of draft legislation is likely to be relatively straightforward.

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<sup>24</sup> Butler & Watts. (2015). p.9.

<sup>25</sup> See: <http://www.smh.com.au/federal-politics/political-news/parliament-considers-new-offence-for-revenge-porn-20151113-gkyevl.html>

<sup>26</sup> See: <http://www.dpmc.gov.au/taskforces/reducing-violence-women>

<sup>27</sup> See: <http://www.theadvocate.com.au/story/3494856/revenge-porn-best-left-to-coag-review-abetz/>



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