

14 January 2016

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into "revenge porn"

Thank you for the opportunity to comment on this important issue; the Society appreciates being consulted on these matters.

The phenomenon colloquially known as "revenge porn" is a growing problem, and the Society supports action in relation to same. This phenomenon is manifesting itself in many different areas, including bullying at school and in the workplace, as a form of domestic violence and as leverage in family law proceedings.

The Society has reviewed the *Criminal Code Amendment (Private Sexual Material) Bill 2015* and makes the following comments:

Criminal Defamation

The primary ill of "revenge porn" is that it is a direct attack on the victim's character and reputation by the publication of a truth which was always intended to remain private, in circumstances where there is no public benefit justification for its publication. At present, s365 of the *Criminal Code* creates an offence of criminal defamation, which would cover the practice of "revenge porn" if not for the fact that s365 also provides that truth is a defence to a prosecution brought under the section. The effect of this is that if images posted with the intent to cause harm (or without regard to whether or not the images cause harm) which were genuine images, that conduct could not found a successful prosecution under this section.

If s365 were amended to require material to be both true and for public benefit to establish defence, it may be that the practice of "revenge porn" could be addressed through the existing legislation without the need to create a new offence. The Society suggests this avenue be considered by the committee as an alternative to the creation of new offences.

Consent

The society suggests that the bill should specifically state that persons under the age of 18 are not capable of providing consent to any of the activities addressed in the bill. The Society is also of the view that the bill should note that a party consenting to creating private sexual material does not impliedly consent to the transmission or sharing of that material.

In addition, given the nature of the activity which the bill seeks to address, the bill should also specify that any consent to the transmission or sharing of private sexual material which is given within the context of a relationship does not survive the end of the relationship. For example, if a woman consents to her husband sharing private sexual material during marriage, and the couple subsequently divorces, any transmission or sharing of the material after the end of the marriage ought not to be considered consensual.

Causing distress or harm

The Society also suggests that the bill be amended to cover circumstances where conduct may cause distress or harm at the time of the conduct or at some time in the future.

Media activities

Given the prevalence of photographers attempting to obtain inappropriate photographs of people in the public eye, it is suggested that the bill specify that conduct is not in the public interest simply because the subject of that conduct is well-known or has a high media profile.

Penalty

In relation to penalties for engaging in "revenge porn", the Society is of the view that any penalty should have the prevention of a recurrence of the conduct as a priority. In view of this, the Society suggests that consideration be given to providing the Court with a power to issue a restraining order in relation to the offensive conduct, similar to the powers of the court in relation to unlawful stalking contained in section 359F of the Criminal Code.

Enforcement issues

The Society is of the view that issues will arise in relation to the enforcement of this legislation. It is typically difficult in such matters to establish the identity of the poster of material on the internet, and the jurisdiction in which the material can be said to be published. There also arises the question of copyright in the material, as this will likely reside in the person who took the photograph. The Society suggests that consideration be given to addressing these issues, and that the Committee seek further submissions on these issues prior to finalising the Bill.

Bill Potts
President