

Chapter 2

Key issues

2.1 This chapter examines a range of issues raised during the course of the inquiry as follows:

- the terminology of 'revenge porn';
- consent;
- threats of non-consensual sharing of intimate images;
- the impact of non-consensual sharing of intimate images on victims;
- challenges for law enforcement agencies; and
- dissemination of images on the internet.

Terminology

2.2 As discussed in chapter 1, the term 'revenge porn' refers to a range of scenarios associated with the non-consensual sharing of intimate images.

2.3 The term 'revenge porn' was concerning to some submitters. For example, one concern was that this term may be too narrow: 'material of this nature may not only be distributed as a result of relationship breakdown, but also...obtained through hacking'.¹

2.4 Objections also related to perceptions of the victim: 'revenge is generally associated with a vengeful act, as being some form of retribution, and is therefore somewhat justified'.² The Sexual Assault Support Service (SASS) similarly stated:

Like a number of other parties who lodged written submissions, we believe that the term "revenge porn" is misleading. We prefer one used by Drs Henry, Powell and Flynn—that is, image based sexual exploitation. Language matters when there is harm to community understandings on this public issue. We believe that it is vital for it to be framed up using clear, non-emotive terms that are focused on behaviour not motivation or intentions. This has implications for the drafting of legislative provisions. Revenge is not the only motive to consider. Perpetrators of the behaviour may seek notoriety or financial gain, or believe that they are providing entertainment for others. Some perpetrators may intend to cause emotional harm to their targets and humiliate them, while others will give little or no thought to potential impacts.³

1 Top End Women's Legal Service (TEWLS), *Submission 1*, p. 2.

2 TEWLS, *Submission 1*, p. 2.

3 Ms Alexis Martin, Policy/Research Officer, Sexual Assault Support Service Inc. (SASS), *Committee Hansard*, 18 February 2016, p. 1.

2.5 In addition to concerns about the use of 'revenge', Women's Legal Services NSW stated that describing non-consensual sharing of intimate images as a form of pornography may understate the seriousness of the offender's conduct:

[it] focuses unduly on the actions of the victim, categorising their actions as pornography and encouraging victim blaming, rather than focusing squarely on real harm, which is caused by the perpetrator.⁴

2.6 Alternative definitions were offered by submitters. For example, Victorian Women Lawyers (VWL) was 'in favour of a less incendiary title, such as "non-consensual distribution of private sexual material".⁵

2.7 The term 'non-consensual sharing of intimate images' was used throughout the submission received from the Australian Women Against Violence Alliance (AWAVA). AWAVA stated that:

The term "porn" may inadvertently reinforce the view that people whose intimate images are misused were somehow responsible for this misuse, because they supposedly "consented" to the creation of the image. In this submission we use the description "non-consensual sharing of intimate images".⁶

2.8 Project Respect also criticised the terminology 'revenge porn', for similar reasons, and provided another option:

Due to the non-consensual nature of the distribution of "private sexual material" without consent, we support using the term "technologically facilitated sexual violence".⁷

2.9 As discussed further in chapter 3, there may be legal implications associated with how non-consensual sharing of intimate images is described in legislation. Non-consensual sharing of intimate images legislation enacted by jurisdictions at the state level in Australia, as well as overseas, has defined the material differently; the Commonwealth Director of Public Prosecutions (CDPP) argued it would be helpful:

if the types of subject matter depicted was clearly defined and less open to interpretation... 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.⁸

4 Women's Legal Services New South Wales, *Submission 2*, p. 2. See also Ms Stephanie Milione, Convenor, Victorian Women Lawyers (VWL), *Committee Hansard*, 18 February 2016, p. 23.

5 Ms Milione, VWL, *Committee Hansard*, 18 February 2016, p. 23.

6 Australian Women Against Violence Alliance (AWAVA), *Submission 19*, pp 1–2.

7 Project Respect, *Submission 21*, p. 4.

8 Commonwealth Director of Public Prosecutions (CDPP), *Submission 3*, p. 4.

Consent

2.10 As noted in chapter 1, perpetrators of non-consensual sharing of intimate images are often current or former intimate partners of their victim and the majority of victims are women.

2.11 The committee heard evidence that non-consensual sharing of intimate images occurs in a range of circumstances, including situations of domestic or intimate partner violence. The Victim Support Service (VSS) emphasised that wherever it occurs:

it is clear that revenge porn is used as a tool of power and control. In one case, intimate images of a woman were shared on Facebook explicitly with the intention to punish her for ending the relationship. In a second example, revenge porn was used in an ongoing relationship to coerce and control the victim.⁹

2.12 SASS informed the committee:

...that image based sexual exploitation may be used as a means by which to threaten and intimidate intimate partners or ex-partners. In the context of intimate partner violence, or IPV, it would appear to add another layer of coercive control. Some of our clients in IPV situations have presented for support after experiencing this form of exploitation.

We also recognise that the behaviour affects people who are not in IPV situations. SASS has supported clients who have been sexually assaulted by an associate, such as a friend of a friend, and the perpetrator has then used photos or recordings as a means to silence or blackmail them. Victims of drink spiking in pubs and other venues may also be targeted. The impacts of the behaviour in all of these contacts are potentially devastating for individuals, families and communities...¹⁰

2.13 Irrespective of the circumstances in which images are obtained, the matter of consent arose again and again during the course of the inquiry. SASS emphasised that:

the important thing to recognise is that people may take photos and recordings of each other in the context of a loving relationship, and we do not see that there is a problem with that. The difficulty is of course if those images and recordings are used as a means to intimidate the other person during the relationship or once the relationship has broken down.

...

Adults may consent to having their images taken or recordings made in the context of a loving relationship, but it does not mean that they automatically consent to those images and recordings being shared with others.¹¹

⁹ Ms Victoria Laughton, Research and Advocacy Officer, Victim Support Service (VSS), *Committee Hansard*, 18 February 2016, p. 2.

¹⁰ Ms Martin, SASS, *Committee Hansard*, 18 February 2016, p. 1.

¹¹ Ms Martin, SASS, *Committee Hansard*, 18 February 2016, p. 5.

2.14 VSS concurred:

The key issue is consent. It might happen in a loving relationship; it also happens in an abusive domestic relationship. Again, consent is the issue, because the internet images may or may not be taken with the consent of the subject, the woman. Then, because she is in the context of an abusive relationship, out of fear for her safety, or the safety of her children, or both, she is compelled to comply with the perpetrator and what he is doing with the internet images.¹²

2.15 Other witnesses similarly reiterated the importance of consent: the Office of the Children's eSafety Commissioner (OCeSC),¹³ Women's Legal Services NSW,¹⁴ VWL,¹⁵ the Law Council of Australia (LCA)¹⁶ and the Queensland Law Society (QLS)¹⁷ all discussed in some detail the need for consent to be a primary focus of any responses to non-consensual sharing of intimate images, and particularly in any legislative reform.

2.16 The way in which consent might be reflected in any future legislation is examined in greater detail in chapter 3.

Threats of non-consensual sharing of intimate images

2.17 Threats of non-consensual sharing of intimate images, as distinct from non-consensual sharing of intimate images itself, were raised during the course of the inquiry. As outlined in the previous section, non-consensual sharing of intimate images is in essence a device through which to control the victim: the potential for intimate images to be used to manipulate an individual makes them an attractive way of exerting that control. Submitters and witnesses argued that threats to disseminate intimate images—irrespective of whether or not those images exist—can have the same or similar impact as actual dissemination.

2.18 For example, Women's Legal Services NSW stated:

For many of our clients, they often do not know that there is material in existence; but a threat to distribute material—even material that may not exist—causes extreme anxiety about what the material is and the threat to distribute.

...

12 Ms Laughton, VSS, *Committee Hansard*, 18 February 2016, p. 5.

13 Ms Andree Wright, Executive Manager, Office of the Children's eSafety Commissioner (OCeSC), *Committee Hansard*, 18 February 2016, p. 14.

14 Ms Janet Loughman, Principal Solicitor, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

15 Ms Milione, VWL, *Committee Hansard*, 18 February 2016, p. 23.

16 Ms Pauline Wright, Member, National Criminal Law Committee, Law Council of Australia (LCA), *Committee Hansard*, 18 February 2016, p. 35.

17 Mr Shane Budden, Senior Policy Adviser, Queensland Law Society (QLS), *Committee Hansard*, 18 February 2016, p. 38.

We have certainly had clients from certain communities who feel a very heightened sense of shame about these threats, fear that the images are going to be shared with family or sent overseas to family, and fear of going to the police because of that shame and embarrassment about what the images may be, for example.¹⁸

2.19 Women's Legal Services NSW also informed the committee that non-consensual sharing of intimate images and threats to disseminate intimate images are occurring more often, particularly as 'a part of the domestic violence pattern'.¹⁹ The QLS remarked that it had:

anecdotal feedback from members that this sort of thing, or the threat to do this sort of thing, is coming up in Family Court proceedings and in a domestic violence context. There is the threat that "If we do not settle this soon, your mother will see this on Facebook"—that kind of stuff. That is the sort of thing that we need to explicitly put an end to.²⁰

2.20 Similarly, Ms Alexis Davis shared some of her experience in legal practice with clients in abusive relationships:

In practice, I have had many clients who have felt trapped to stay in violent relationships because of threats by their abusive partner that they will release images or recordings online or to family members if they attempt to leave. I have had clients where out of fear of such recordings being released, they have refused to talk to police, and through their reluctance to explain their true circumstances, have ended up as defendants in domestic violence proceedings. I have noticed in practice, threats of this nature often affect vulnerable clients from culturally and linguistically diverse backgrounds where cultural shame may carry a heavy burden. I strongly recommend any criminal or civil actions that flow from sharing private sexual images without consent should also extend to where images or recordings are threatened to be shared without consent.²¹

2.21 Numerous submitters and witnesses recommended that the threat of sharing images should be an offence under any future legislation.²² Drs Nicola Henry, Asher Flynn and Anastasia Powell stated:

Creating an offence to threaten to distribute an intimate image without consent means that the law will communicate the serious harms that result from such threats – for instance, perpetrators using threats in the context of an intimate relationship or in a post-separation context, or perpetrators

18 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 25.

19 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 28.

20 Mr Budden, QLS, *Committee Hansard*, 18 February 2016, p. 39.

21 Ms Alexis Davis, *Submission 12*, p. 6.

22 See for example YWCA Adelaide, *Submission 8*, p. 5; Safe Steps, *Submission 29*, p. 2; Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 26.

using such images as a way to coerce a victim to engage in unwanted sex acts.²³

2.22 The question of whether legislation should address threats of non-consensual sharing of intimate images is considered in greater detail in chapter 3.

Impact on victims

2.23 Victims of non-consensual sharing of intimate images can suffer a range of harms as a result, including serious psychological injury. SASS outlined some of the consequences identified in academic research, including:

- 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 (for example 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;
- social withdrawal;
- body shame;
- trust issues;
- trauma symptoms (including anxiety, sleeplessness, and nightmares); and
- suicidal ideation and/or attempts.²⁴

2.24 Based on its experience, VSS explained that:

A wide array of harms can be caused, depending on the context. In terms of the impact directly on the victim, it can range from changes in behaviour, such as withdrawing from social interaction, as in the case that Ms Martin raised before, where the woman was afraid the partner and child would find out. That is a great example of how it affects your normal social relationships. There is also the risk of damage to reputation at work and in social circles if the intimate images are circulated or stumbled across accidentally by somebody. Like many victims of family and domestic abuse and sexual assault, there are feelings of violation, being ashamed, being embarrassed, being humiliated, feeling anxious or worried, feeling angry

23 Drs Henry, Flynn and Powell, *Submission 9*, p. 7.

24 SASS, *Submission 11*, p. 3.

about what has happened to them and feelings of betrayal. Fear is a big factor as well, and also experiencing fear for their safety, particularly in the context of family and domestic abuse, and feeling loss of control.²⁵

2.25 The Office of the Director of Public Prosecutions in New South Wales (ODPP NSW) described some of the objectives of perpetrators of non-consensual sharing of intimate images and the common impacts on victims. According to the ODPP NSW, perpetrators seek to cause:

humiliation, distress, embarrassment, and shame and, often, to invite negative comments and attack or bullying from those who view the images. The result of the dissemination usually aligns with the aim. Additionally, victims often suffer anxiety related to who has seen the images, depression and other serious psychological harm.²⁶

2.26 Electronic Frontiers Australia (EFA) submitted that the potential harm and distress involved in non-consensual sharing of intimate images can be very significant and 'can result in loss of reputation, employment, social standing, and in extreme circumstances, can be seen as a factor involved in suicide'.²⁷

2.27 Dr Nicola Henry highlighted that whilst it is known that the impacts on victims are serious, there is currently a lack of evidence:

We are relying on anecdotal evidence that is presented in the media, and also in academic articles where they have spoken to victims about their experiences...there are cases of victims committing suicide, people losing their jobs and intimate relationships breaking down.²⁸

2.28 The committee also heard about the stigma surrounding non-consensual sharing of intimate images, its relationship to victim blaming and the resulting reluctance of victims to identify and seek assistance:

...we have heard from the victims that we have supported that there is a lot of fear around coming forward. There is a lot of social stigma around sexting and intimate images being shared within a consensual relationship, let alone outside that scope. So we feel that training and education is needed to combat those victim-blaming attitudes that prevent victims from reporting the crime to police or coming forward for support.²⁹

2.29 Both the OCeSC³⁰ and VSS highlighted the importance of education in eliminating victim blaming and shifting to a situation where victims of non-consensual sharing of intimate images feel able to come forward:

25 Ms Laughton, VSS, *Committee Hansard*, 18 February 2016, p. 3.

26 Office of the Director of Public Prosecutions (ODPP) NSW, *Submission 24*, p. 2.

27 EFA, *Submission 27*, p. 2.

28 Dr Henry, La Trobe University, *Committee Hansard*, 18 February 2016, p. 33.

29 Ms Laughton, VSS, *Committee Hansard*, 18 February 2016, p. 4.

30 Ms Priyanka Saha, Expert Adviser, OCeSC, *Committee Hansard*, 18 February 2016, p. 9.

It is common for victims of sexual offences and domestic abuse to be blamed or seen as culpable for what has happened to them. This is very true for victims of revenge porn. The shame and stigma experienced by victims is a significant barrier to reporting to police or seeking support. Our position on this issue is clear: victims of revenge porn are not responsible for the actions of the perpetrator. The community must be educated that this is a crime. Such education is needed to combat the myths associated with revenge porn and other forms of violence, particularly against women. Revenge porn is to be taken seriously and community attitudes have a big part to play in challenging victim blaming attitudes.³¹

Challenges for law enforcement agencies

2.30 Non-consensual sharing of intimate images and cybercrime more broadly can be a challenge for law enforcement and prosecution agencies. The absence of legislation in most Australian jurisdictions can render police unable to formally pursue complaints and allegations of non-consensual sharing of intimate images; in other circumstances a lack of evidence stymies any investigation. The global nature of social media and the internet presents jurisdictional challenges, and the technology involved can impact the ability to collect evidence. All of these factors throw up challenges for law enforcement agencies.

2.31 The committee heard evidence that victims of non-consensual sharing of intimate images experience a range of responses when reporting their situation to police:

We could say it is possible to get a good response and it is possible to get a bad response. As I have mentioned, the technology seems to provide that extra layer of complexity that the police find difficult.³²

2.32 In some cases victims have reported to police but were told 'we don't know that the person you are accusing necessarily sent that image, so because we cannot prove that we are not able to prosecute'.³³

2.33 In many cases, the websites on which non-consensually shared intimate images are posted are run overseas, and the images may be uploaded outside Australia: 'In such matters, the issue may be referred to overseas law enforcement agencies for investigation, [but] they may not take an interest'.³⁴

2.34 The Australian Federal Police (AFP) noted that although it has law enforcement partners around the world, it can still be difficult to obtain information in a timely manner that enables investigations to be conducted quickly.³⁵ Commercial

31 Ms Laughton, VSS, *Committee Hansard*, 18 February 2016, p. 2.

32 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 25.

33 Ms Elizabeth Snell, Law Reform and Policy Coordinator, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 25.

34 Mr Shane Connelly, Assistant Commissioner/National Manager, Crime Operations, Australian Federal Police (AFP), *Committee Hansard*, 18 February 2016, p. 42.

35 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 45.

providers, such as social media companies may be reluctant to provide data required for investigations, particularly where they are based offshore.

2.35 The OCeSC, as a statutory Commonwealth agency, has certain powers under legislation to efficiently remove images from social media and websites, as well as images that have been transmitted by email. This has proven to be an effective strategy, even in response to persistent offenders:

the most we have seen is a case where a person had uploaded material and it would appear that the same person loaded the same material twice. We took it down the first time; they recreated another page with the same intention; we took it down. At that point I think they realised, "There is no point in me doing this; the office is going to respond quickly." By that time the social media service was also responding fast. As a result they gave up.³⁶

2.36 The lack of uniformity in legislation currently in place around Australia was highlighted as a current issue from a law enforcement perspective:

The AFP assesses referrals of such matters on a case-by-case basis, with the majority of these matters falling under the state and territory laws, which differ in every jurisdiction. I did note in the previous speaker's submission the concerns around unified laws in this space. Certainly, as the challenges of cybercrime continue, uniformity in legislation would be most helpful for police, who have to investigate these things ultimately.³⁷

2.37 The Northern Territory Commissioner of Police noted that:

In all instances the individuals posting the material have used a variety of platforms and methods to obfuscate their involvement, often using platforms that are based outside of Australia creating significant delays and difficulties in obtaining evidentiary material. In addition, it is difficult to identify the identity of the individual that actually posted the material and to identify in which jurisdiction the offence occurred.³⁸

2.38 There are also issues associated with technology and encryption that can make it difficult to obtain evidentiary material, particularly from smart phones. The AFP noted that:

If material is sent from phone to phone, it is very hard for us to retrieve it from a phone. So the victim may well know that the ex-husband—if I can paraphrase this, and I am sorry to generalise—is sending this image around to his friends as a form of revenge or payback or harm. But unless it is left on the phone we may have incredible trouble retrieving it from the phone, because the phone companies do not store this data for us.³⁹

36 Mr Alastair MacGibbon, Commissioner, OCeSC, *Committee Hansard*, 18 February 2016, p. 14.

37 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 42.

38 Northern Territory Commissioner of Police, *Submission 25*, p. 3.

39 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 44.

2.39 In this respect, the AFP argued that legislation that facilitates evidence gathering, such as data retention, may enable police to achieve better conviction rates in non-consensual sharing of intimate images cases.⁴⁰

2.40 The AFP described cybercrime investigations (of which non-consensual sharing of intimate images can be a part) as 'incredibly resource intensive'.⁴¹ For this reason, and while offering assurances that 'all crime is taken seriously', the AFP stated that:

...all crime has to be prioritised. It is simply a resourcing issue...With online crime, ultimately we will have to prioritise, and contact offences will always have a higher priority than non-contact offences, simply because of resources.⁴²

Dissemination of images on the internet

2.41 The use of the internet to disseminate intimate images raises a number of issues in relation to the anonymity of the perpetrator, photo-shopped images, and ownership of images.

Anonymity and photo-shopped images

2.42 The potential anonymity of the internet appears to be a significant hurdle in pursuing perpetrators who non-consensually share intimate images. The Northern Territory Commissioner of Police told the committee that in all reports of non-consensual sharing of intimate images received by Northern Territory police between July 2015 and December 2015, investigations did not proceed to prosecution partly because:

individuals posting the material have used a variety of platforms and methods to obfuscate their involvement, often using platforms that are based outside of Australia creating significant delays and difficulties in obtaining evidentiary material. In addition, it is difficult to identify the identity of the individual that actually posted the material and to identify in which jurisdiction the offence occurred.⁴³

2.43 Related to the anonymity of perpetrators, the use of photo-shopped or de-identified images in non-consensual sharing of intimate images was raised by some submitters. These submitters and witnesses argued that non-consensual sharing of intimate images offences should extend to include photo-shopped images, for example where a victim's head is pasted on to a commercially produced pornographic image, in cases where:

- The image was distributed without a person's consent;

40 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 52.

41 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 45.

42 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 51.

43 Northern Territory Commissioner of Police, *Submission 25*, p. 2.

- The image was used or misappropriated in a way that a reasonable person would understand to be a violation of that person's privacy; or,
- The image was used or misappropriated in a way that a person would understand might cause fear, apprehension, or mental harm to the victim.⁴⁴

2.44 According to this approach, not including this activity in legislation would create a 'loophole, and provide a powerful tool for perpetrators to harm, control and threaten victims in a way similar to if the photograph depicted the real image of the victim'.⁴⁵

Ownership of images

2.45 In addition to anonymity, further issues arise when intimate images are disseminated on the internet. Once an image is uploaded onto the internet, it becomes impossible to control how it is accessed, viewed and distributed. At the hearing, the committee heard that there is also a commercial element in non-consensual sharing of intimate images: 'Victims of revenge porn are sexually exploited on at least two levels: in the first instance, by the perpetrator and, subsequently, by the consumers of revenge porn websites', and that addressing this issue should also form part of a 'swift and certain...response'.⁴⁶

2.46 However, '[t]he global nature of the internet means that the majority of revenge porn websites are hosted outside of Australia and therefore this makes it difficult for police to investigate'.⁴⁷

2.47 The Women's Information and Referral Exchange (WIRE) highlighted the difficulty victims face in removing images from the internet, and recommended that 'any legislative approach to this issue acknowledges the urgency of action against sites that share material, and provides timely, appropriate mechanisms for taking down material shared without the subject's consent'.⁴⁸

2.48 VWL emphasised the need to engage with internet companies to provide effective solutions in this area, stating that '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'.⁴⁹

2.49 The Digital Industry Group (DIG) represents several United States-based internet companies; in its submission, DIG affirmed that 'the safety and well-being of the people who connect and engage via our services is our top priority', and further

44 Drs Henry, Flynn and Powell, *Submission 9*, p. 6.

45 Drs Henry, Flynn and Powell, *Submission 9*, p. 6.

46 Ms Laughton, VSS, *Committee Hansard*, 18 February 2016, p. 4.

47 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 42.

48 The Women's Information and Referral Exchange (WIRE), *Submission 17*, p. 3.

49 VWL, *Submission 13*, p. 4.

stated that 'the non-consensual sharing of intimate images expressly [violates] our policies and will be removed when we become aware of them'.⁵⁰

50 Digital Industry Group (DIG), *Submission 14*, p. 2.