

# Chapter 4

## Broader responses

4.1 It was acknowledged by most submitters and witnesses that non-consensual sharing of intimate images is a complex issue and that criminalising it will not be sufficient in isolation: 'Crime prevention strategies such as education and awareness campaigns both from government and private sector stakeholders should also be considered as part of any response'.<sup>1</sup>

4.2 This chapter explores the following ways in which non-consensual sharing of intimate images might be addressed, in addition to legislative changes:

- civil law remedies;
- public education;
- options for victims to report non-consensual sharing of intimate images; and
- professional training.

### Civil remedies

4.1 In addition to criminal penalties, the availability of civil remedies to victims of non-consensual sharing of intimate images was discussed during the course of the inquiry.

### Statutory powers

4.2 The Office of the Children's eSafety Commissioner (OCeSC) is an independent statutory Commonwealth agency that operates under the *Enhancing Online Safety for Children Act 2015*. The OCeSC undertakes a range of education services and has powers to take action on behalf of children who have been the victim of certain cybercrimes.<sup>2</sup>

4.3 Under its legislation, the OCeSC has authority to communicate to websites or social media services that are hosting harmful material and require the removal of that material. Nine social media services are enrolled with the OCeSC, including Google+, YouTube, Twitter, ASKfm, Facebook, Instagram, Yahoo Answers, Yahoo Groups and Flickr.<sup>3</sup> The OCeSC also has an end user notice provision that enables a notice to be served on a person who is creating or uploading the material and requiring them to take the material down.<sup>4</sup>

4.4 The potential to extend these powers, so that they also apply to adults, was considered in the course of the inquiry. The OCeSC takes a civil rather than a criminal

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1 Assistant Professor Terry Goldsworthy, *Submission 31*, p. 5.

2 Mr Alastair MacGibbon, Commissioner, Office of the Children's eSafety Commissioner (OCeSC), *Committee Hansard*, 18 February 2016, p. 9.

3 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 10.

4 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 10.

law approach, and can efficiently address issues, including the posting of sexual material online. At the same time, taking this action 'does not preclude a criminal investigation'.<sup>5</sup> One of the benefits of this approach is that it is not necessary to take a complainant's statement, an intensive, time consuming and can be undertaken promptly and does not require the victim to go through the criminal justice system.<sup>6</sup>

4.5 It is also unnecessary for the OCeSC to prove something occurred beyond reasonable doubt, in order for action to be taken. It was emphasised by the OCeSC that it has strong:

relationships with police around the country and I would not want to suggest that we are being critical of them in any way; it is for them how they run their organisations. What we try to provide is quick resolution of problems that in many respects the public has been frustrated about over time.<sup>7</sup>

4.6 The OCeSC explained that 'take downs' can also be applied to material that is emailed, rather than solely on social media:

We can serve a notice upon the person who has been sending [images] or uploading them to a website. While we deal with social media services in a very defined way, the way we would impact a person doing that is actually to go after the person doing the posting, uploading the images to some foreign website or emailing.<sup>8</sup>

4.7 Applying this approach to the wider community to address non-consensual sharing of intimate images among adults was acknowledged as an option. At the hearing, the OCeSC was asked whether expanding this approach to all members of the community would be possible:

The act restricts us to people aged 18 or under. Our powers relate to Australian children, so that would require the government to have a desire to head down that path...Clearly, the reason why we are keen to give evidence to the committee is that we can demonstrate that there are things you can do. Whether it is us or others is neither here nor there. Really, it is about showing that there are actions that can be taken online. Those actions can be prompt and they can restore a sense of dignity and control to the person who is otherwise being attacked, because this so-called revenge porn is really about power and it is about disempowering another person.<sup>9</sup>

4.8 Overall, the OCeSC emphasised the importance of victims having different options available<sup>10</sup> and highlighted that effective outcomes can be achieved by means outside the criminal law:

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5 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 13.

6 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 11.

7 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 13.

8 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 13.

9 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 11.

10 Ms Priyanka Saha, OCeSC, *Committee Hansard*, 18 February 2016, p. 19.

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it is about showing that there are actions that can be taken online. Those actions can be prompt and they can restore a sense of dignity and control to the person who is otherwise being attacked, because this so-called revenge porn is really about power and it is about disempowering another person. It is not about the actual intimate images themselves.<sup>11</sup>

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The measure I always take is, "Does the complainant feel empowered and satisfied that they are made whole again?" If those services are providing those types of things then they are good services for Australia.<sup>12</sup>

### ***Statutory tort***

4.9 Civil action is available under common law in Australia for some breaches of privacy or confidentiality; however, it is unclear whether existing civil remedies would cover all examples relevant to non-consensual sharing of intimate images. The equitable doctrine of breach of confidence has been used in the Australian non-consensual sharing of intimate images cases *Wilson v Ferguson*<sup>13</sup> and *Giller v Procopets*.<sup>14</sup> The Law Council of Australia (LCA) noted that concerns have been expressed by a number of Australian legal organisations questioning whether 'relying on the equitable action for breach of confidence would provide equivalent protections against serious invasions of privacy'.<sup>15</sup>

4.10 The LCA was of the view that:

Given the vastly increased technological capacity for capturing images and making recordings; and for rapid and large scale dissemination of digital material, we submit that there is utility in creating a new cause of action in tort for serious invasions of privacy.<sup>16</sup>

4.11 Further, the LCA argued that this action should be available where the plaintiff has a reasonable expectation of privacy, and allow for the court to consider relevant circumstances, including the nature of the information, the means used to obtain it, the purpose of the disclosure, and relevant conduct of the plaintiff.<sup>17</sup>

4.12 Electronic Frontiers Australia (EFA) also noted that any criminal law legislation to address the non-consensual sharing of intimate images should be accompanied by the introduction of a statutory cause of action for serious invasions of privacy.<sup>18</sup>

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11 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 10.

12 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 20.

13 *Wilson v Ferguson* [2015] WASC 15.

14 *Giller v Procopets* [2008] VSCA 236.

15 Law Council of Australia (LCA), *Submission 10*, p. 4.

16 LCA, *Submission 10*, p. 4.

17 LCA, *Submission 10*, p. 4.

18 Electronic Frontiers Australia (EFA), *Submission 27*, p. 3.

4.13 Women's Legal Services NSW was supportive of the introduction of a statutory tort that could provide a further means of redress for victims of non-consensual sharing of intimate images:

Certainly we have been advocating for both a Commonwealth and a New South Wales statutory tort on serious invasion of privacy. That is something that is lacking. It would be beneficial if that could happen. We understand, as our colleagues in Victoria have raised, that there are also limitations on that in that it may not necessarily be accessible for all. So it is but one tool in a range of tools that could be used.<sup>19</sup>

4.14 Not all submitters and witnesses agreed. SASS argued that 'targets of revenge porn should not have to rely on time-consuming civil litigation in order to pursue justice' and 'relying on civil remedies effectively privatises the issue'.<sup>20</sup> The LCA conceded that 'civil litigation is certainly quite costly' and for that reason 'it is important to make sure that we have adequate criminal offences to deal with revenge pornography behaviour'.<sup>21</sup>

4.15 The question of a tort of privacy has been discussed by the Commonwealth government since 2014, when it was recommended in a report on *Serious Invasions of Privacy in the Digital Era* by the Australian Law Reform Commission (ALRC).<sup>22</sup> The ALRC considered this statutory cause of action as a remedy of relevance to non-consensual sharing of intimate images cases. In its submission to the inquiry, the Attorney-General's Department (AGD) stated that at this point in time, the 'Australian Government does not support a tort of privacy'.<sup>23</sup>

4.16 By contrast, the Australian Federal Police (AFP) and Commonwealth Director of Public Prosecutions (CDPP) suggested at the public hearing that they would support the introduction of a statutory action in tort as part of the broad range of responses necessary to address non-consensual sharing of intimate images, particularly due to the concerns that victims may have about coming forward to police about these issues, and taking action through the criminal law. For instance, the AFP stated that:

if there are existing areas within tort or privacy legislation that could be utilised we would not be upset if they were. It goes back to something that was said earlier—that is, if people start understanding that the harms they may cause through this activity will lead to a ramification, be it at tort or in the criminal law, and our good friends in the media show that to be the

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19 Ms Elizabeth Snell, Law Reform and Policy Coordinator, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 24

20 Ms Alexis Martin, Policy/Research Officer, SASS, *Committee Hansard*, 18 February 2016, p. 3.

21 Dr Natasha Molt, Senior Policy Lawyer, LCA, *Committee Hansard*, 18 February 2016, p. 37.

22 ALRC, *Serious Invasions of Privacy in the Digital Era*, 2014.

23 Attorney Generals Department (AGD), *Submission 28*, p. 10.

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case, maybe people will rethink their position when they undertake this activity.<sup>24</sup>

4.17 The CDPP noted the potential benefit of this approach in providing a range of options to a victim:

Having more than one avenue, not just a criminal solution but another solution that an individual could pursue might be an option and it might do some social good to have that available, at least, rather than just have the remedy solely in the criminal sphere, where things need to be proved beyond reasonable doubt to a standard, and pursuant to the elements, and will not possibly cover all of the factual situations where this might occur. Tort law might be more flexible and more conducive to having something done about this, and the remedy being in the individual citizen's hands rather than through the authorities, which...have other priorities on occasions.<sup>25</sup>

## Education

4.18 Several submitters suggested that prevention strategies, such as public education campaigns, are as important as any legislative response. According to the OCeSC, a legislative response should be a component of 'a broader approach, resourced to provide appropriate programs, public awareness initiatives, and community education, to address non-consensual sharing of images and associated gender and victim blaming'.<sup>26</sup> Dr Nicola Henry also focused on the need to address victim blaming: 'we really need to have public education campaigns around trying to dismantle some of those victim blaming messages'.<sup>27</sup>

4.19 The AGD acknowledged: 'Education and awareness-raising schemes and the assistance of the community sector all present additional tools to address this behaviour'.<sup>28</sup>

4.20 One of the challenges that agencies on the front line encounter is stigma experienced by victims of non-consensual sharing of intimate images. The committee heard that education can play an important role in addressing this:

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

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24 Mr Shane Connelly, Assistant Commissioner/National Manager, Crime Operations, Australian Federal Police (AFP), *Committee Hansard*, 18 February 2016, p. 53.

25 Mr David Adsett, Deputy Director, Commonwealth Director of Public Prosecutions (CDPP), *Committee Hansard*, 18 February 2016, p. 53.

26 OCeSC, *Submission 21*, p. 9.

27 Dr Nicola Henry, Senior Lecturer, Latrobe University, *Committee Hansard*, 18 February 2016, p. 34.

28 Ms Brooke Hartigan, Assistant Secretary, AGD, *Committee Hansard*, 18 February 2016, p. 41.

combat those victim-blaming attitudes that prevent victims from reporting the crime to police or coming forward for support.<sup>29</sup>

4.21 It was suggested that in the first instance, this should include both traditional and digital media and provide 'information for victims of revenge pornography advising them of their legal and non-legal options'.<sup>30</sup>

4.22 Some examples of government-sponsored educational campaigns were described by submitters, including 'Megan's Story', a video produced in Australia and targeted at teenagers engaging in sexting, and a United Kingdom (UK) program promoting the message 'be aware b4 you share'. These programs emphasise the possible implications of sharing intimate images.

4.23 Currently, the Australian Federal Police (AFP) runs a national cyber safety program called 'ThinkUKnow'. The program includes presentations to parents, carers, teachers, and school children, by over 500 volunteers (who are trained, accredited and background checked), and police officers. Preventative advice regarding inappropriate online behaviour, including 'sextortion', online grooming, inappropriate material, cyber-bullying, fraud, and identity theft, is included in presentations and online material.<sup>31</sup>

4.24 The OCeSC has been involved in the education of over 60,000 students, teachers and pre-service teachers. The OCeSC runs the 'Cybersmart' education program, a broad-ranging program covering online safety and digital citizenship:

the short film Tagged and its associated lesson plans which tackle issues such as cyberbullying, sexting and digital reputation management...[and] the important sexting resource, So You Got Naked Online, developed in conjunction with Bravehearts, which seeks to move beyond blame to offering practical solutions to people experiencing problems and provides guidance to young people under the age of 18.<sup>32</sup>

4.25 The OCeSC discussed its education program in more detail, stating that it engages with schools using a resource known as 'virtual classrooms', as well as a strong web presence and engagement with social media services.

4.26 Requiring that education be a component of sentencing following a non-consensual sharing of intimate images conviction was suggested by Victorian Women Lawyers (VWL) as an approach worth considering:

we feel that, as part of a broader approach under this legislation, there would be potential for factors such as respectful relationship training to be a part of the courts options at sentencing. That would be something that

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29 Ms Victoria Laughton, Victim Support Service (VSS), *Committee Hansard*, 18 February 2016, p. 4.

30 Drs Henry, Flynn and Powell, *Submission 9*, p. 9.

31 AGD, *Submission 28*, p. 11.

32 OCeSC, *Submission 22*, p. 5.

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would really tie into what we would hope is the overarching aim of this legislation.<sup>33</sup>

4.27 Dr Tony Krone, Dr Gregor Urbas and Professor Douglas Boer suggested that further work could be undertaken to evaluate the effectiveness of the education programs that have been implemented to date.<sup>34</sup> It is also important that education be informed by research. Dr Henry, one of a number of researchers involved in a project undertaken in Australia 2015, emphasised at the public hearing that:

We really need to collect better data to help determine the prevalence of the problem ...In terms of data collection, to really understand how big the problem is, we need national data, which is something we do not have. We are relying on UK and US research, looking at their data. We could use that research to draw out the themes associated with revenge porn, what the particular issues affecting victims of crime are and what legal and policy responses are needed to tackle those issues.<sup>35</sup>

### **Reporting by victims**

4.28 The Australian Cybercrime Online Reporting Network (ACORN), launched in 2014, is an online reporting facility that enables the public and small businesses to securely report cybercrime incidents. The ACORN also accepts reports of online harassment, which can include incidents of non-consensual sharing of intimate images;<sup>36</sup> indeed, there have been 489 reports of non-consensual sharing of intimate images made to the ACORN since it was launched in late 2014.<sup>37</sup> However, the ACORN is not designed for urgent investigations or life-threatening situations, including those associated with domestic violence.

4.29 The ACORN reports are forwarded to federal, state, or international law enforcement or regulatory agencies. However, investigation and prosecution is at the discretion of the receiving state and territory agencies and not all reports to the ACORN are investigated. Reports to the ACORN are also used to assist law enforcement and other government agencies to understand cybercrime trends.<sup>38</sup>

4.30 A Revenge Porn Helpline has been implemented in the UK, providing victims with a means of reporting non-consensual sharing of intimate images offences and avenue to take action. This service does 'not make any promises to callers around their ability to advocate for the removal of content...they do say that they have very good

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33 Ms Sophie Brown, Victorian Women Lawyers (VWL), *Committee Hansard*, 18 February 2016, p. 24.

34 Professors Krone, Urbas, and Boer, *Submission 18*, p. 18.

35 Ms Victoria Laughton, Research and Advocacy Officer, VSS, *Committee Hansard*, 18 February 2016, p. 2, p. 7.

36 AGD, *Submission 28*, p. 12.

37 Ms Brooke Hartigan, Acting Assistant Secretary, AGD, *Committee Hansard*, 18 February 2016, p. 46.

38 AGD, *Submission 28*, p. 12.

contacts, so they will do everything they can to help people to have those images removed'.<sup>39</sup>

4.31 The helpline established in the UK was discussed by the OCeSC as a broader measure that could potentially be implemented in Australia. The OCeSC already has a similar contact line in conjunction with its legislative powers to compel the removal of materials from the internet:

In 2015, a pilot program was launched in the United Kingdom called the Revenge Porn Helpline. As an example, it is not too dissimilar from the service that we provide to Australian families and children, except that ours is backed by legislation so that we can compel material to be taken down from social media services, whereas the UK helpline cannot.<sup>40</sup>

4.32 The introduction of a helpline for adult victims of non-consensual sharing of intimate images was described as a response that could be investigated in more detail.<sup>41</sup>

### **Professional training**

4.33 Crimes involving sexual exploitation require respectful and sensitive handling; the use of technology and mobile devices in such crimes adds complexity that may make matters more difficult for police. Women's Legal Service NSW noted that working with non-consensual sharing of intimate images victims has highlighted the fact that the associated technological complexities 'introduces an impediment to police responding' and for a range of reasons, 'it is either not seen as serious or as harmful, and as a result of the technology, it is more expensive to investigate and to prosecute'.<sup>42</sup>

4.34 It is important that police and other professionals in the criminal justice system have the requisite knowledge and skills to effectively investigate and prosecute non-consensual sharing of intimate images, as well as appropriately respond to and support victims. Agencies that assist victims of non-consensual sharing of intimate images identified this as a necessary part of a broader response to non-consensual sharing of intimate images:

Laws must be developed to adequately respond to the misuse and abuse of new and emerging forms of technology...Adequate and ongoing training must be provided for Police so the laws are enforced, and to social workers and caseworkers to assist women with responding to these situations, including technology safety planning.<sup>43</sup>

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39 Ms Alexis Martin, Policy/Research Officer, Sexual Assault Support Service (SASS), *Committee Hansard*, 18 February 2016, p. 8.

40 Mr MacGibbon, OCeSC, *Committee Hansard*, 18 February 2016, p. 9.

41 Dr Henry, Latrobe University, *Committee Hansard*, 18 February 2016, p. 33.

42 Ms Janet Loughman, Principal Solicitor, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 24.

43 Women's Legal Services New South Wales, *Submission 2*, p. 2.



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4.35 In addition to its training programs for students, the OCeSC also described relevant training it had provided to police officers:

In November 2015, the Office trained over 55 South Australian police including investigators and management from the Electronic Crime Section, State Crime Prevention Officers, Special Crime Investigation Branch, Multi Agency Protection Section, and Training and Development Coordinators from the local areas, following a 'revenge porn' incident in 2015 involving a number of South Australian targets.<sup>44</sup>

4.36 At the hearing, the AFP acknowledged that 'ACT policing has training in dealing with domestic violence matters. We have sexual assault and child teams, which are all specifically trained'; it was also noted that training in relation to non-consensual sharing of intimate images 'should' be included in training for officers working in these areas.<sup>45</sup>

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44 OCeSC, *Submission 22*, p. 5.

45 Mr Connelly, AFP, *Committee Hansard*, 18 February 2016, p. 48.

