

# Chapter 5

## Committee views and recommendations

5.1 Non-consensual sharing of intimate images is a serious and growing problem in Australia, facilitated in part by technological advances and increasing use of social media. Non-consensual sharing of intimate images can have a significant impact on victim, psychologically and physically, as well as being damaging to the victim's reputation and standing.

5.2 The committee believes that a range of measures should be implemented to combat the growing scourge of non-consensual sharing of intimate images. These measures should include criminal and civil law penalties, public education and awareness campaigns, and professional training for police.

5.3 The committee's views and recommendations in relation to each of these areas are set out in this chapter.

### Terminology

5.4 Throughout the inquiry submitters and witnesses voiced opposition to the phrase 'revenge porn' (see chapter 2). 'Revenge porn' is too narrow, suggesting a particular type of behaviour as opposed to the range of behaviours and circumstances that involve the non-consensual dissemination of intimate images. The use of 'revenge' infers that a perpetrator's motive is restricted to that end, while the use of 'porn' focusses on perceived actions by the victim.

5.5 The committee agrees with these concerns and endorses the recommendations from various submitters and witnesses about more appropriate terms, such as 'non-consensual sharing of intimate images'. Changing the words and ways in which non-consensual sharing of intimate images is discussed should help address issues with community perceptions about it, particularly persistent victim blaming. The committee suggests it is vital that any legislation addressing and formal documentation discussing non-consensual sharing of intimate images use phrases such as this, noting the importance of the definition given to words such as 'sharing' and 'intimate' (see chapter 3).

### Recommendation 1

**5.6 The committee recommends that Australian governments use the phrase 'non-consensual sharing of intimate images' or similar when referring to the phenomenon colloquially known as 'revenge porn' in legislation and formal documentation.**

5.7 However, the committee acknowledges that using 'non-consensual sharing of intimate images' in legislation and formal documentation will only go some way to changing community perceptions about non-consensual sharing of intimate images. Eradicating the use of the phrase 'revenge porn' in colloquial language is a more difficult challenge. The committee expects that community perceptions and language about non-consensual sharing of intimate images will take some time to change:

greater education and awareness of the problem and its impact on victims will play an important role in this regard.

### **Legislative change**

5.8 As discussed in chapters 2 and 3, the committee heard overwhelming support from submitters and witnesses for legislative change, including at the Commonwealth level. The committee highlights that the Commonwealth Director of Public Prosecutions (CDPP) and the Australian Federal Police (AFP) were supportive of legislation to address non-consensual sharing of intimate images, while the Attorney-General's Department (AGD) advised that it has been considering the issue for some time.

5.9 The committee is particularly concerned about the limited avenues at criminal law for victims of non-consensual sharing of intimate images to currently seek redress. The present situation is unacceptable: victims of non-consensual sharing of intimate images should not be further disempowered and damaged by an inability to pursue alleged perpetrators.

5.10 The committee heard some criticism of police in respect of their current responses to allegations; while this is of concern, and the committee believes better education and training for police are warranted, the committee also appreciates that in most Australian jurisdictions police have limited powers to investigate allegations of non-consensual sharing of intimate images. Legislating offences related to non-consensual sharing of intimate images in all Australian jurisdictions will equip police to investigate and bring to justice perpetrators of non-consensual sharing of intimate images. The committee also notes the remarks of the AFP that legislation criminalising non-consensual sharing of intimate images should not be too prescriptive given non-consensual sharing of intimate images arises in a range of 'places and crime types'.<sup>1</sup>

5.11 Submitters and witnesses also told the committee that criminal offences have the effect of informing the community that certain behaviours are unacceptable and, in this instance, that non-consensual sharing of intimate images will not be tolerated. The committee believes that non-consensual sharing of intimate images offences, while but one way in which the community's opposition to it can be communicated, are an important way of doing so.

5.12 In respect of the technical drafting of non-consensual sharing of intimate images offences, a number of submitters and witnesses, particularly those providing victim support services and community legal services, discussed in detail the centrality of consent and the concepts of 'intent' and 'harm' (see chapters 2 and 3).

5.13 The committee heard differing opinions as to whether non-consensual sharing of intimate images offences should include 'an intent to cause harm' and 'proof of harm' elements. Some submitters and witnesses argued that the perpetrator's intention

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

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to cause harm and whether or not a victim is actually harmed by non-consensual sharing of intimate images are irrelevant; others claimed that the inclusion of such elements is important to give clarity to the circumstances in which offences apply. Many submitters and witnesses emphasised that however legislation is drafted, the victim's explicit consent (or absence thereof) must be the determining factor.

5.14 The committee is persuaded by the arguments for consent to be the central tenet of any non-consensual sharing of intimate images offences. The committee is similarly convinced that non-consensual sharing of intimate images offences should not include 'an intent to cause harm' or 'proof of harm' elements: the perpetrator's intentions and whether or not the victim is harmed are not pertinent; the acts of non-consensually taking and/or sharing intimate images should be sufficient for an offence to have been committed. With regard to 'recklessness', as advised by the CDPP (see chapter 3), the committee believes that a recklessness element should be included in non-consensual sharing of intimate images offences.

5.15 The committee does not propose to make specific recommendations in respect of legislative definitions of, for example, 'recording', 'sharing' and 'intimate'. The committee does, however, encourage Australian governments to consider the issues raised during the course of this inquiry (see chapter 3) and urge them to give due consideration to the legislative definitions for key words in non-consensual sharing of intimate images offences, with particular focus on capturing the wide range of relevant behaviours and the various ways in which images are or might in the future be shared. The committee also suggests that consideration is given to the recommendation by the Law Council of Australia (LCA) and others that consent for intimate images to be taken or disseminated during the course of a relationship should terminate upon the conclusion of the relationship. Similarly, issues around the application of offences to minors must be taken into account by the Commonwealth and state and territory governments when legislating in this area.

5.16 The committee heard that the enactment of offences for non-consensual sharing of intimate images by the Commonwealth may not fully address existing legislative gaps: it is vital that the states and territories also adopt non-consensual sharing of intimate images offences. As the AFP advised the committee, unified and uniform legislation across Australia would 'be most helpful for police' and should substantially address jurisdictional issues within Australia that currently hinder both victims and police in pursuing allegations of non-consensual sharing of intimate images. The committee also takes into account concerns about Commonwealth legislation overriding state and territory legislation, and the preference that Commonwealth legislation act in conjunction with that in the states and territories.

5.17 The committee is left in no doubt about the need for legislation and believes that the Commonwealth must demonstrate leadership in this regard. The committee recommends that, as a priority, the Commonwealth legislate offences for recording and/or sharing an intimate image without consent, and for threatening to take and/or share an intimate image without consent, irrespective of whether or not those intimate images exist. The committee also recommends that the states and territories enact the same or substantially similar offences in their jurisdictions to ensure unified and

uniform criminal approaches to non-consensual sharing of intimate images across Australia.

## **Recommendation 2**

**5.18 Taking into account the definitional issues discussed in this report, the committee recommends that the Commonwealth government legislate, to the extent of its constitutional power and in conjunction with state and territory legislation, offences for:**

- **knowingly or recklessly recording an intimate image without consent;**
- **knowingly or recklessly sharing intimate images without consent; and**
- **threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.**

## **Recommendation 3**

**5.19 The committee recommends that the states and territories enact legislation with offences the same or substantially similar to those outlined in Recommendation 2, taking into account relevant offences enacted by the Commonwealth government.**

## **Civil remedies**

5.20 The committee heard that victims should have access to a range of remedies, both criminal and civil, when seeking to resolve instances of non-consensual sharing of intimate images. The committee concurs with Mr Alastair MacGibbon, Children's eSafety Commissioner, when he stated that 'a series of laws, civilian and criminal' are needed because 'those different remedies will fit different situations'.<sup>2</sup>

5.21 The committee also highlights the comments of the AGD that:

criminal justice is only one aspect of the potential response to technology-facilitated abuse and revenge porn; civil remedies, education and awareness-raising schemes and the assistance of the community sector all present additional tools to address this behaviour.<sup>3</sup>

5.22 The committee believes that there is value in a Commonwealth agency being authorised to issue take down notices outside of a court process, similar to the OCeSC currently. While the committee has not reached a conclusive view about whether this is something that the OCeSC should be empowered to do or whether it would be more appropriately done by another agency, the committee agrees that take down notices often offer a more expeditious remedy in the first instance for removing intimate images and affording victims some protection.

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2 Mr Alastair MacGibbon, Children's eSafety Commissioner, OCeSC, *Committee Hansard*, 18 February 2016, p. 18.

3 Ms Brooke Hartigan, Acting Assistant Secretary, Crime and Justice Policy Branch, Attorney-General's Department (AGD), *Committee Hansard*, 18 February 2016, p. 41.

5.23 The committee welcomes the AGD's comments that addressing non-consensual sharing of intimate images 'requires the continuing goodwill of...private sector partners' and that:

Service providers...and social media networks have an important role to play by responding promptly and effectively to reports of offensive online content, including where that applies to instances of revenge porn.<sup>4</sup>

5.24 The committee does not believe, however, that the government should rely solely on the goodwill of internet and social media providers. The committee notes that in some instances internet and social media providers reluctantly engage in the process of removing intimate images, in part because of the complexity and cost involved:<sup>5</sup> the committee suggests that the Canadian approach, where offenders can be required to pay the costs associated with the removal of images, is worthy of consideration.

#### **Recommendation 4**

**5.25 The committee recommends that the Commonwealth government consider empowering a Commonwealth agency to issue take down notices for non-consensually shared intimate images.**

5.26 The committee is also of the view that the AGD and AFP should continue to engage with internet and social media providers and platforms to ensure there is ongoing dialogue about non-consensual sharing of intimate images and remedies to address it. If there is not already a formal mechanism by which Commonwealth agencies and internet and social media providers regularly engage on issues related to non-consensual sharing of intimate images, the committee recommends that such a mechanism is established.

#### **Recommendation 5**

**5.27 If not already in existence, the committee recommends that the Commonwealth government establish a formal mechanism by which Commonwealth agencies and internet and social media providers regularly engage on issues relating to non-consensual sharing of intimate images.**

5.28 A number of submitters and witnesses advocated for a tort of privacy. The committee notes the creation of such a tort was recommended by the Australian Law Reform Commission (ALRC) in 2014.<sup>6</sup>

5.29 While the AGD advised the committee that the Commonwealth government is not supportive of the establishment of a tort of privacy, the committee notes the AFP and CDPP's comments in support of such.

5.30 As stated elsewhere in this report, victims are entitled to a range of avenues through which they can pursue their non-consensual sharing of intimate images

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4 AGD, *Submission 28*, pp 11–12.

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

6 ALRC, *ALRC Report 123: Serious Invasions of Privacy in the Digital Era*, June 2014.

matter. The committee therefore recommends that the Commonwealth government give further consideration to the ALRC's recommendations regarding the creation of a tort of privacy. In doing so, the committee acknowledges that such a statutory cause of action would be restricted to serious invasions of privacy, as recommended by the ALRC.

## **Recommendation 6**

**5.31 The committee recommends that the Commonwealth government give further consideration to the Australian Law Reform Commission's recommendations regarding a statutory cause of action for serious invasion of privacy.**

### **Education**

5.32 Legislating for non-consensual sharing of intimate images offences should not occur in isolation as it is one part of a much broader response required.

5.33 Chapter 4 discussed some of the work undertaken by the Office of the Children's eSafety Commissioner (OCeSC) and its programs for educating children and young people about safety and inappropriate behaviour online.

5.34 The committee supports this work by the OCeSC particularly as it educates and helps protect Australia's young people. The committee hopes that by educating young people about appropriate online behaviour, those messages will filter through to their parents, wider family and friends; similarly, today's young people are Australia's future leaders and decision makers and instilling in them the importance of appropriate online behaviour will only become more beneficial as time passes.

5.35 There appears to the committee, however, to be an absence of education and awareness amongst adults about what constitutes non-consensual sharing of intimate images and how to deal with it if you are a victim. The committee believes that there should be a public education and awareness campaign targeted at adults that seeks to both warn and advise about the legal and non-legal ramifications from and options for addressing non-consensual sharing of intimate images. An efficient way of doing so may be empowering and resourcing the OCeSC and AFP to deliver these services, noting their current work with children in relation to cybersafety. The states and territories should also give consideration to implementing public education and awareness campaigns, and collaborating with the Commonwealth government to do so.

## **Recommendation 7**

**5.36 The committee recommends that the Commonwealth government implement a public education and awareness campaign about non-consensual sharing of intimate images for adults by empowering and resourcing the Office of the Children's eSafety Commissioner and the Australian Federal Police to build on their existing work with children in relation to cybersafety.**

### **Professional training**

5.37 The committee acknowledges that non-consensual sharing of intimate images may fall under one of a number of crime types, such as cybercrime, sex crime and

domestic violence, and that police in Australia currently encounter barriers to pursuing allegations of non-consensual sharing of intimate images related to their capabilities, resourcing and the potential absence of relevant criminal offences.

5.38 As discussed in chapter 4, victims' support services told the committee that victims encounter a variety of responses from police when reporting allegations of non-consensual sharing of intimate images, ranging from proactive and helpful through to dismissive.

5.39 The committee has recommended that the Commonwealth, states and territories enact non-consensual sharing of intimate images offences; the committee expects that this will empower police to investigate allegations of non-consensual sharing of intimate images in a consistent and comprehensive way which has not been previously available to them. It should also go some way to improving police responses to victims reporting non-consensual sharing of intimate images.

5.40 In addition, the committee believes that police should be required to participate in professional training in relation to non-consensual sharing of intimate images and particularly any new offences enacted in the relevant jurisdiction. The committee acknowledges that police working in certain fields (for example cybercrime and domestic violence) may be more likely to encounter allegations of non-consensual sharing of intimate images; however, given the extent of non-consensual sharing of intimate images and the diverse behaviours involved, the committee recommends that all police undertake at a minimum basic training in relation to non-consensual sharing of intimate images.

### **Recommendation 8**

**5.41 The committee recommends that that all Australian police undertake at a minimum basic training in relation to non-consensual sharing of intimate images, in particular any new offences in the relevant jurisdiction.**

**Senator Glenn Lazarus  
Chair**

