

Submission to the Senate Inquiry - "Inquiry into 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." By Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj.

Submission 31

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Submission to the Senate Inquiry - "Inquiry into 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." By Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj.

In response to a request from the chair of the committee we would make the following submissions. We will provide our responses as they relate to each term of reference.

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;

It can be argued that revenge porn is but an example of a broader trend that has seen technology impact on criminal activity in a number of ways. As a result of movement from the physical to the digital world, globalisation and society's reliance on technology, many more of our lifestyle activities are conducted in the digital world. Examples of this include technology driven communities such as Facebook, twitter etc. People enjoy capturing their experiences, including some of the most intimate ones and share them.

Technology has impacted on crime in a number of ways. There is an increased ability to acquire new victims with greater ease remotely. The extension of reach and range of a predator due to technology has assisted in the commission of offences. The creation of, and access to, new markets of victims, no longer constrained by physical location assists potential offenders. Technology has further impacted crime through the extension and facilitation of traditional offences through technology, for example frauds, but in the realm of sex offences, the ability to stalk, meet victims on dating sites. The creation of new offences through technology, revenge porn, unauthorised surveillance, electronic stalking and the use of audience and distribution to aid the offence are also examples of technology and its influence on criminal behaviour and our policy responses.

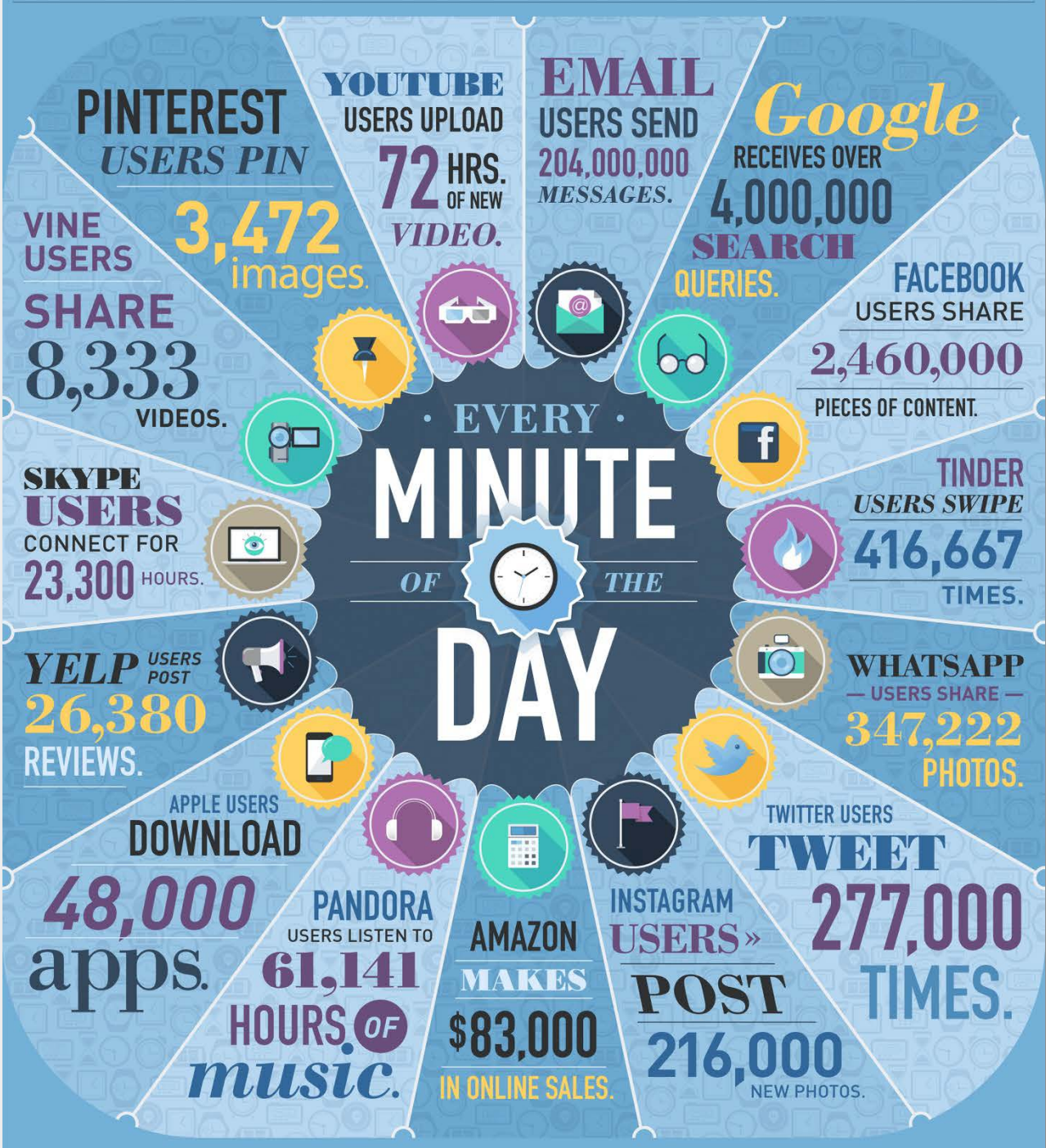
The below graphic created by analytics software provider Domo, shows just how much data is generated in one minute online (Morrison, 2014).



DATA NEVER SLEEPS 2.0

How Much Data is Generated Every Minute?

Data is being created every minute of every day without us even noticing it. Given how much information is floating around these days, it's tempting to talk about big data only in terms of size. Big data describes the massive avalanche of digital activity pulsating through cables and airwaves, but it also describes all the things we were never able to measure before. With every status we share, every article we read or every photo we upload, we are creating a digital trail that tells a story. Below, we explore how much data is generated in one minute.



THE GLOBAL INTERNET POPULATION GREW 14.3% FROM 2011 - 2013 AND NOW REPRESENTS

2.4 BILLION PEOPLE.

Google's recent decision to remove content at the request of victims of revenge porn highlights the growing importance of this crime category (Singhal, 2015). The emergence and increase of revenge porn type offences is also reflected by the fact that governments are also reacting to the growing problem – the New South Wales government last year announced a parliamentary inquiry into existing laws and whether there was any need for reform.



The United Kingdom has also considered the issue of revenge porn and implemented laws to combat such. As noted at the Council of Australian Government meeting (COAG) 2015, strategies were needed to tackle the increased use of technology to facilitate abuse against women, and to ensure women have adequate legal protections against this form of abuse (Branco, 2015b).

"Technology-facilitated abuse encompasses the non-consensual distribution of sexual images, as well as stalking, monitoring of location via car or mobile device GPS systems, harassment and abuse through social media, texts or email and monitoring and tracking of website history of computers or mobile devices." (Branco, 2015b).

Anecdotal information from the Gold Coast Centre against Sexual Violence provides some understanding into the role technology plays in sexual offences. The councillors of the service identified five main areas that technology played a role in sexual assaults:

- met offender online
- online harassment of the victim by the offender
- victim transmitted explicit material
- offender transmitted explicit material, and
- assault filmed

We would argue that there are a number of elements for the specific offence of revenge porn. It usually involves the following aspects:

- an existing or previous relationship
- an intent to cause harm
- the unauthorised public release of intimate images, and
- the act is facilitated by technology

While this is neither a legal definition nor an exhaustive one, it does capture the traditional concept of how revenge porn is seen in today's society. Recently mainstream media have used the term to encompass almost any unauthorised release of intimate images regardless of relationship status. The term has also been made synonymous with the mass dumping of images of multiple victims. Examples of this include the release of intimate images on the internet of 400 women in Adelaide and some 700 from Brisbane in 2015 (Branco, 2015a; Fewster, 2015).

We suggest a number of factors have driven the rise in incidences of revenge porn, these include:

- the ability to create content
- the ability to distribute this content, and
- the assistance in many cases of facilitators to distribute to a much wider audience

To highlight the issue of exploitation, an online study of 1,519 consumers conducted by McAfee in 2014 known as 'Love, Relationships and Technology' reported that 98 per cent of respondents use their mobile device to take photos, and 54 per cent send or receive intimate content including video, photos, emails and messages (McAfee, 2014). Of those surveyed, 69 per cent were securing their smartphone with a password or passcode. Of those found to secure their phone, 42 per cent use the same password across multiple devices, which increases the likelihood that the security of these mobile devices will become exploited (McAfee, 2014).

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

Our submission in response to this term of reference will be succinct. The impact on each victim would depend on the resilience and nature of the victim. Further the impact would also depend on the nature of the intimate image posted. It should be noted that there have been some suggestion that the act of revenge porn should be considered an extension of sexual assault type of offences given the potential impact on victims.

There is also the issue of longevity of the offence. For instance in a physical assault that offence is committed and then ceased. While the effects may be ongoing, the actual act causing the offence is in most cases clearly defined from a time and place point of view. In revenge porn cases this may not be the case due the difficulty in having information removed from the internet. Where an image may be removed from one source, given the distribution networks in effect, it is highly likely that image may appear on another source site and thus the offence continues. In other words the impact could be continually ongoing due to new instances.



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

In the public domain there have been a number of responses to the revenge porn issue. In June 2015, Google announced that it would remove links to revenge pornography on request (Singhal, 2015). Microsoft followed suit in July (Beauchere, 2015). These measures have, in part, confirmed that there is a significant issue with the distribution of non-consensual images on the Internet, the availability of those images globally, and the harm that it causes to victims. From a civil prospective Google is the latest in a series of high-profile internet companies to enact a removal policy. Reddit, Twitter and Facebook have already initiated such policies.

Google will consider the removal of material only once users have submitted an online request. The final decision as to whether content should be removed remains a matter for Google. Though Google has identified that the decision was motivated by its appreciation of the destructive nature such material has on (mostly female) victims, it is consistent with Google's current policy of removing sensitive personal information such as bank account numbers and signatures (Singhal, 2015). Consideration should also be given to enacting provisions that give legal effect to an individual's requests for previously shared images be deleted. A recent ruling in Germany has meant a small victory for German citizens as requests for the deletion of intimate images shared as part of a relationship have been held to be enforceable (Oltermann, 2014).

However, the announcement is not universally welcomed. The decision to remove revenge porn has been cited as a potential infringement of the right to free speech. But, the criticisms are not all centred on civil rights arguments. Legitimate concerns are raised as to how exactly the policy will be administered and how Google will deal with historic revenge porn images that have been freely available.

It has been reported that couples are drafting pre-nuptial agreements that include social-media clauses (Thompson, 2014). Recent events have aided in limiting the damaging consequences of 'revenge porn', such as the European Union Ruling on 13 May 2014 by the European Court of Justice that a person has the 'right to be forgotten' (Travis & Arthur, 2014). Individuals are able to request that search engines remove information, including images, if it is 'inadequate, inaccurate, irrelevant or excessive'. These measures have, in part, confirmed that there is a significant issue with the distribution of non-consensual images on the internet, the availability of those images globally, and the harm that it causes to victims.

Crime prevention strategies such as education and awareness campaigns both from government and private sectors stakeholders should also be considered as part of any response.

Great care must be taken when drafting legislation to combat an issue such as 'revenge pornography'. For example, what does it mean to distribute? Does showing a friend or work colleague an image stored on an electronic device, such as a mobile phone constitute distribution? What about instances where the image is, instead of stored on a mobile phone, merely retrievable via an online 'cloud'-like application? What if the image is not deliberately/intentionally distributed? It is submitted that any legislation that is drafted should include both terrestrial and cyber forms of distribution so as to include, for example, the sharing or sending of a hard-copy photograph to another.

It is plausible that a person ('A') may lose, sell or otherwise transfer their electronic storage device (e.g., mobile phone, camera, laptop) to another person ('B') and B may distribute an intimate image of C. Should A be criminally liable for the distribution of C's image? Relatedly, A's electronic storage device system may be exploited (i.e., hacked) by another person and images stored on that device may be distributed. In all of these instances: loss; sale; transfer; and exploitation; person A may have, although unintentionally, recklessly distributed another person's image. A may not have, for example, purchased adequate anti-viral software on his or her computer.

A may not have deleted historic images from his or her electronic device prior to selling it. A, a teacher, could allow a student to borrow their USB storage pen and B, a student, could make the explicit, nude images stored and found on the USB pen, available to the public. This example, in fact, reportedly occurred in November 2015 at a college in Western Australia (Hedley & Hondros, 2015).

A baseline of evidence would need to be presented to show that current legislative offences present in Australian jurisdictions are ineffective in dealing with revenge porn related offences. The various State and Federal prosecution authorities would be the custodians of this information. Additionally, it must be shown that any proposed new offences would be effective in addressing any perceived failings of the current scheme, and were simply not "window dressing" with the creation of a specific new offence.

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

While a number of jurisdictions have enacted legislation to combat revenge porn, substantial challenges for law enforcement remain. First, police action requires the victim becoming aware of images being posted. Second, offences of this kind often are transnational in nature – they occur in multiple countries and multiple legal jurisdictions. This poses investigative challenges in securing the evidence needed to prosecute. Third, the acts are often deliberately conducted in such a way as to preserve the offender's anonymity. Various legislative acts in jurisdictions around the world provide for specific revenge porn offences. It would seem responses can generally be categorised as specific and non-specific. Specific responses are those that have created niche offence for revenge porn. Non-specific responses are those that rely on more generalised offences to deal with instances of revenge porn and other offences.

An example of a specific response is the Victorian response to revenge porn offences. Victoria created a specific offence under *the Summary Offences Act 1966* - sect 41DA - Distribution of intimate image, the section in brief outlines the offence as below.

Distribution of intimate image

(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.*

The act then provides the below example of the prescribed offence.

A intentionally distributes an intimate image of another person (B) to a person other than B; and the distribution of the image is contrary to community standards of acceptable conduct.

The maximum penalty for the offence is 2 years imprisonment. This offence does reference the use of social media and it has an additional offence that covers threats to distribute. . An

intimate image is defined as either a person engaged in sexual activity, a person in a manner or context that is sexual, or the genital or anal region of a person or, in the case of a female, the breasts. The second type of intimate image, 'a person in a manner or context that is sexual' is arguably too broad. The legislation also fails to consider instances where real images may be doctored or fabricated so as to appear 'intimate', despite their lack of authenticity.

The Victorian provision also has exclusion clauses, which include if the offence is committed by a minor and if the act is committed with consent:

B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to—

- (i) the distribution of the intimate image; and*
- (ii) the manner in which the intimate image was distributed.*

A key aspect of the offence is the community standard as to what is acceptable conduct. This has been described by the Victorian Attorney General as follows in the reading of the bill into parliament.

“The bill provides guidance to courts to determine the application of community standards of acceptable conduct in a particular case. The court is directed to consider the context in which the image was captured and distributed, the personal circumstances of the person depicted, and the degree to which their privacy is affected by the distribution. The purpose of the community standards test is to ensure that the offences do not unjustifiably interfere with individual privacy and freedom of expression, while at the same time targeting exploitative, harmful and non-consensual behaviour.” (Parliament of Victoria, 2014).

The Victorian laws are similar to South Australian Laws, sections 26B and 26C of the *Summary Offences Act 1953 (SA)*, which created the offence of distributing an invasive image. Sections 26B and 26 C of the Act create the offence of distributing an invasive image. There are also additional offences under this Act that also make it unlawful to film a person who is subjected to, or forced to, engage in a humiliating or degrading act, and/or distributing such a film.

The United Kingdom introduced a specific offence in 2014, Section 33 of the *Criminal Justice and Courts Act 2015* provided:

It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—

- (a) without the consent of an individual who appears in the photograph or film, and*
- (b) with the intention of causing that individual distress.*

Of note is that the offence does not specifically mention technology based offences, the clear intent of the legislation was to capture those offences. The press release for the amendments stated:

The change will cover the sharing of images both online and offline. It will mean that images posted to social networking sites such as Facebook and Twitter will be caught by the offence, as well as those that are shared via text message. Images shared via email, on a website or the distribution of physical copies will also be caught. Those convicted will face a maximum sentence of 2 years in prison. (Grayling, 2014).

The United Kingdom provisions contained a number of defences to the offence including:

(2) But it is not an offence under this section for the person to disclose the photograph or film to the individual mentioned in subsection (1)(a) and (b).

(3) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.

(4) It is a defence for a person charged with an offence under this section to show that—

(a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and

(b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

(5) It is a defence for a person charged with an offence under this section to show that—

(a) he or she reasonably believed that the photograph or film had previously been disclosed for reward, whether by the individual mentioned in subsection (1)(a) and (b) or another person, and

(b) he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1)(a) and (b).

Examples of non-specific legislation include the Federal offence of *Criminal Code Act 1995 (Commonwealth)* section 474.17, using a carriage service to menace, harass or cause offence. This section relies on the test of what a reasonable person would regard as being, in all the circumstances, menacing, harassing or offensive.

Currently, instances of the malicious distribution of intimate images in Queensland may, depending on the circumstances, be prosecuted as offences of Extortion (section 415 *Criminal Code 1899*), Unlawful Stalking (s.359E *Criminal Code 1899*) and under the *Domestic Violence and Protection Act 2012*. The question as to whether terms like ‘deliberate’, ‘maliciously’ or indeed, what an ‘intimate image’ all mean will likely be left to the Courts to answer unless caution and care are liberally applied to the drafting of any legislation proscribing the commission of revenge porn.

The below snapshot provides some insight into legislative responses to the revenge porn phenomena. In the United States some 26 states (as of September 2105) have specific laws that deal with the issue of revenge porn (Goldberg, 2015).

As can be seen there are a number of common elements to laws that have been specifically created to address revenge porn type offences. These elements include the issue of consent, the element of intent, the type of harm and whether the victim has to suffer such and the type of image subject of dissemination. Of note is that many of the legislative responses do not reference technology specifically, despite this being the conduit for these type offences being committed.

State	Technology specific	Consent element	Intent element	Type of harm	Type of image
UK	No	Yes	Yes	With the intention of causing that individual distress	A private sexual photograph or film
Canada	No	Yes	Yes (refers to knowingly or being reckless)	None required	Intimate - in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity
Colorado	Yes	Yes	Yes	To harass the depicted person and inflict serious emotional distress upon the depicted person and the conduct results in serious emotional distress of the depicted person	Private intimate parts -means external genitalia or the perineum or the anus or the pubes of any person or the breast of a female
California	No	Yes	Yes	Will cause serious emotional distress, and the person depicted suffers that distress	The image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation
Idaho	No	Yes	Yes (mentions reckless disregard)	None required	Image or images of the intimate areas of another person or persons
Virginia	No (but does mention service providers)	Yes (mentions not licenced or authorised)	Yes	To coerce, harass, or intimidate	Any videographic or still image created by any means whatsoever that depicts another person who is totally nude, or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breast

e) Any other related matters.;

Nil.



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