

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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Recommended citation(APA):

Goldsworthy, T., & Raj, M. (2016). 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. Commonwealth Government of Australia.
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The Senate

Legal and Constitutional Affairs
References Committee

Phenomenon colloquially referred to as
'revenge porn'

February 2016

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ISBN 978-1-76010-376-7

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Recommendations

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.

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.

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.

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.

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.

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.

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.

Chapter 1

Introduction and background

Referral

1.1 On 12 November 2015, the following matter was referred to the Senate Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 25 February 2016:

- 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;
- b. the impact this has on the targets of revenge porn, and in the Australian community more broadly;
- c. potential policy responses to this emerging problem, including civil and criminal remedies;
- d. the response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions; and
- e. any other related matters.¹

Conduct of the inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 14 January 2016. Details of the inquiry were made available on the committee's website at www.aph.gov.au/senate_legalcon.

1.3 The committee received 32 public submissions, which are listed at Appendix 1; 2 submissions were received *in camera*. A public hearing was held in Sydney on 18 February 2016. A list of witnesses who appeared before the committee at the hearing is at Appendix 2.

1.4 The committee thanks all those who made submissions and gave evidence at its public hearing.

A note on terminology

1.5 During the course of the inquiry, the committee heard opposition to and concern about the use of the phrase 'revenge porn'. This issue is discussed in more detail in chapter 2. The committee shares the concerns raised in relation to the connotations of 'revenge porn' and the committee agrees that there are more appropriate terms—such as 'non-consensual sharing of intimate images'—that should be used instead; this terminology reflects that a variety of motives are relevant and that not all images are created or distributed for the purposes of pornography.

1 *Journals of the Senate*, 12 November 2015, p. 3377.

Structure of this report

- 1.6 There are five chapters in this report.
- 1.7 This chapter describes the phenomenon of non-consensual sharing of intimate images and outlines some statistics about victims in Australia. It also describes current legislation in Australia, at both a Commonwealth and state level, as well as legislation in comparable international jurisdictions.
- 1.8 Chapter 2 discusses a range of issues raised during the course of the inquiry.
- 1.9 Chapter 3 considers criminal law approaches and options for legislative reform.
- 1.10 Chapter 4 considers broader responses to non-consensual sharing of intimate images, including civil remedies, education and options for victims to report non-consensual sharing of intimate images.
- 1.11 Chapter 5 outlines the committee's views and recommendations.

Background

What is 'revenge porn'?

1.12 The non-consensual sharing of intimate images encompasses a range of behaviours which may include:

images obtained (consensually or otherwise) in an intimate relationship; photographs or videos of sexual assault/s; images obtained from the use of hidden devices to record another person; stolen images from the Cloud or a person's computer or other device; and pornographic or sexually explicit images that have been photo-shopped, showing the victim's face.²

1.13 As stated above, images may have been obtained with or without the consent of the victim, are associated with a range of motivations, and can be distributed by various means.³ What constitutes an 'intimate image' can also vary according to community standards. For example, 'photographs of a Muslim woman without her hijab' would be considered an intimate image in some circumstances.⁴

1.14 While the non-consensual sharing of intimate images is often perpetrated by ex-partners who distribute images seeking revenge, it can also involve acquaintances or strangers who distribute images in order to coerce, blackmail, humiliate or embarrass another person, or those who distribute images for sexual gratification, fun, social notoriety or financial gain.⁵

1.15 The non-consensual sharing of intimate images can occur by various means, for example, by:

2 Drs Nicola Henry, Asher Flynn and Anastasia Powell, *Submission 9*, p. 3.

3 Attorney-General's Department (AGD), *Submission 28*, p. 4.

4 Safe Steps, *Submission 29*, p. 3.

5 Drs Henry, Flynn and Powell, *Submission 9*, p. 3.

text message or email to family, friends, colleagues, employers and/or strangers; uploading images to pornography websites, including mainstream pornography sites, or specifically designed revenge pornography or "ex-girlfriend porn" websites; uploading images onto social media, thread or image board websites; or more traditional means of distributing images in public places, such as through the post, letterboxes or public spaces.⁶

Prevalence of non-consensual sharing of intimate images

1.16 The non-consensual sharing of intimate images is becoming increasingly prevalent, in part due to technological advances and the use of mobile phones and other recording devices, as well as the pervasive ubiquity of social media. It was observed by Associate Professor Terry Goldsworthy et al that:

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.⁷

1.17 Limited research has been conducted on non-consensual sharing of intimate images in Australia, and there is a need for greater understanding of the extent of the problem. Further research in this area could:

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.⁸

1.18 Research to date, however, does give some insight into the scope of the problem. A 2015 survey on online abuse and harassment conducted at the Royal Melbourne Institute of Technology (RMIT), reported that 1 in 10 Australians have had a nude or semi-nude image of them distributed online or sent onto others without their permission.⁹ This research surveyed 3000 Australian respondents between 18 and 55 years of age via a panel survey provider, and used quota sampling to match the demographics of the sample with the Australian census data.¹⁰

1.19 The Northern Territory Commissioner of Police informed the committee that in that jurisdiction six separate reports of non-consensual sharing of intimate images had been received in the period from July 2015 to December 2015 and that these instances:

6 Drs Henry, Flynn and Powell, *Submission 9*, p. 3.

7 Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj, *Submission 31*, p. 1.

8 Ms Victoria Laughton, Research and Advocacy Officer, Victim Support Service (VSS), *Committee Hansard*, p. 7.

9 A. Powell and N. Henry, *Digital Harassment and Abuse of Adult Australians: A Summary Report*, RMIT University, Melbourne, 2015. See also Dr Nicola Henry, Senior Lecturer, La Trobe University, *Committee Hansard*, 18 February 2016, p. 30.

10 Dr Henry, La Trobe University, *Committee Hansard*, 18 February 2016, p. 31.

involved allegations of ex-partners making material available either generally through the internet or specifically to associates of the victim. The material in question has varied from mildly provocative images to highly explicit sexual images or movies.¹¹

1.20 Women's Legal Services NSW told the committee:

The Domestic Violence Resource Centre down in Victoria did a national survey in 2015. That survey was with 546 [domestic violence] workers. Of that number, 98 per cent reported that their clients had experience facilitated stalking and abuse—not all necessarily were the non-consensual sharing of intimate images but technology facilitated stalking and abuse.¹²

1.21 The problem of non-consensual sharing of intimate images has also been increasing in comparable overseas jurisdictions. Data from the United Kingdom (UK) indicates that since legislation was introduced in April 2015, 'nearly 830 cases of revenge pornography have allegedly been reported to police, with the first offender sentenced on 7 August 2015'.¹³

1.22 Globally, analysis by *The Economist* from 2014 showed there are at least 3000 pornography websites functioning with a revenge purpose.¹⁴ That analysis also stated:

In Japan the number of cases reported to police more than tripled, to 27,334, between 2008 and 2012.

The consequences for the unwitting subjects can be severe, including damage to their future relationships and careers. Ms Chiarini was harassed online. Others have had abusive strangers turn up at their doors. In the past couple of years several are known to have killed themselves.

Yet victims often find themselves without legal recourse. Many countries have laws against harassment or "malicious communication", but these generally target repeated actions, direct contacts and verbal or physical threats. Copyright law cannot help if the person who publishes an image also took it. Even if it was snapped by the subject (one survey suggests that such "selfies" make up a large share of all revenge porn), getting it taken down is slow and costly. And during the delay it may be republished elsewhere.¹⁵

1.23 Many submitters noted that women are more likely than men to be victims of non-consensual sharing of intimate images. For instance, the Law Council of Australia

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

12 Ms Elizabeth Snell, Law Reform and Policy Coordinator, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 27.

13 Law Council of Australia (LCA), *Submission 10*, p. 2.

14 *The Economist*, 'Misery merchants', 5 July 2014, available: <http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be> (accessed 21 February 2016).

15 *The Economist*, 'Misery merchants', 5 July 2014.

(LCA) provided details of convictions in the UK since April 2015 when non-consensual sharing of intimate images legislation was enacted and noted that the 10 convictions to date in that jurisdiction have all involved female victims: 'it is clear that currently the majority of reported victims of "revenge pornography" are women'.¹⁶ However, there have also been prominent Australian examples of men being victimised.¹⁷

Current legislation

Commonwealth

1.24 Part 10.6 of the *Criminal Code Act 1995* (Cth) (the Code) provides for the criminalisation of conduct relating to the misuse of a telecommunications service with a penalty of imprisonment for three years. Under section 474.17 of the Code, a person is guilty of an offence if:

- a) the person uses a carriage service; and
- b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

1.25 The individual must have intended to use the carriage service and have been reckless as to whether they were using a carriage service in a way that the reasonable person would regard in all the circumstances as menacing, harassing or offensive.¹⁸ The reasonable person test allows for community standards and common sense to be taken into account when determining whether certain conduct or content of a communication is in fact menacing, harassing or offensive.

1.26 Under section 473.4 of the Criminal Code, matters to be taken into account when deciding whether reasonable persons would regard particular material or use of a carriage service as being offensive include:

- the standards of morality, decency and propriety generally accepted by reasonable adults
- the literary, artistic or educational merit (if any) of the material, and
- the general character of the material (including whether it is of a medical, legal or scientific character).

1.27 The types of use of a carriage service the offence may cover include use that would make a person apprehensive as to their safety or well-being or the safety of

16 LCA, *Submission 10*, p. 2.

17 S. Wardill, 'Sexting MP Peter Dowling sent explicit images to secret mistress', *Courier Mail*, 6 August 2013.

18 *Criminal Code Act 1995* (Cth) ss 5.6(2), 5.2, 5.4.

their property, use that encourages or incites violence, and use that vilifies persons on the basis of their race or religion.¹⁹

1.28 Other provisions of the Criminal Code that are potentially relevant include section 471.12 criminalising the use of a postal or similar service to menace, harass or cause offence, and sections 474.19 and 474.20, criminalising the use of a carriage service for child pornography material. Section 474.25 establishes offences related to the obligations of internet service providers and internet content hosts with regard to child pornography and child abuse material.

Criminal Code Amendment (Private Sexual Material) Bill 2015

1.29 In September 2015, the Australian Labor Party developed an exposure draft of the Criminal Code Amendment (Private Sexual Material) Bill 2015. The Bill is currently at second reading stage before the House of Representatives; it sets out proposed amendments to the *Criminal Code Act 1995* that:

target individuals who share, or threaten to share, private sexual images or film recordings of others without consent and with the intention of, or where there is the risk of, causing that person harm or distress, as well as those who operate 'revenge porn' websites.²⁰

1.30 A number of submitters to this inquiry also made submissions on the exposure draft and forwarded these to the committee.

State and territory

1.31 To date, South Australia and Victoria are the only states in Australia to have introduced legislation specifically in relation to non-consensual sharing of intimate images.

South Australia

1.32 In 2013, South Australia introduced legislation which makes it an offence to distribute invasive images of a person without their consent.²¹

1.33 The South Australian Act defines 'distribute' and 'invasive image' as follows:

distribute includes—

- (a) communicate, exhibit, send, supply, upload or transmit; and
- (b) make available for access by another,

but does not include distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider;

...

19 Explanatory Memorandum (EM), *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No. 2) 2004*, p. 34.

20 Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft, *Discussion Paper*, September 2015, p. 1.

21 *Summary Offences (Filming Offences) Amendment Act 2013* (SA), s 26C(1).

invasive image means a moving or still image of a person—

- (a) engaged in a private act; or
- (b) in a state of undress such that the person's bare genital or anal region is visible,

but does not include an image of a person under, or apparently under, the age of 16 years or an image of a person who is in a public place...²²

Victoria

1.34 In 2014, Victoria introduced legislation which makes it an offence to threaten to distribute or distribute an intimate image.²³

1.35 The Victorian Act defines 'distribute' as including publishing, exhibiting, communicating, sending, supplying or transmitting to any other person and to 'make available for access by any other person'.²⁴

1.36 Under the Victorian Act, 'intimate image' is defined as:

...a moving or still image that depicts—

- (a) a person engaged in sexual activity; or
- (b) a person in a manner or context that is sexual; or
- (c) the genital or anal region of a person or, in the case of a female, the breasts...²⁵

New South Wales

1.37 In June 2015, the New South Wales (NSW) Parliament undertook an inquiry into remedies for the serious invasion of privacy, which is due to report in March 2016.

International jurisdictions

1.38 Various comparable international jurisdictions such as New Zealand, the UK, Canada and numerous states in the United States of America, have introduced similar criminal law legislation to specifically address the phenomenon of non-consensual sharing of intimate images.

1.39 A table summarising the key features of overseas non-consensual sharing of intimate images legislation was provided by the Attorney-General's Department (AGD) and is included in this report at Appendix 4.

New Zealand

1.40 Up until 2015, the *Privacy Act 1993* (NZ) specifically excluded domestic affairs which meant that people were not liable for collecting, distributing or using any

22 *Summary Offences (Filming Offences) Amendment Act 2013* (SA), s 26A.

23 *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), ss 41DA and 41DB.

24 *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), s 40.

25 *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), s 40.

information that related to their family or household, even if harmful to another person.²⁶

1.41 In July 2015, the *Harmful Digital Communications Act 2015* (NZ) (the HDCA Act) was enacted.²⁷ The HDCA Act means that the exclusion for personal information relating to domestic affairs no longer applies in circumstances where 'collection, disclosure or use would be highly offensive to an ordinary reasonable person'.²⁸

1.42 The HDCA Act defines 'intimate visual recording' as:

(a) ...a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device with or without the knowledge or consent of the individual who is the subject of the recording, and that is of—

(i) an individual who is in a place which, in the circumstances, would reasonably be expected to provide privacy, and the individual is—

(A) naked or has his or her genitals, pubic area, buttocks, or female breasts exposed, partially exposed, or clad solely in undergarments; or

(B) engaged in an intimate sexual activity; or

(C) engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing; or

(ii) an individual's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—

(A) from beneath or under an individual's clothing; or

(B) through an individual's outer clothing in circumstances where it is unreasonable to do so; and

(b) includes an intimate visual recording that is made and transmitted in real time without retention or storage in—

(i) a physical form; or

(ii) an electronic form from which the recording is capable of being reproduced with or without the aid of any device or thing²⁹

1.43 The HDCA Act outlines numerous orders that can be made by the court against a defendant:

- an order to take down or disable material:
- an order that the defendant cease or refrain from the conduct concerned:

26 Office of the Privacy Commissioner (New Zealand), *Harmful Digital Communications Act FAQs*, available: <https://opcwebsite.cwp.govt.nz/news-and-publications/guidance-resources/hdca-faqs/#amendment-section-56> (accessed 21 February 2016).

27 *Harmful Digital Communications Act 2015* (NZ).

28 *Harmful Digital Communications Act 2015* (NZ), s 41.

29 *Harmful Digital Communications Act 2015* (NZ), s 4.

-
- an order that the defendant not encourage any other persons to engage in similar communications towards the affected individual:
 - an order that a correction be published:
 - an order that a right of reply be given to the affected individual:
 - an order that an apology be published.

1.44 The HDCA Act also empowers a court to make orders against an online content host, for example 'take down or disable public access to material that has been posted or sent', 'order that the identity of an author of an anonymous or pseudonymous communication be released to the court' and 'order that a right of reply be given to the affected individual'.³⁰

1.45 Offences under the HDCA Act include non-compliance with a court order, with a penalty of not more than six months imprisonment or a fine not exceeding \$5000 for a natural person,³¹ and 'causing harm by posting digital communication':

- (1) A person commits an offence if—
 - (a) the person posts a digital communication with the intention that it cause harm to a victim; and
 - (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
 - (c) posting the communication causes harm to the victim.
- (2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—
 - (a) the extremity of the language used:
 - (b) the age and characteristics of the victim:
 - (c) whether the digital communication was anonymous:
 - (d) whether the digital communication was repeated:
 - (e) the extent of circulation of the digital communication:
 - (f) whether the digital communication is true or false:
 - (g) the context in which the digital communication appeared.
- (3) A person who commits an offence against this section is liable on conviction to,—
 - (a) in the case of a natural person, imprisonment for a term not exceeding 2 years or a fine not exceeding \$50,000:
 - (b) in the case of a body corporate, a fine not exceeding \$200,000.³²

30 *Harmful Digital Communications Act 2015* (NZ), s 19.

31 *Harmful Digital Communications Act 2015* (NZ), s 21.

32 *Harmful Digital Communications Act 2015* (NZ), s 22.

1.46 Online content hosts can be held liable in respect of specific content of a digital communication posted by a person and hosted by the online content host.³³

United Kingdom

1.47 In the UK, section 33 of the *Criminal Justice and Courts Act 2015* (UK) makes it 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.

1.48 The UK Act defines 'private sexual photograph' as photographs or films which show something not of a kind ordinarily seen in public, depicting either an individual's exposed genitals or pubic area, or something that a reasonable person would consider to be sexual because of its nature, or content, taken as a whole. The UK Act includes the sharing of these images without consent both on- and offline as well as the physical distribution of images. Offenders can be imprisoned for up to two years.³⁴

Canada

1.49 In December 2014 the *Protecting Canadians from Online Crime Act 2014* (Canada) was enacted.³⁵ The Canadian Act 'was introduced primarily to address cyber bullying concerns'³⁶ and amends the Canadian Criminal Code to provide for:

(a) a new offence of non-consensual distribution of intimate images as well as complementary amendments to authorize the removal of such images from the Internet and the recovery of expenses incurred to obtain the removal of such images, the forfeiture of property used in the commission of the offence, a recognizance order to be issued to prevent the distribution of such images and the restriction of the use of a computer or the Internet by a convicted offender;

(b) the power to make preservation demands and orders to compel the preservation of electronic evidence;

(c) new production orders to compel the production of data relating to the transmission of communications and the location of transactions, individuals or things;

(d) a warrant that will extend the current investigative power for data associated with telephones to transmission data relating to all means of telecommunications;

(e) warrants that will enable the tracking of transactions, individuals and things and that are subject to legal thresholds appropriate to the interests at stake; and

33 *Harmful Digital Communications Act 2015* (NZ), ss 23 and 24.

34 Attorney-General's Department (AGD), *Submission 28*, p. 14.

35 *Protecting Canadians from Online Crime Act 2014* (Canada).

36 AGD, *Submission 28*, p. 16.

(f) a streamlined process of obtaining warrants and orders related to an authorization to intercept private communications by ensuring that those warrants and orders can be issued by a judge who issues the authorization and by specifying that all documents relating to a request for a related warrant or order are automatically subject to the same rules respecting confidentiality as the request for authorization.³⁷

1.50 The Canadian Act defines an 'intimate image' as:

a visual recording of a person made by any means including a photographic, film or video recording, 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; in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and where the person depicted retains a reasonable expectation of privacy at the time the offence is committed.³⁸

1.51 Offenders face a sentence of up to five years' imprisonment.³⁹

1.52 It is worth noting that the Canadian Act also makes complementary amendments to authorise the removal of such images from the internet and the recovery of expenses incurred to obtain the removal of such images, the forfeiture of property used in the commission of the offence, a recognisance order to be issued to prevent the distribution of such images and the restriction of the use of a computer or the internet by a convicted offender.⁴⁰

United States of America

1.53 At present there is no specific federal 'revenge porn' offence under United States (US) law. The extent to which existing federal offences may address non-consensual sharing of intimate images is the subject of debate:

Although American privacy and copyright laws appear to provide avenues for redress in certain cases, critics have dismissed the suitability of these civil law remedies to address revenge porn, citing the cost of civil litigation and the conceptual diminishing of a revenge porn matter to one of property law as key challenges to this approach.⁴¹

1.54 Democratic Congresswoman Jackie Speier has prepared a 'discussion draft' of the Intimate Privacy Protection Bill 2015 that is yet to be introduced into Congress. The draft:

proposes to make it a federal crime, by providing that it is unlawful to reproduce, distribute, exhibit, publish, transmit, or otherwise disseminate a visual depiction of a person who is nude or partially nude or engaged in

37 *Protecting Canadians from Online Crime Act 2014* (Canada), summary.

38 AGD, *Submission 28*, p. 16.

39 AGD, *Submission 28*, p. 16.

40 AGD, *Submission 28*, p. 16.

41 AGD, *Submission 28*, p. 14.

sexually explicit conduct, regardless of whether the depicted person consented to the capture of the image.¹⁶ The perpetrator must have known, or should have known, that such an act would likely cause emotional distress to a reasonable person if that reasonable person were so depicted. The offence carries a maximum five year penalty. Notably, the offence can also apply to telecommunications and internet service providers who fail to remove the content in question within 48 hours of receiving a notice of such content from the victim, the victim's legal representative, or a law enforcement officer.

1.55 Many jurisdictions (26 states) in the US have enacted legislation in response to non-consensual sharing of intimate images.⁴² For example, the state of Illinois criminalised the non-consensual dissemination of private sexual images in June 2015. Illinois' legislation does not require that the offender have the intent to cause emotional distress to the victim⁴³ and:

The content of the material distributed without consent is not defined by the presence of nudity or "sexual parts", and acknowledges that victims can be harmed by non-consensually distributed sexual images that do not contain nudity (e.g. engaging in any sexual act);

There is strong punishment for the crime of distributing non-consensual private sexual material, including 1-3 years in prison, and substantial fines. Furthermore, the law requires forfeiture of any profits made from the distribution of the non-consensual material;

The law also includes images that victims may have taken of themselves and not just those that are taken by another person;

The law can also be made to apply to any person who distributes the non-consensual image, and not just the original distributor, in order to prevent an image "going viral"; and

The law also includes the act of "doxing", or sharing personal information in connection with the non-consensual image.⁴⁴

1.56 In September 2015 California amended *The Penal Code of California* to include the following offences:

647. ...every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

...

(4) (A) Any person who intentionally distributes 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 by the person depicted or in which the person depicted

42 AGD, *Submission 28*, p. 13.

43 AGD, *Submission 28*, p. 15.

44 YWCA Adelaide, *Submission 8*, p. 5.

participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.

(B) A person intentionally distributes an image described in subparagraph (A) when he or she personally distributes the image, or arranges, specifically requests, or intentionally causes another person to distribute that image.⁴⁵

1.57 In addition to the offences under the California Penal Code, victims of cyber exploitation also have a private right of action against their perpetrators under California law:

Assembly Bill No. 2643 codified a private right of action against any person who intentionally distributes a photograph or recorded image of another without consent, if: (1) the person knew that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part or shows an act of intercourse, oral copulation, sodomy, or other act of sexual penetration, and (3) the other person suffers general or special damages as described in Civil Code section 48(a). A victim may also be able to bring a tort claim for the public disclosure of private fact and/or the intentional infliction of emotional distress depending on the circumstances of the case.⁴⁶

45 *The Penal Code of California*, s 647.

46 AGD, *Submission 28*, p. 15.

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 contexts 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.

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- 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.

Chapter 3

Legislative responses

3.1 The importance of enacting laws to criminalise non-consensual sharing of intimate images was highlighted by most submitters to the inquiry. In particular, organisations working directly with victims of non-consensual sharing of intimate images asserted that legislation in this area would send a strong message that this type of conduct is unacceptable and serve to deter potential perpetrators from offending.¹ Overall, most submitters supported the introduction of legislation at the Commonwealth level to address non-consensual sharing of intimate images, for example, the Commonwealth Director of Public Prosecutions (CDPP) submitted that legislation in this area would 'fill a gap within the existing law'.² The Law Council of Australia (LCA) advocated that legislation addressing the problems of non-consensual sharing of intimate images 'would be a positive step in combating violence against women'.³

3.2 The Top End Women's Legal Service (TEWLS) discussed the potential contribution of legislation to reducing the impact of non-consensual sharing of intimate images:

criminal offences effectively serve as a symbolic and educative function for society...by providing a tailored offence for criminal porn, this behaviour would be appropriately identified to the public and would clearly highlight and reinforce the 'wrongfulness' of revenge porn.⁴

3.3 The broader benefits of criminalising non-consensual sharing of intimate images were also articulated by the Queensland Law Society (QLS):

If people become aware that they may be committing an offence by sharing things they might become a little bit more discretionary about what they share and in what circumstances. With a public awareness campaign maybe less of it will happen, because they will be thinking, "Hang on, I'd better be damn sure that I've got consent before I pass this on".⁵

1 See, Australian Women Against Violence Alliance (AWAVA), *Submission 19*, p. 1.

2 Commonwealth Director of Public Prosecutions (CDPP), *Submission 24*, p. 5.

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

4 Top End Women's Legal Service (TEWLS), *Submission 1*, p. 4.

5 Mr Shane Budden, Senior Policy Adviser, Queensland Law Society (QLS), *Committee Hansard*, 18 February 2016, p. 40.

3.4 Submitters and witnesses also told the committee that enacting legislation at the Commonwealth level is unlikely to be the only measure needed to address the problem.⁶

3.5 Most submissions advocated specific legislation at a Commonwealth level, rather than relying on legislation enacted by the states and territories. A range of reasons were raised. For example, Domestic Violence Victoria (DVV) discussed its concerns about the adequacy of state based legislation to address non-consensual sharing of intimate images, noting that it is common in relationship breakdown, particularly in cases of domestic violence, for one partner to move interstate:

A Commonwealth law against 'revenge porn' would allow for a consistent response across states and territories in recognition that this issue—often in digital form—crosses physical borders. This will be essential to ensure congruency with stalking, harassment and other laws, as well as the national domestic violence order scheme and parenting orders.⁷

3.6 There is also often an international element in non-consensual sharing of intimate images cases, for instance, where the images are posted on a website hosted outside Australia. The committee was advised that addressing this international element of non-consensual sharing of intimate images would be challenging, even with Commonwealth legislation in place, and 'complications around the transnational nature of technology-facilitated crimes, in that the owners of the site may not reside in Australia and thus not subject to its laws'⁸ would persist.

3.7 Recommendations from submitters and witnesses in relation to amending existing or implementing new Commonwealth legislation are discussed in the following sections.

Commonwealth legislation

Is existing legislation being used and working?

3.8 According to the Australian Federal Police (AFP), the Commonwealth legislation (section 474.17 of the criminal code) has not been used in relation to non-consensual sharing of intimate images. However, it has been used by the ACT Director of Public Prosecutions in a related case that involved the non-consensual filming of sexual activity and 'the use of the telecommunications service to broadcast that to the people watching it in another location was the misuse of the carriage service'.⁹

6 Ms Katherine McLachlan, Quality and Research Manager, Victim Support Service, *Committee Hansard*, 18 February 2016, p. 4; Mr David Adsett, Deputy Director, CDPP, *Committee Hansard*, 18 February 2016, p. 53.

7 Domestic Violence Victoria (DVV), *Submission 4*, p. 2.

8 Drs Henry, Flynn and Powell, *Submission 9*, p. 8.

9 Mr Shane Connelly, Assistant Commissioner, Australian Federal Police (AFP), *Committee Hansard*, 18 February 2016, p. 50.

3.9 The submission from the CDPP identified a number of issues with the current Commonwealth legislation in terms of how effectively it could be applied in the context of non-consensual sharing of intimate images offences.

3.10 As discussed in chapter 1, section 474.17 of the Criminal Code provides for the criminalisation of conduct relating to the misuse of a telecommunications service. However, in the context of a potential non-consensual sharing of intimate images offence, section 474.17 does not address:

consent of the victim, nor does it define what might constitute an offensive communication, in the context of disseminating intimate, personal or sexual material electronically.¹⁰

3.11 According to the CDPP, other aspects of a non-consensual sharing of intimate images offence that are 'not contemplated' in the current legislation, include whether the victim 'held and maintained an expectation of privacy in relation to the image' and the fact that this part of the Commonwealth offence relates to the misuse of a telecommunications service, and would not extend to non-online conduct, such as distributing hard copy images.¹¹

3.12 The CDPP stated that a fundamental issue in evaluating the adequacy of the current legislation is that section 474.17 is not being used in relation to non-consensual sharing of intimate images, meaning that there has not been an opportunity to test the law. However, it was noted that there are 'evidentiary difficulties in isolating the use of the telecommunication service. Is it one push of a button, and how is that recorded electronically? Evidence-gathering issues associated with that are considerable'.¹²

3.13 The CDPP opined that amendments to the criminal code to create a new Commonwealth offence targeting non-consensual sharing of intimate images would be beneficial if they clarify issues 'in relation to the sort of material it applies to and the circumstances in which it applies'.¹³

Constitutional issues

3.14 The Attorney General's Department (AGD) discussed aspects of Australian Constitutional law of relevance to future non-consensual sharing of intimate images legislation. Under the Australian Constitution, powers are distributed between the Commonwealth and the states and territories¹⁴.

3.15 Where the Commonwealth has 'legislative power regarding a subject matter, it can create criminal offences in respect of the subject matter'.¹⁵ Under section 51(v) of

10 (CDPP, *Submission 3*, p. 3.

11 CDPP, *Submission 3*, p. 3.

12 Mr David Adsett, Deputy Director, CDPP, *Committee Hansard*, 18 February 2016, p. 43.

13 Mr Adsett, CDPP, *Committee Hansard*, 18 February 2016, p. 50.

14 Sections 51 and 52 of the *Commonwealth of Australia Constitution Act 1901* (Cth) describe the scope of Commonwealth powers.

15 Attorney-General's Department (AGD), *Submission 28*, p. 5.

the Constitution, the Commonwealth has authority to make laws with respect to postal, telegraphic, telephonic, and other like services. This has been interpreted as giving the power to make laws with respect to 'carriage services', including telecommunications networks and the internet.

3.16 Noting that state legislation has already been enacted in response to non-consensual sharing of intimate images, the CDPP considered potential Constitutional issues and suggested that 'it is preferable that any Commonwealth law not operate to exclude or limit the concurrent operation of those State laws':¹⁶

To maximise coverage of the State laws that have been enacted, it is preferable that any Commonwealth law not operate to exclude or limit the concurrent operation of those State laws. To this end, it is recommended that a provision stating Parliament's intent in this regard be included (for example, a provision similar to s 300.4 and 370.3 of the Code).¹⁷

3.17 The reasons why this could be problematic were outlined by the Director of Public Prosecutions (DPP) Tasmania:

If the Commonwealth does decide to legislate in this area, I would suggest that such legislation provides that it is to act in conjunction with State legislation and not to replace any such legislation for the same types of behaviour. The reason for this is that often such conduct...can be involved with other State-based offences against the victim. Therefore, if any Commonwealth legislation were to replace the State-based legislation it would make it difficult to prosecute offences under both Commonwealth and State legislation. Further, often for these victim-type offences the offence would be investigated by State-based police.¹⁸

3.18 Women's Legal Services NSW and the LCA highlighted a gap in the current legislation around non-consensual sharing of intimate images in hard copy, for example, 'if an image was left at someone's door or passed from person to person, but not through an electronic device'.¹⁹

3.19 The LCA discussed the need for criminalisation of non-consensual sharing of intimate images to include physical and non-online forms of action, but raised a concern that 'Commonwealth legislation may be restricted to online forms for Constitutional reasons, and this issue would therefore need to be addressed in State legislation':²⁰

We also see that state and territory legislation is also needed to address the issue of non-consensual sharing of images beyond carriage service

16 CDPP, *Submission 3*, p. 5.

17 CDPP, *Submission 3*, p. 5.

18 Director of Public Prosecutions (DPP) Tasmania, *Submission 26*, p. 2.

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

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

providers and postal services, such as person-to-person sharing of images or leaving an image at someone's doorstep.²¹

Key elements of potential future legislation

Definitions

3.20 As discussed in chapter 2, a number of submitters and witnesses outlined concerns with the term 'revenge porn', recommending terms such as 'non-consensual sharing of intimate images' to describe 'revenge porn'.²² Definitional issues associated with a number of other terms were also brought to the committee's attention.

3.21 For example, it was highlighted that the Victorian non-consensual sharing of intimate images legislation uses the term 'intimate image' and defines it as:

a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or content that is sexual; or (c) the genital or anal region of a person, or, in the case of a female, the breasts.²³

3.22 The Victorian legislation also states that community standards of acceptable conduct must be taken into account. This includes the nature and content of the image, the circumstances in which it was captured and distributed, and the circumstances of the person who is the subject of the image, including the impact on their privacy.²⁴

3.23 Noting that 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 CDPP submission recommended that 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.²⁵

3.24 The AGD described this point in more detail, noting that some parts of the community would be likely to take a broader view about what constitutes non-consensual sharing of intimate images:

beyond images that are strictly of a "sexual" nature; intimate, non-sexual images (for example, of a Muslim woman without her hijab) distributed without consent can be equally as damaging and traumatic for a victim and can be used in much the same way as a sexual image by a perpetrator of abuse.²⁶

21 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

22 Sexual Assault Support Service (SASS), *Submission 11*, p. 2.

23 *Summary Offences Act 1966* (Vic) section 40, cited in: Drs Henry, Flynn and Powell, *Submission 9*, p. 5.

24 Drs Henry, Flynn and Powell, *Submission 9*, pp 5–6.

25 CDPP, *Submission 3*, p. 4.

26 AGD, *Submission 28*, p. 4.

3.25 It was brought to the attention of the committee that under the current Victorian non-consensual sharing of intimate images legislation, 'distribute' is defined as 'publish, exhibit, communicate, send, supply, or transmit to any other person, whether to a particular person or not'.²⁷ However, Drs Henry, Flynn and Powell indicated in their submission that under this definition it was not clear whether 'communicate' could mean 'showing' someone an image, for example, a printed hardcopy or an image on a screen, and that any 'new offence should clearly state that distribution can mean sharing and showing, and that it is irrelevant whether it is distributed to one person or millions of people'.²⁸

3.26 Assistant Professor Terry Goldsworthy et al noted that:

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.²⁹

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.³⁰

3.27 The Office of the Director of Public Prosecutions in NSW (ODPP NSW) stated that the term 'image' should include still (photographs) and moving (film/video) images.³¹ Further, a 'reasonable expectation of privacy would include such things as, an image in which':

27 Drs Henry, Flynn and Powell, *Submission 9*, pp 5–6.

28 Drs Henry, Flynn and Powell, *Submission 9*, pp 5–6.

29 Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj, *Submission 31*, p. 5.

30 Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj, *Submission 31*, p. 6.

31 Office of the Director of Public Prosecutions (ODPP NSW), *Submission 24*, p. 4.

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- A person is depicted naked or partially naked, irrespective of whether their genitals are exposed and irrespective of the type of pose the person has adopted;
 - A person is depicted engaged in a sexual act/activity, irrespective of whether their face is visible;
 - A person is depicted in a way which, by the context or content, would suggest that the image is of an intimate or private nature such as images depicting a person dressed in lingerie, or in a sexual pose.³²

3.28 It was suggested that photo-shopped images should also fall within the scope of future legislation, and that the Victorian legislation 'fails to consider instances where real images may be doctored or fabricated so as to appear "intimate", despite their lack of authenticity'.

Consent

3.29 Consent was described by witnesses as a key aspect of legislation addressing non-consensual sharing of intimate images, and the importance of careful drafting was highlighted, as any ambiguity in this area may favour the perpetrator:

If consent is left vague or open to argument, it certainly will be argued. It is our view, as we have stated there, that certain categories a person, even if they give consent, some should be deemed unable to consent, such as those under 18.³³

3.30 The LCA made it clear that any consent given for intimate images to be created in the course of a relationship should cease at the conclusion of the relationship: 'Consent to having intimate images taken or disseminated within a relationship should be taken to have terminated upon the conclusion of that relationship'.³⁴

3.31 The ODPP NSW held a similar view:

Consent would need to be explicit/express and would need to be consent to that particular image at that particular time and in the manner used. The onus would be on the offender to prove consent.³⁵

3.32 The submissions from Women's Legal Services NSW discussed whether a 'harm element' might be necessary in addition to consent. However, at the hearing Women's Legal Services NSW's view shifted and the service agreed that a lack of consent should suffice:

32 ODPP NSW, *Submission 24*, pp 4–5.

33 Mr Budden, QLS, *Committee Hansard*, 18 February 2016, p. 36.

34 Ms Pauline Wright, Member, National Criminal Law Committee, LCA, *Committee Hansard*, 18 February 2016, p. 39.

35 ODPP NSW, *Submission 24*, p. 4.

In our submission to the committee we have been open to supporting in principle a harm element to an offence. But, on reflection, we now hold the view that absence of consent should be sufficient. We see consent as a core issue. It should be explicitly stated in legislation that consent to make the image of itself does not include consent to distribute an image.³⁶

3.33 It was also emphasised that the legislation must make clear that consent must be provided for the creation *and* distribution of images:

Separate consent is required for distribution [and there should be]...explicit and express consent for the sharing of that particular image at that particular time, and the onus should be on the offender to prove such consent was given.³⁷

And:

Those two things should not be muddled; they are very different. Someone may consent to a photograph being taken and being kept by the taker as a private memento, but they may not consent at all for that to be disseminated in any way, shape or form beyond that one-to-one situation.³⁸

Intent

3.34 Drs Henry, Flynn and Powell submitted that legislation should clarify the intent of a perpetrator and exclude third parties who collect or distribute images without knowing how it was created: 'Although that behaviour is abhorrent, an offence should only apply if the person knows, or has reason to know, that the other person did not consent to the distribution of the image'.³⁹

3.35 However, this was not supported by other submitters. Victorian Women Lawyers (VWL) stated that 'the behaviour of distributing sexual material without consent should be a key focus. In particular, that then takes away the onus on the victim to prove that they have established harm'.⁴⁰ This was supported by the Sexual Assault Support Service (SASS):

We believe that the proposed provisions should not rely on an intent to cause harm. We believe that there are a lot of problems with this because, as I talked about in my opening statement, there is a range of motivations for the behaviour. We are very concerned that if there is a provision that talks about an intent to cause harm it may create a bit of a legal loophole whereby perpetrators can basically say that they did not intend to cause any

36 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

37 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

38 Ms Wright, LCA, *Committee Hansard*, 18 February 2016, p. 38.

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

40 Ms Amy Johnstone, Law Reform Committee Co-chair, Victorian Women Lawyers (VWL), *Committee Hansard*, 18 February 2016, p. 24.

harm or distress to the victim, that they just thought it was a bit of a laugh and that they were trying to entertain their mates, or something like that.⁴¹

3.36 The ODPP NSW submission was emphatic on this issue in its submission to the inquiry: 'No intent should be required...there can be no innocent intent. The only inference available is that the person intends to do the harm, there can be no other reason for distributing the image'.⁴²

Recklessness

3.37 The CDPP argued that it would be preferable for a recklessness element to be included in the provisions of any future non-consensual sharing of intimate images legislation, whether or not legislation required intent, or a lack of consent. For example, if an offence required the lack of consent of a victim, it should also include provisions covering instances where the accused was reckless as to whether consent was given.⁴³

3.38 The CDPP discussed this position in more detail at the hearing:

In relation to the proof...it is easier to prove recklessness... I think some of the earlier discussion with other speakers has been about the difficulty of proving consent and when that stopped. That is really addressing that issue, I think, that it will be uncertain sometimes when somebody has not consented to the distribution of an image. I think somebody just ignoring that and not trying to establish that is evidence of recklessness, and that would be a preferable fault element to have applicable.⁴⁴

Threats

3.39 As discussed in chapter 2, threats of non-consensual sharing of intimate images can be powerful and there is 'the potential for the person receiving the threat to be blackmailed'.⁴⁵ This potential has been described as becoming 'a part of the domestic violence pattern'⁴⁶ and a 'tool of coercion and control' that can create a 'reluctance to report to police'.⁴⁷

3.40 Witnesses at the hearing stated that threats to disseminate intimate images should also be proscribed in legislation: 'It is important that there be remedies for both the actual sharing of intimate images without consent as well as the threat to do so'.⁴⁸ Further, 'that there should be no requirement of proof that an image actually exists

41 Ms Martin, Policy/Research Officer, Sexual Assault Support Service (SASS), *Committee Hansard*, 18 February 2016, p. 4.

42 ODPP NSW, *Submission 24*, p. 5.

43 CDPP, *Submission 3*, p. 5.

44 Mr Adsett, CDPP, *Committee Hansard*, 18 February 2016, p. 50.

45 Electronic Frontiers Australia (EFA), *Submission 27*, p. 4.

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

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

48 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

when a threat to share is made, as the mere threat is sufficient to cause fear, anxiety, a sense of powerlessness'.⁴⁹

3.41 The CDPP submission noted in the context of current and future legislation that it envisaged situations 'where an individual...threatens to disseminate an image or recording' would form part of a typical non-consensual sharing of intimate images situation.⁵⁰

Anonymity for victims

3.42 Feelings of shame, humiliation, personal violation, and powerlessness can reduce the likelihood that victims of non-consensual sharing of intimate images will come forward and make an official complaint to police. A number of submitters recommended that care should be taken to protect the privacy and anonymity of victims who are involved in the criminal justice system.⁵¹

3.43 This issue has been discussed in the United Kingdom (UK), where non-consensual sharing of intimate images legislation has already been enacted. The LCA noted that following the introduction of non-consensual sharing of intimate images legislation, 'proposals are now being considered in the UK to provide automatic anonymity to a complainant of "revenge pornography", rather than requiring specific individual suppression orders on a case by case basis'.⁵²

3.44 Police in Australia are aware that victims can be reluctant to come forward due to embarrassment and the stress that may be caused by the court process.⁵³ The CDPP identified that section 15YR of the *Crimes Act 1914* (Cth) makes it an offence to publish any material which actually identifies a victim in certain proceedings, such as those involving vulnerable adult witnesses. It was suggested that it may be that 'the Crimes Act needs to be expanded to incorporate the victims of this type of crime under the umbrella of vulnerable adult witnesses'.⁵⁴

Young people

3.45 The issue of how potential future legislation to address this issue would impact on young people was raised by the OCeSC:

Careful consideration should be given to the impact of any new criminal sanctions on young people under the age of 18, as well as consideration of diversions or alternatives which can impose immediate consequences for

49 Ms Loughman, Women's Legal Services NSW, *Committee Hansard*, 18 February 2016, p. 22.

50 CDPP, *Submission 3*, p. 2.

51 YWCA Adelaide, *Submission*, p. 5.

52 LCA, *Submission 10*, p. 3.

53 NT Commissioner of Police, *Submission 25*, p. 2.

54 Mr Greg Williams, Practice Group Coordinator, CDPP, *Committee Hansard*, 18 February 2016, p. 53.

offending behaviour while avoiding the social cost associated with the criminal justice system.⁵⁵

3.46 It was also acknowledged by other submitters that young people should be considered by legislators when developing legislation in this area. The ACT Attorney-General emphasised in his submission to the inquiry that there are 'complex policy issues' associated with enacting legislation in this area, including 'how consensual "sexting" between children and young people should be considered' and that there was concern regarding the 'inappropriate application of criminal laws to children and young people'.⁵⁶ Electronic Frontiers Australia (EFA) submitted that 'any Commonwealth legislation should ensure that the actions of minors are addressed appropriately, and specifically that minors are not dealt with under the terms of child pornography or statutory rape offences'.⁵⁷

3.47 However, the committee was told that cases where both parties are under the age of 18 years should be distinguished from cases where the perpetrator is over the age of 18 years and the victim is not. The CDPP recommended that legislation include an aggravated offence in cases where the victim is under a specific age, such as 16 years.⁵⁸

55 OCeSC, *Submission 22*, p. 7.

56 ACT Attorney-General, *Submission 7*, p. 4.

57 EFA, *Submission 27*, p. 3.

58 CDPP, *Submission 3*, p. 2.

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'.¹

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.²

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.³ 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.⁴

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

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'.⁵ 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.⁶

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.⁷

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.⁸

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.⁹

4.8 Overall, the OCeSC emphasised the importance of victims having different options available¹⁰ and highlighted that effective outcomes can be achieved by means outside the criminal law:

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.

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.¹¹

...

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.¹²

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*¹³ and *Giller v Procopets*.¹⁴ 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'.¹⁵

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.¹⁶

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.¹⁷

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.¹⁸

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.¹⁹

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'.²⁰ 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'.²¹

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).²² 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'.²³

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

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.

case, maybe people will rethink their position when they undertake this activity.²⁴

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.²⁵

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'.²⁶ 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'.²⁷

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'.²⁸

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

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.²⁹

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'.³⁰

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.³¹

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 18.³²

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

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.

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

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.³⁴ 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.³⁵

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;³⁶ indeed, there have been 489 reports of non-consensual sharing of intimate images made to the ACORN since it was launched in late 2014.³⁷ 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.³⁸

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

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'.³⁹

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.⁴⁰

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.⁴¹

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'.⁴²

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.⁴³

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.

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.⁴⁴

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.⁴⁵

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

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

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'.¹

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

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

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'.²

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.³

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.

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.⁴

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.⁵ 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 2014.⁶

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

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

Additional Remarks from Government Members of the Committee

1.1 Government Senators acknowledge widespread support for the introduction of a legislative framework that incorporates law-enforcement and education to address the harm being caused by the phenomenon colloquially referred to as 'Revenge Porn' (revenge porn').

1.2 Government members of the committee broadly do not disagree with the conclusions and recommendations of the majority report. Government Senators note however that the inquiry process in this case has been premature. Evidence provided to the committee clearly indicates that the relevant governments and government departments are in the process of formulating their advice to government on this issue. Once such advice is provided government will be able to formulate a response which, if legislated, will come before the committee for inquiry and report in the normal way.

1.3 The committee should note the agreement reached by COAG in December 2015 to undertake detailed assessment of appropriate responses to revenge porn.

1.4 The Government members of the committee offer the following remarks on the recommendations of the majority committee report:

1.5 Recommendation 1 of the majority report calls for governments to substitute the term 'revenge porn' with the term 'non-consensual sharing of intimate images'. Government members agree that some other nomenclature may be appropriate although noting that the brief—if inaccurate—terminology 'revenge porn' does provide a now well-known and understood description of the recent and increasing criminal phenomenon.

1.6 Recommendation 2 of the majority report calls on the Commonwealth to legislate offences of knowingly or recklessly recording or sharing intimate images without consent and/or threatening to take or share such images. Government members of the committee agree but urge a cautious and consultative approach to developing the elements of these offences. The advice of legal experts will be essential in ensuring a scheme is developed that does not criminalise innocent conduct or place unsuspecting citizens in unnecessary legal peril.

1.7 Recommendation 3 of the majority committee report calls on the states to enact offences similar to those mentioned in recommendation 2, and to do so taking into account any relevant Commonwealth legislation. The Government members of the committee have no particular objection to this however note that formulation of offences around revenge porn is already under consideration by the Commonwealth and various state governments.

1.8 Recommendation 4 of the majority report calls on the Commonwealth to empower a Commonwealth agency to issue 'take down notices for non-consensually shared intimate images'. Government members of the committee agree and note that evidence provided to the committee indicated that the Children's eSafety Commissioner already has that power in relation to children and it should not be too

difficult to extend those provisions (if not necessarily to this agency) to enable this to happen.

1.9 Recommendation 5 of the majority report calls on the Commonwealth to instigate a 'formal mechanism' for engagement between government and internet and social media providers. Government members of the committee do not object to this however note that in the case of the Children's eSafety Commissioner existing mechanisms are operating satisfactorily.

1.10 Recommendation 6 of the majority report calls on the government to give further consideration to the Australian Law Reform Commission's 2014 proposal for the introduction of a tort of privacy. Government members do not support the introduction of a tort of privacy and note that tort law is ordinarily a matter for the states and that creating a new tort of privacy could produce unforeseen and undesirable consequences. These consequences may be precluded by the introduction of a specific revenge porn prohibition.

1.11 Recommendation 7 of the majority report calls for the introduction of an education and awareness campaign. Government Senators agree with this recommendation and note that the evidence shows that the Government, and relevant agencies, are already investigating a wide range of legal, social and cultural responses to the emergence of revenge porn.

1.12 Recommendation 8 of the majority report calls for all Australian Police forces to undergo training around new offences relating to revenge porn in their jurisdictions. Government members have no objection but suggest that this recommendation is unnecessary in that police officers would normally be trained in any new legislative scheme that created new offences.

Senator the Hon Ian Macdonald
Deputy Chair

Appendix 1

Public submissions

- 1 Top End Women's Legal Service Inc.
- 2 Women's Legal Services NSW
- 3 Commonwealth Director of Public Prosecutions
- 4 Domestic Violence Victoria
- 5 Victim Support Service
- 6 Professor Dan Svantesson
- 7 ACT Attorney-General
- 8 YWCA Adelaide
- 9 Drs Henry, Flynn and Powell
- 10 Law Council of Australia
- 11 Sexual Assault Support Service
- 12 Alex Davis
- 13 Victorian Women Lawyers
- 14 Digital Industry Group
- 15 Women's Legal Service Tasmania
- 16 Women's Health West
- 17 Women's Information and Referral Exchange
- 18 Professors Krone, Urbas and Boer
- 19 Australian Women Against Violence Alliance
- 20 Queensland Law Society
- 21 Project Respect
- 22 Office of the Children's eSafety Commissioner
- 23 Australian Law Reform Commission
- 24 Office of the Director of Public Prosecutions (NSW)
- 25 Northern Territory Commissioner of Police
- 26 Director of Public Prosecutions (Tasmania)
- 27 Electronic Frontiers Australia

- 28 Attorney-General's Department
- 29 Safe Steps
- 30 Law Society of New South Wales
- 31 Assistant Professor Terry Goldsworthy and Senior Teaching Fellow Matthew Raj
- 32 Civil Liberties Australia
- 33 Confidential
- 34 Confidential

Appendix 2

Public hearings and witnesses

Thursday 18 February 2016—Sydney

ADSETT, Mr David, Deputy Director, Commonwealth Director of Public Prosecutions

BROWN, Ms Sophie, Law Reform Committee Member, Victorian Women Lawyers

BUDDEN, Mr Shane, Senior Policy Adviser, Queensland Law Society

CONNELLY, Mr Shane Patrick, Assistant Commissioner/National Manager, Crime Operations, Australian Federal Police

GRIFFITHS, Ms Rebecca Jean, Policy Lawyer, Criminal and National Security Law, Law Council of Australia

HARTIGAN, Ms Brooke Emma, Acting Assistant Secretary, Crime and Justice Policy Branch, Attorney-General's Department

HENRY, Dr Nicola, Senior Lecturer, La Trobe University

JOHNSTONE, Ms Amy, Law Reform Committee Co-chair, Victorian Women Lawyers

LAUGHTON, Ms Victoria Frances, Research and Advocacy Officer, Victim Support Service

LEE, Mr Simon, Acting Director, Federal Offenders and Cybercrime, Crime and Justice Policy Branch, Attorney-General's Department

LOUGHMAN, Ms Janet, Principal Solicitor, Women's Legal Services NSW

MacGIBBON, Mr Alastair, Children's eSafety Commissioner, Office of the Children's eSafety Commissioner

MARTIN, Ms Alexis Elizabeth, Policy/Research Officer, Sexual Assault Support Service Inc

McLACHLAN, Ms Katherine Jane, Quality and Research Manager, Victim Support Service

MILIONE, Ms Stephanie, Convenor, Victorian Women Lawyers

MOLT, Dr Natasha Lee, Senior Policy Lawyer, Criminal and National Security Law, Law Council of Australia

OSTINI, Dr Jenny, University of Southern Queensland

SAHA, Ms Priyanka, Expert Adviser, Office of the Children's eSafety Commissioner

SNELL, Ms Elizabeth, Law Reform and Policy Coordinator, Women's Legal Services NSW

WILLIAMS, Mr Greg, Practice Group Coordinator, Commonwealth Director of Public Prosecutions

WRIGHT, Ms Andree, Executive Manager, Office of the Children's eSafety Commissioner

WRIGHT, Ms Pauline, Member, National Criminal Law Committee, Law Council of Australia

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

1. Attorney General's Department - answers to questions taken on notice from public hearing, 18 February 2016 (received 22 February 2016)

Additional information

- 1 Additional information from Dr Nicola Henry (received 18 February 2016)

Appendix 4

Key features of Overseas Legislation

	Conduct	Fault element	Applies to offline conduct	Maximum imprisonment
United Kingdom	<i>England & Wales</i> Disclosing a private sexual photo/film without consent	<i>England & Wales</i> Intent to cause distress	<i>England & Wales</i> ✓	<i>England & Wales</i> Two years
NB. Scotland's legislation introduced but not yet passed	<i>Scotland</i> Disclosing/threatening to disclose an intimate photo/film without consent	<i>Scotland</i> Intent to cause fear/alarm/distress or reckless as to whether the victim will be caused fear/alarm/distress	<i>Scotland</i> ✓	<i>Scotland</i> Five years
United States	<i>Federal</i> Reproducing/distributing/exhibiting/publishing/transmitting/otherwise disseminating a nude/sexually explicit image without consent	<i>Federal</i> Knows/should have known that such conduct would likely cause emotional distress to a reasonable person if that person were so depicted	<i>Federal</i> ✓	<i>Federal</i> Five years
NB. Federal legislation drafted but not yet introduced	<i>Illinois</i> Non-consensual dissemination of private sexual images	<i>Illinois</i> Knows/should have known that the person in the image has not consented to the dissemination	<i>Illinois</i> ✓	<i>Illinois</i> Three years
	<i>California</i> Distributing intimate/sexual images where the person depicted suffers serious emotional distress	<i>California</i> Knows/should know that distribution of the image will cause serious emotional distress	<i>California</i> ✓	<i>California</i> Six months
Canada	Publishing an intimate image without consent	Being reckless as to whether or not that person gave their consent	✓	Five years
New Zealand	Posting an intimate visual recording which causes serious emotional distress to the victim and would cause such harm to an ordinary reasonable person in the position of the victim	Intent to cause serious emotional distress	✗	Two years

