

11.0 BROADER RESPONSES

Non-consensual sharing of intimate images is a complex issue and it is likely that criminalising it will be an insufficient response in isolation. In this context, it is clear that there is impetus for action and that this conduct remains a serious and increasing concern and a level of coordination is needed.

Issues that need further consideration include:

- the division between Commonwealth legislative power and State and Territory legislative power and the most effective use of both;
- co-operation between States and Territories in legislating, and in dealing with offenders in one State or Territory moving to another State or Territory;
- Recommendations 1-8 of the Senate Committee (see Attachment 1);
- sharing of information; and
- education strategies for law enforcement and other service providers.

In addition, there are many other responses to this conduct beyond legislative reform that need to be considered. Other measures include:

- developing community or corporate codes of conduct that stipulate clearly that this behaviour is unacceptable, similar to approaches taken with domestic violence perpetrators;
- supporting and advocating for the victims, including challenging the stigma experienced by victims rather than those committing these offences;
- training and resourcing police and service providers; and
- awareness-raising and prevention within the community – similar to or incorporated within responses to domestic violence.⁵⁶

11.1 Education

Consideration should be given to the creation of education and awareness campaigns in the Northern Territory covering three important aspects: first, education and awareness about what constitutes non-consensual sharing of intimate images; secondly, how to deal with it if you are a victim; and thirdly, appropriate responses amongst enforcement and support agencies. An important part in any education strategy would be reducing the stigma experienced by victims of non-consensual sharing of intimate images. Education, therefore, should not only be directed at potential perpetrators but also at agencies such as schools and law enforcement to ensure complaints are appropriately dealt with and victims are supported.

In recommending an education campaign a note of caution must be sounded. There is a risk that an excessive focus on educating individuals about the consequences of allowing sexual images to be taken could be harmful. Messages that focus on the risks that arise from consenting to the

⁵⁶ A. Powell and N. Henry, *Ending 'revenge porn': how can we stop sexual images being used to abuse?*; The Conversation 16 February 2016 online.

production of private sexual images are easily translated to the message that people who take such risks are personally responsible for any harm that may befall them. This obscures the gendered inequities of such offending and harmfully amplifies existing and out-dated cultural norms that blame women who experience gendered violence. Such an approach overlooks the fact that digital and online technology has been integrated into modern sexual life and implies that victims are responsible for the decisions of perpetrators committing this kind of offence.⁵⁷ The position that it is a woman's responsibility to manage such risk fails to take into account the spontaneous nature of sexual interaction and that such acts do not lend themselves to calculative rationality.⁵⁸ The emphasis of an 'education drive' should thus be on the need to not distribute the images that a partner has implicitly been trusted with.

The Northern Territory should also collaborate with the Commonwealth Government when it implements any such education strategies.

Recommendation 6

Public education and awareness campaigns about non-consensual sharing of intimate images should be developed and implemented by appropriate offices such as the Children's Commissioner and the Northern Territory Police to prepare and support adults, young people and children in relation to cyber-safety and the misuse of digital technology.

11.2 Reporting mechanisms

It could be that the Australian Cybercrime Online Reporting Network (ACORN), an online reporting facility that enables the public and small businesses to securely report cybercrime incidents, could be further developed in this sphere.⁵⁹ For example, 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 should be established (see 11.4 below).

An alternative avenue is that pursued by the UK, which has implemented a 'Revenge Porn Helpline', providing victims with a means of reporting non-consensual sharing of intimate images offences and an avenue to take action.

11.3 Removal and non-publication powers

The material reviewed demonstrates that there is strong recognition of the need for action to be taken against sites that share intimate images non-consensually. It is also important that individuals who have had intimate images posted without their consent have timely and cost-effective mechanisms for removing such images. While it is perhaps unlikely that internet sites established specifically to share such images would adhere to an order to take the material down from the site, particularly if the site is located outside of Australia, social media sites such as

⁵⁷ Top End Women's Legal Service Inc., Submission to the Senate Legal and Constitutional Affairs References Committee for inquiry and report: Phenomenon colloquially referred to as 'revenge porn', 18 December 201[5] at p.6.

⁵⁸ Salter, M., & Crofts, T. (2015), 'Responding to revenge porn: challenges to online legal impunity' in L. Comella & S. Tarrant (Eds.), *New Views on Pornography: Sexuality, Politics, and the Law*, California: Praeger at 236.

⁵⁹ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [4.28].

Facebook are more likely to comply with such orders given that the failure to do so could result in reputational damage.

The Commonwealth Office of the Children's eSafety Commissioner has certain powers under legislation to efficiently remove images from social media and websites, as well as images that have been transmitted by email. Further, in Recommendation 4 of the Senate Committee's report entitled 'Phenomenon colloquially referred to as "revenge porn"', the Senate Committee recommended that the 'Commonwealth government consider empowering a Commonwealth agency to issue take down notices for non-consensual shared intimate images'.⁶⁰ While clearly it would be preferable that a national scheme for the removal of such images be established, to date this has not occurred. Consequently, given the urgency of the problem and the damage being suffered by those whose intimate images are posted online without their consent, the Committee recommends that the Northern Territory government enact take-down notice provisions.

The fundamental issue for most individuals faced with publication of intimate images is that there is both an ongoing affront to their dignity and an ongoing invasion of their privacy. The continuing nature of the affront (open to a large portion of the family, friends and work colleagues of the victim and, often, to the world at large) is of particular importance in establishing appropriate remedies. Further, we live in a digitally-connected world where publication is instant, as is the ability to share the image. The remedies for victims must match this environment. In such cases, every minute counts.

While court action, either civil or criminal, is an important remedy, such actions alone cannot sustain a just outcome for the individual victim. The most effective remedy for the individual, at least initially, is to stop immediately the intrusion into their privacy. This should not, at first instance, involve lengthy, complex or expensive court proceedings. The remedy should be a simple and speedy process that provides legal authority to compel individuals and service providers to take down, and not to re-publish, intimate images of another posted without that person's consent. The Committee is also of the view that such a remedy, at least initially, should be heavily weighted in favour of the individual whose intimate image has been posted without her or his consent.

Ideally, as a victim's first contact to complain of the posting of intimate images without consent generally is the police; the Police Commissioner or his or her delegate should have the power to issue a take-down and non-republication notice. Such decision would be reviewable, either by the Northern Territory Civil and Administrative Tribunal or the Local Court.

Alternatively, should the Northern Territory government be of the view that such a take-down notice scheme constitutes the exercise of a judicial rather than an administrative function, consideration should be given to the enactment of a statutory power for the Northern Territory Police, or the individual whose intimate image has been posted, to apply to the Local Court for an *ex parte* injunctive order. As has been noted in Chapter 5, there is still some uncertainty in Australian law regarding the court's power at common law to provide a remedy for a serious invasion of privacy. It is the Committee's view, therefore, that the ability to apply for the *ex parte* injunction be provided for in a statute.

⁶⁰ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [5.27].

Recommendation 7

The Northern Territory Parliament should enact appropriate legislation to establish a statutory based administrative scheme that provides for the rapid issue of take-down and non-publication notices in relation to intimate images that have been posted without consent. Alternatively, should the Northern Territory Parliament be of the view that such an administrative scheme is not appropriate, it should enact appropriate legislation to empower the police, or the individual whose intimate image has been posted, to apply to the Local Court for an ex parte injunctive order to take-down, and not permit the republication of, the intimate image.

11.4 Self-regulation mechanisms implemented by social media platforms

The adequacy of State and Territory-based legislation to address the issue of the non-consensual sharing of intimate images is questionable given the frequent extra-territorial and transnational nature of technology-facilitated crimes where, for example, images are posted on a website hosted outside Australia, or the owners of the site do not reside in Australia.⁶¹

As non-consensual sharing of intimate images and online harassment is increasingly tied to internet use, and as much of our internet use is mediated by companies like Google and Facebook, the self-regulation mechanisms of those companies can be a practical tool for the victims of these offences. Given the difficulty in removing images from the internet, sites that share material should be urged to provide timely, appropriate mechanisms for taking down material shared without the subject's consent. There is an unquestionable need to engage with internet companies to provide effective solutions.

While the current mechanisms arguably provide aggrieved individuals with a means to stop the further dissemination of the non-consensually sharing of intimate images, it must be noted that the availability of these mechanisms are subject to the whims of the relevant companies and providers, and the effect of any such mechanisms is prospective and not deterrent. Further, for some of the 'less reputable photo sharing websites' (sites tailored specifically to hosting this sort of activity), there is often no mechanism for reporting material and/or making complaints for people to have their respective private sexual material removed.

The terms of reference of such websites are relevant. In 2015, Facebook clarified its 'Community Standards' in respect of the non-consensual sharing of intimate images and will remove content depicting explicit content. Facebook also claims to refer threats to share intimate images to law enforcement. Facebook users can report content that includes the non-consensual sharing of intimate images which is then evaluated and potentially removed by Facebook User Operations Teams.⁶² Similar mechanisms are also available on Facebook-owned Instagram⁶³ as well as on SnapChat⁶⁴ and YouTube⁶⁵. To this limited extent, social media platforms

⁶¹ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [3.6].

⁶² Facebook, Community Standards, 2016, www.facebook.com/communitystandards - see also 'What Happens After You Click Report'.

⁶³ Instagram Inc., Community guidelines <https://help.instagram.com>.

⁶⁴ Snapchat, Inc., Community guidelines – <https://support.snapchat.com>.

provide an efficient way to achieve the removal of intimate images at no monetary cost to the victim. Breach of the Community Guidelines by a user may lead to that user's access to the platform being terminated for breach of the relevant Terms of Use.

However, practically it is very difficult to get Facebook either to provide evidence to law enforcement or to take down images as they are located in the United States of America (if, for example, the self-regulation mechanism fails). Accordingly, if nothing else, this 'gap' highlights the need to engage with internet companies to provide effective solutions. Reputable platforms such as Google, Facebook and others that allow for distribution of images of private sexual material should be required to assist prosecutors of non-consensual sharing of intimate images – how this should occur and what shape it would take requires further consideration.

⁶⁵ YouTube Community Guidelines www.youtube.com.