

4.0 INTRODUCTION

The non-consensual sharing of intimate images encompasses a range of behaviours relating to:

‘...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.’¹

Throughout this report the word ‘images’ is intended to encompass both video and still images.

The activity of sharing intimate images proliferated with the evolution of the Polaroid camera which facilitated taking private photographs without the need to engage the services of a photographic developer. The evolution of digital photography and videography surpassed the Polaroid in the ability to quickly share images. One of the earliest cited examples of the non-consensual sharing of intimate images was the commercial and informal circulation of a pornographic home movie of Jayne Kennedy and Leon Isaac Kennedy in the late 1970s. The video became available only after Jayne divorced Leon. It was suggested that Leon released the tape to punish Jayne for leaving him.² In the 1980s, the pornographic magazine ‘Hustler’ began publishing images of naked women submitted by readers, sometimes accompanied by identifying information about the women, including their names. Some of these images were submitted without the permission of the women, and resulted in legal action (i.e. *Wood v Hustler Magazine Inc.* [1984] 10 Media L Rep 2113).³

Advances in photo-imaging combined with the emergence of social media websites where images can easily be shared with ever larger numbers of recipients, for example Facebook, have provided a forum to share images without consent, and for the purpose of harassing or otherwise causing harm. The use of the phrase ‘revenge porn’ can be traced back to 2007. Facebook acknowledged around 2011 that it was receiving increasing complaints about intimate images being posted or shared without consent.⁴ There are two well-known cases of prosecutions for this type of offending; a 2010 New Zealand case of *Police v Joshua Ashby* and the 2011 case of *Police v Ravshan Usmanov* [2011] NSWLC 40, which relied on section 578C of the *Crimes Act 1900* (NSW).

In some instances, intimate material may be published to a specific ‘revenge porn website’. It has been reported that at least 3,000 websites ‘feature this genre’.⁵

Northern Territory Police has recorded an increase in complaints regarding the sharing of intimate sexual images and recordings on social media platforms. Many of the complaints made to

¹ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as ‘revenge porn’* (2016) at [1.12].

² 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 234.

³ 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 234.

⁴ <http://blog.oxforddictionaries.com/2015/02/words-news-revenge-porn/>.

⁵ Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for Serious Invasion of Privacy in New South Wales* (2016) at [2.11].

Northern Territory Police occur within acrimonious relationship breakdowns where the image was originally obtained with consent and during a dispute, threats are made to post the image.⁶

The Top End Women's Legal Service, in its submission to the Senate Committee, acknowledged that the non-consensual sharing of intimate images is a highly gendered activity that is primarily committed by males and disproportionately targets women (although males may also be victimised). Further, the impact of non-consensual distribution of intimate images is arguably associated with more serious consequences for females than men. This is because female social status has traditionally been intertwined with perceptions of chastity and modesty. Accordingly, an offender may employ these sexual norms to punish the female 'victim' by distributing such material to third parties or the general public.⁷

Northern Territory Police created a High Tech Crime Squad to investigate crimes that involve computer technology. Between July 2015 and January 2016, the High Tech Crime Squad received six separate complaints of non-consensual sharing of intimate images through the Australian Cybercrime Online Reporting Network (ACORN). These instances involved allegations of ex-partners making material available either generally through the internet or specifically to associates of the victim. The material varied from mildly provocative images to highly explicit sexual images or movies. The High Tech Crime Squad's investigations into these reports did not proceed to prosecution due to a number of factors. The Squad experienced difficulty identifying the suspects and establishing their level of involvement. Investigations were also hampered due to victims' embarrassment and unwillingness to proceed with a formal complaint and be involved in the court process. There were also instances where the suspect was located outside of Australia and beyond the Northern Territory Police's jurisdiction.⁸ In all of the instances, the individuals posting the material used a variety of platforms and methods to obfuscate their involvement, often using platforms that are based outside of Australia which in turn created significant delays and difficulties in obtaining evidentiary material. It also proved difficult to identify the individual who actually posted the material and to identify the jurisdiction in which the offence occurred.⁹

Since January 2016, Northern Territory Police report that complaints continue to be made, however, responsibility for handling such complaints now rests with the Domestic Violence Unit.

A 2015 survey on online abuse and harassment conducted at the Royal Melbourne Institute of Technology (RMIT) reported that 1 in 10 Australians (between 18 and 55 years of age) have had a nude or semi-nude image of them distributed online or sent onto others without their permission, with 10.7% reporting that someone had taken a nude or semi-nude image of them without their permission; 9.3% reporting that someone had posted such images online or sent them on to

⁶ Northern Territory Police Force, Submission to the Senate Legal and Constitutional Affairs References Committee for inquiry and report: Phenomenon colloquially referred to as 'revenge porn', 15 January 2016 at p.2.

⁷ 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 2015 at p.3.

⁸ Northern Territory Police Force, Submission to the Senate Legal and Constitutional Affairs References Committee for inquiry and report: Phenomenon colloquially referred to as 'revenge porn', 15 January 2016 at p.2.

⁹ Northern Territory Police Force, Submission to the Senate Legal and Constitutional Affairs References Committee for inquiry and report: Phenomenon colloquially referred to as 'revenge porn', 15 January 2016 at p.3.

others; and 9.6% reporting that someone has threatened to post nude or semi-nude images of them online or send them on to others.¹⁰

Cyber Civil Rights Institute (anon-profit public charity in Florida, United States of America) hosted a survey on the website 'endrevengeporn.org' from August 2012 to December 2013, in which participants visited the website and completed the survey of their own accord. A total of 1,606 individuals responded to the survey.¹¹ The responses are as follows:

- 61% of respondents said they had taken a nude photo/video of themselves and shared it with someone else;
- 23% of respondents were victims of non-consensual sharing of intimate images;
- 83% of victims (of non-consensual sharing of intimate images) said they had taken nude photos/videos of themselves and shared them with someone else;
- 90% of victims (of non-consensual sharing of intimate images) were women;
- 68% were 18-30 years old, 27% were 18-22 years of age;
- 57% of victims said their material was posted by an ex-boyfriend, 6% said it was posted by an ex-girlfriend, 23% said it was posted by an ex-friend, 7% said it was posted by a friend, 7% said it was posted by a family member;
- 51% have had suicidal thoughts due to being a victim;
- 93% of victims said they have suffered significant emotional distress due to being a victim;
- 82% said they suffered significant impairment in social, occupational, or other important areas of functioning due to being a victim;
- 42% sought out psychological services due to being a victim;
- 49% said they have been harassed or stalked online by users that have seen their material; and
- 30% said they have been harassed or stalked outside of the Internet (in person, over the phone) by users that have seen the material online.

Significant numbers of respondents that were victims also reported as follows:

- 34% said it has jeopardised their relationships with family;
- 38% said it has jeopardised their relationships with friends; and
- 37% said that they have been teased by others due to being a victim.

¹⁰ 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.

¹¹ http://www.endrevengeporn.org/main_2013/wp-content/uploads/2014/12/RPStatistics.pdf.

Victims also reported fears for the future:

- 40% fear the loss of a current or future partner once he or she becomes aware that this is in their past;
- 54% fear the discovery of the material by their current and/or future children;
- 55% fear that the professional reputation they have built up could be tarnished even decades into the future;
- 57% occasionally or often have fears about how this will affect their professional advancement; and
- 52% feel as though they are living with something to hide that they cannot acknowledge to a potential employer (such as through an interview).

Victims reported impacts on their engagement online:

- 25% have had to close down an email address and create a new one due to receiving harassing, abusive, and/or obscene messages;
- 26% have had to create a new identity (or identities) for themselves online; and
- 26% have had to close their Facebook account (11% closed their Twitter account; 8% closed their LinkedIn account).

Victims also reported impacts on their employment or education:

- 26% have had to take time off from work or take fewer credits in, or a semester off, from school due to being a victim;
- 42% have had to explain the situation to professional or academic supervisors, co-workers, or colleagues;
- 6% were fired from their job or kicked out of school;
- 8% quit their job or dropped out of school;
- 13% have had difficulty getting a job or getting into school;
- 39% say that this has affected their professional advancement with regard to networking and putting their name out there;
- 54% have had difficulty focusing on work or at school due to being a victim;
- 3% have legally changed their name due to being a victim; and
- 42% haven't changed their name, but have thought of it.

A survey of 1,000 Australian women by Symantec for Beyond Blue identified that over half had been harassed online, while 76% of surveyed women under 30 years of age had been victims of online harassment. While only 6% were victims of non-consensual sharing of intimate images, this

grew to almost 10% for women under 30 years of age.¹² The impact on victims is clearly significant and cases of suicide have been linked to non-consensual sharing of intimate images.¹³ It is clear that it is timely to examine whether existing laws are sufficient to regulate this behaviour.

There is a significant amount of legislative reform occurring in this area globally and in Australia. Victoria and South Australia have enacted legislation creating stand-alone offences for the non-consensual sharing of intimate images. New South Wales and Western Australia have announced plans to introduce similar legislation.

The Senate Committee carefully considered and made recommendations, including recommendations for Commonwealth legislation dealing with this matter. The Senate Committee identified that jurisdictional issues within Australia hinder both victims and police in pursuing allegations of non-consensual sharing of intimate images and accepted that uniform legislation across Australia would substantially address these issues. It is clear that there is impetus for action and that this conduct remains a serious and increasing concern; further that a level of co-ordination is needed. A Bill dealing with these matters was before the previous Federal Parliament, prior to its dissolution in April 2016.

The scope of this report is limited to consideration of the legislative context and opportunities for legislative reform. Importantly, this report reflects that criminal law can have a symbolic, as well as censoring function. Also, criminal law is a public matter generally prosecuted by the state, with remedies designed primarily to punish the harm-doer rather than compensate the victim. The legislative context also includes consideration of civil law which is a private matter between the individual parties with remedies designed primarily to compensate for any loss or harm caused. This report notes the advantage of creating specific criminal offences, rather than relying on general criminal offences or the civil law, that flows from offenders being convicted according to the perceived wrongfulness of the behaviour, as this communicates society's core values and confirms in the public's mind the wrongfulness of the behaviour.

This report acknowledges that a legislative response is not the only mechanism to respond to this concerning behaviour and the problems it creates within the community. These matters are discussed further below.

¹² <http://www.afr.com/leadership/workplace/norton-by-symantec-beyondblue-say-online-harassment-affects-half-of-all-women-20160302-gn8ng7>.

¹³ See the case of Tiziana Cantone from Naples Italy who committed suicide in September 2016 due to the online harassment and abuse that resulted when a video she sent to her ex-boyfriend was uploaded without her consent.