

6.0 CRIMINAL SANCTIONS JURISDICTIONAL COMPARISON

6.1 Legislative framework

A number of Australian jurisdictions are contemplating or have introduced criminal provisions to address this concerning behaviour.

South Australia and Victoria are the only Australian jurisdictions that currently have specific offences criminalising the non-consensual sharing of intimate images.

The Committee has examined the Victorian and South Australian legislation as a guide, and adheres to the principle that, unless for some reason particular to the Northern Territory it is inappropriate, uniformity with the existing State legislation should be achieved.

6.2 Northern Territory

It could be argued, though rather optimistically, that section 47(e) and (f) of the *Summary Offences Act* (NT) could apply to a situation of the non-consensual sharing of intimate images:

‘Every person who is guilty:

...

(e) of unreasonably causing substantial annoyance to another person; or

(f) of unreasonably disrupting the privacy of another person, shall be guilty of an offence.

Penalty: \$2,000 or imprisonment for 6 months, or both.’

These subsections are not sufficiently specific so far as the non-consensual sharing of intimate images is concerned and designed for the more immediate, transitory and familiar instances of ‘offensive conduct’ dealt with in the Local Court. Due to the non-specific nature of these offences, instances where this provision has been used to prosecute non-consensual sharing of intimate images cannot be cited with any accuracy. The Committee understands that these offences have not been utilised to prosecute an offender.³⁸

Anecdotally, it appears that charges for ‘up skirting’ (the practice of surreptitiously and without consent photographing underneath a female’s dress or skirt) which come before the Local Court are most commonly laid under section 47(a) of the *Summary Offences Act* (NT) and section 12(1) of the *Surveillance Devices Act* (NT).

Section 47(a) of the *Summary Offences Act* (NT) provides:

‘Every person who is guilty:

...

³⁸ 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.

(a) of any riotous, offensive, disorderly or indecent behaviour, or of fighting, or using obscene language, in or within the hearing or view of any person in any road, street, thoroughfare or public place;

Penalty: \$2,000 or imprisonment for 6 months, or both.'

Section 12(1) of the *Surveillance Devices Act* (NT) provides '[a] person is guilty of an offence if the person:

(a) installs, uses or maintains an optical surveillance device to monitor, record visually or observe a private activity to which the person is not a party; and

(b) knows the device is installed, used or maintained without the express or implied consent of each party to the activity.

Maximum penalty: 250 penalty units or imprisonment for 2 years.'

Other Northern Territory criminal offences that may cover similar conduct include:

- assault and aggravated assault under section 188 of the *Criminal Code Act* (NT) (by virtue of the definition of assault which can include threats by words alone e.g. by telephone). The penalty for assault is 1 year imprisonment. If the circumstance of the assault is that it is a male assaulting a female, aggravated assault may be charged and the maximum penalty is 5 years, or 2 years if found guilty summarily;
- threat to kill under section 166 of the *Criminal Code Act* (NT) which can be evidenced by the production of technology facilitated threats. The maximum penalty for this offence is 7 years imprisonment;
- unlawful stalking under section 189 of the *Criminal Code Act* (NT) (if requirements of the offence are made out by using a telephone or electronic communication methods). In circumstances of non-consensual sharing of intimate images, it could be suggested that the technology (the internet) has been used to cause harm to a victim. The maximum penalty for this offence is 2 years imprisonment, or where the conduct contravenes a bail condition, an injunction or other order of a court of the Northern Territory, Commonwealth or other jurisdiction (for example, a Domestic Violence Order), or where the conduct involves a weapon, the maximum penalty is 5 years imprisonment;
- threats under section 200 of the *Criminal Code Act* (NT). The maximum penalty for this offence is 2 years imprisonment; and
- unlawful publication of defamatory matter under section 204 of the *Criminal Code Act* (NT). While prosecution for criminal defamation is rare, where cyber-bullies post derogatory or denigrating material on the internet that is sufficiently egregious, prosecution under section 204 of the *Criminal Code Act* (NT), 'Unlawful publication of defamatory matter', may be warranted. This offence carries a maximum penalty of 3 years imprisonment.

6.3 Other Australian States and Territories

6.3.1 South Australia

Section 26C(1) of the *Summary Offences Act 1953* (SA) prohibits the distribution of an invasive image of persons without their consent and provides for a maximum penalty of \$10,000 or 2 years imprisonment.

‘Distribute’ is defined in section 26A of the *Summary Offences Act 1953* (SA) as including:

- (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.

Section 26A of the *Summary Offences Act 1953* (SA) defines ‘invasive image’ as 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.

On its face, it appears that the definition of ‘invasive image’ is unduly narrow and arguably creates a high threshold to be satisfied in order for a particular image to attract criminal sanction for its distribution, primarily because of the age requirement, and the removal of public places from the definition.

‘Private act’ is then defined in section 26A as:

- (a) a sexual act of a kind not ordinarily done in public; or
- (b) using a toilet.

It is a defence to a charge under section 26C(1) if the distribution of the image was for a purpose connected to law enforcement, or for medical, legal or scientific purposes, or if the image was filmed by a licensed investigation agent in the course of an investigation for a claim for compensation or damages.³⁹

From 1 May 2013 to 26 July 2016, there were 34 individuals charged with an offence under section 26C(1) of the *Summary Offences Act 1953* (SA). These 34 individuals were charged with a total of 39 offences. Seven charges were brought against persons under the age of 18 years. Of these seven charges, two charges were not finalised and the remaining five were heard via a ‘family conference’.

³⁹ Section 26C(2), *Summary Offences Act 1953* (SA).

The Summary Offences (Filming and Sexting Offences) Amendment Bill 2016 updated the offences in part 5A of the *Summary Offences Act 1953 (SA)*. The Bill inserted a new section 26DA into the *Summary Offences Act 1953 (SA)* to make it an offence to threaten to distribute an invasive image.

The Summary Offences (Filming and Sexting Offences) Amendment Bill 2016 was passed by the Legislative Council on 23 June 2016, and received royal assent on 29 September 2016. The amendments to the *Summary Offences Act 1953 (SA)*, inserted by the Bill, commenced on the 28 October 2016.

6.3.2 Victoria

Sections 41DA and 41DB of the *Summary Offences Act 1966 (Vic)* make it an offence to threaten to distribute or distribute an intimate image. Section 41DA prohibits the intentional distribution 'of an intimate image where the distribution is contrary to community standards of acceptable conduct'. The offence is not applicable where the subject of the image is an adult who consents to the distribution. Section 41DB 'prohibits a person from making a threat to distribute such an image'. The section emphasises that it is the consent of the subject that renders publication lawful or criminal and explicitly takes into account the contextual nature of consent. Section 41DA(3)(b) provides that the respective consent must be to the 'distribution of the intimate image' and the specific 'manner in which the intimate image was distributed'.

The maximum penalty for distribution of an intimate image under section 41DA is 2 years imprisonment, while the maximum penalty for threatening to do so under section 41DB is 1 year imprisonment.

'Distribute' is defined in section 40 of the *Summary Offences Act 1966 (Vic)* as including:

- (a) publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not; and
- (b) make available for access by any other person, whether by a particular person or not.

It is unclear from this definition of 'distribute' whether 'communicate' could mean 'showing' someone an image, i.e. printed hardcopy or an image on a screen. It has been suggested 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'.⁴⁰

Section 40 defines 'intimate image' 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 or a person or, in the case of a female, the breasts.

It is noted that the limitation of this definition is that it does not account for broader concepts of sexuality and thus may not be sufficient to create an offence to publish the breasts of a person who is transgender.

⁴⁰ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [3.25].

An offence under section 41DA does not apply to the distribution of an image with the consent of the person.⁴¹

The Victorian legislation states that community standards of acceptable conduct must be taken into account. ‘Community standards of acceptable conduct’ are defined by a range of factors such as the nature and content of the image and the circumstances in which the image was captured and distributed. The vulnerability of the subject in the image is also relevant (including the impact on their privacy).

In 2015, there were 10 offenders charged against section 41DA (there were no persons charged with an offence against section 41DB). In 2016 (up to June 2016), there have been 35 alleged offenders charged against section 41DA, and 27 alleged offenders charged against section 41DB.

6.3.3 New South Wales

The *Crimes Act 1900* (NSW) contains a range of offences that may be applicable to the matter of the non-consensual sharing of intimate images. Most relevantly, section 578C makes it an offence to publish an indecent article. ‘Indecent’ is nowhere defined in the *Crimes Act 1900* (NSW). The maximum penalty for the offence is 100 penalty units (\$1,100) and/or imprisonment for 12 months. This provision was used in a 2012 case, *Usmanov v R*, where the defendant posted six intimate photographs of his former partner to his Facebook page without her consent. He pleaded guilty in the Local Court and was sentenced to six months imprisonment, which on appeal was reduced to a six month suspended sentence (*Usmanov v R* [2012] NSWDC 290).⁴² Following a conviction for an offence against section 578C, a court may order, pursuant to section 97(1) of the *Victims Rights and Support Act 2013* (NSW), that offenders compensate victims for any loss occurred as a result of the offence.

Various other offences in the *Crimes Act 1900* (NSW) have been noted as having potential application to serious invasions of privacy, including sections: 545B (intimidation or annoyance by violence or otherwise), 91J (voyeurism), 91K (filming a person engaged in a private act), 91L (filming a person’s private parts), 91M (installing a device to facilitate observation or filming), 192J (dealing with identification of information), 249K (blackmail), 308H (unauthorised access to or modification of restricted data held in a computer), 91H(2) (essentially ‘sexting’ an image of a person under 16 years). There are also offences provided by the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and the *Surveillance Devices Act 2007* (NSW) which may be applicable to some serious invasions of privacy and, consequently, to the sharing of intimate images without consent.

On 3 March 2016, the Standing Committee published its report titled ‘Remedies for the serious invasion of privacy in New South Wales’. In its report, the Standing Committee recognised that a number of criminal offences currently on the New South Wales statute books may have application to some forms of serious invasions of privacy. However, it was noted that the available offences fail to cover some key types of privacy invasions, particularly the non-consensual sharing of intimate images type scenarios. The Standing Committee noted that it would be appropriate for the New South Wales Government to consider the Senate Committee’s recommendations for the introduction of criminal offences at a federal level as well as in the

⁴¹ Section 41DA(3), *Summary Offences Act 1966* (Vic).

⁴² Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for Serious Invasion of Privacy in New South Wales* (2016) at [3.30].

States and Territories to address the non-consensual sharing of intimate images. This recommendation has been accepted by the New South Wales Government.

On 5 September 2016, the New South Wales Attorney-General announced that the New South Wales Government is proposing to specifically criminalise the non-consensual distribution of intimate images. The New South Wales Department of Justice has developed a discussion paper identifying issues and posing questions to assist in the development of a new offence, which can be accessed from their website. Written feedback on the discussion paper has been requested by Friday, 21 October 2016. The consultation process has sought feedback on such matters as the definition of 'intimate image', how images are shared or distributed, what penalties should apply and how the offence may apply to children and young people.

6.3.4 Western Australia

The *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA) received royal assent on 29 November 2016. Whilst Part 1 of the Act commenced on royal assent, the rest of the Act will commence on a day fixed by proclamation. The Act inserts a new Part IB (family violence restraining order) into the *Restraining Orders Act 1997* (WA). In this Part, section 10G (restraints on respondent) is concerned with the restraints that the court may impose in making a family violence restraining order. Two additional matters have been included in the non-exhaustive list of restraints that may be imposed: (2)(d) stalking or cyber-stalking; and (2)(g) distributing or publishing, or threatening to distribute or publish, intimate personal images of the person seeking to be protected. These inclusions recognise the role of technology in facilitating family violence and mirror the references in new section 5A (which defines family violence). The new section 5A(2) provides examples of behaviour that may constitute family violence and subsection (k) refers to the 'distributing or publishing, or threatening to distribute or publish, intimate personal images of the family member'. The penalty for breaching a family violence order will be \$6,000 or imprisonment for 2 years, or both.

The current Attorney-General of Western Australia has committed to introducing a stand-alone offence addressing the non-consensual sharing of intimate images, early in a next term of government, if re-elected in March 2017.

6.4 Commonwealth

Prior to proroguing Parliament ahead of the 2016 election, the Commonwealth had before it a Bill to address the issue of non-consensual sharing of intimate images. Currently, the most relevant *Criminal Code Act 1995* (Cth) offence is section 474.17 (using a carriage service to menace, harass or cause offence). Other provisions of the *Criminal Code Act 1995* (Cth) that are potentially relevant include sections 471.12 (producing, supplying or obtaining data or a device with intent to copy an account identifier), 474.19 (using a carriage service for child pornography material), 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service), and 474.25 (obligations of internet service providers and internet content hosts).⁴³

Of the Commonwealth offences, section 474.17 is considered to be most on point.

⁴³ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [1.24] and [1.28].

A person is guilty of an offence under section 474.17 if the person intended to use a carriage service and was reckless as to whether they were using a carriage service in a way that reasonable persons would regard in all of the circumstances as menacing, harassing or offensive. A person who commits an offence against 474.17 is liable to imprisonment for 3 years.

Under section 473.4 of the *Criminal Code Act 1995* (Cth), 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 of the material; and the general character of the material.

The Commonwealth Director of Public Prosecutions previously expressed the opinion that it would be beneficial to create a new Commonwealth offence targeting non-consensual sharing of intimate images as this would provide an opportunity to clarify the sort of material and the circumstances to which the offence would apply.⁴⁴

It appears that section 474.17 does not adequately contemplate or address a number of aspects that the phenomenon of non-consensual sharing of intimate images raises, such as:

- consent of the victim (to the creation/taking of the original images);
- defining what might constitute an offensive communication (in the context of disseminating intimate, personal or sexual material electronically);
- the issue of whether the victim held and maintained any expectation of privacy in relation to the image; and
- the section does not extend to non-online conduct (i.e. the distribution of hard copy images).⁴⁵

The Criminal Code Amendment (Private Sexual Material) Bill 2015 was introduced and read for the first time by the Commonwealth Parliament's House of Representatives in October 2015. The Bill proposed to amend the *Criminal Code Act 1995* (Cth) to insert new offences in relation to the use of a carriage service for private sexual material (image-based sexual exploitation or non-consensual sharing of intimate images). The proposed offences reflected the community's increased use of telecommunications to engage in harmful and abusive behaviour of a sexual nature and the harm that can be caused. The Bill was directed to making it an offence for a person to use or make a threat to another person to use a 'carriage service' to transmit, make available, publish, distribute, advertise or promote 'private sexual material', as well as to possess, control, produce, supply or obtain private sexual material, for a commercial purpose or for the purpose of obtaining a benefit with the intention that it be used by that person or another person in committing one of the primary offences. The Bill lapsed in April 2016.

Proposed section 474.24D defined 'private sexual material' as follows:

- (a) the material depicts:

⁴⁴ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [3.13].

⁴⁵ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [3.10 – 3.11].

- (i) a person (the subject) who is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) a person (the subject) in a manner or context that is sexual; or
 - (iii) a sexual organ or the anal region of a person (the subject); or
 - (iv) the breasts of a person (the subject) who is female, or who is a transgender or intersex person who identifies as female; and
- (b) a reasonable person in the position of the subject would expect the material to be kept private.

Proposed section 474.24E created an offence for a person to use a carriage service to transmit, make available, publish, distribute, advertise or promote ‘private sexual material’. The maximum penalty for the proposed offence was 3 years imprisonment.

Proposed section 474.24F created an offence for a person to make a threat to another person to transmit, make available, publish, distribute, advertise or promote private sexual material of which the second person or a third person is a subject. The maximum penalty for the proposed offence was 3 years imprisonment.

Proposed section 474.24G created an offence for a person to possess, control, produce, supply or obtain private sexual material, for a commercial purpose or for the purpose of obtaining a benefit, with the intention that it be used, by that person or another person, in committing an offence against proposed sections 474.24E or 474.24F. The maximum penalty for the proposed offence was 5 years imprisonment.

Proposed section 474.24H(1) creates a ‘public benefit’ defence. Conduct was defined as being of public benefit if it was necessary for or of assistance in: (a) enforcing a law of the Commonwealth, a State or a Territory; or (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or (c) the administration of justice; or (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section. Proposed section 474.24H(3)(b) provided a defence for the offences in sections 474.24E and 474.24G for journalists and people otherwise engaged in media activities.

Finally, proposed section 474.24J provided that the Commonwealth Attorney-General must give consent for a person under the age of 18 to be prosecuted under the offences.

6.5 International

6.5.1 United Kingdom

In April 2015, the United Kingdom introduced a specific offence for the non-consensual sharing of intimate images. Section 33(1) of the *Criminal Justice and Courts Act 2015* (UK) provides:

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

- (a) without the consent of an individual who appears in the photograph or film, and

(b) with the intention of causing that individual distress.’

The maximum penalty for the offence on summary conviction is imprisonment for a term not exceeding 12 months and/or a fine; or, on conviction on indictment, imprisonment for a term not exceeding 2 years and/or a fine.

A photograph or film is ‘private’ if it shows something that is ‘not of a kind ordinarily seen in public’. A photograph or film is ‘sexual’ if it shows all or part of an individual’s exposed genitals or pubic area, it shows something that a reasonable person would consider to be sexual because of its nature, or its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

The definitions ‘private’ and ‘sexual’ can include digitally altered photographs and videos. ‘Disclosure’ occurs when ‘by any means’ a person gives, shows, or makes available an image to another person.

Section 33 provides for specific defences to a charge of disclosing private sexual photographs and films with intent to cause distress. The defences relate to:

- the investigation of crime;
- the publication of journalistic material that is reasonably believed to be in the public interest; and
- a photograph or film that had previously been disclosed for reward with the consent of the person depicted in the images.

The United Kingdom’s provisions to address non-consensual sharing of intimate images are centred on the perpetrator’s intent to cause distress. The focus on the ulterior intent of the distributor rather than the harm that arises from non-consensual distribution creates a serious limitation for the protection of potential victims.⁴⁶

However, the United Kingdom offence provides a ‘flexible’ approach to the issue of consent. The United Kingdom provision provides that ‘consent’ to a disclosure of private sexual material includes general consent covering the disclosure, as well as consent to the particular disclosure. The express inclusion of consent to ‘particular’ conduct expressly affirms that consent can be limited to certain people and circumstances.⁴⁷

Following the introduction of non-consensual sharing of intimate images legislation in the United Kingdom, proposals are now being considered in the United Kingdom to provide automatic anonymity to a complainant of non-consensual sharing of intimate images, rather than requiring specific individual suppression orders on a case by case basis. In this context, it is noted that section 15YR of the *Crimes Act 1914* (Cth) makes it an offence to publish any material which identifies a victim in certain proceedings, such as those involving vulnerable adult witnesses. It is noted that the Senate Committee’s report makes mention of the potential need to expand the

⁴⁶ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as ‘revenge porn’* (2016) at [3.44].

⁴⁷ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as ‘revenge porn’* (2016) at [3.44].

Crimes Act 1914 (Cth) to incorporate the victims of this type of crime under the umbrella of vulnerable adult witnesses.⁴⁸

The BBC received Freedom of Information request responses from 31 police forces in England and Wales for the period April 2015 to December 2015 (i.e. since the introduction of section 33 of the *Criminal Justice and Courts Act 2015* (UK)). The BBC's analysis showed:⁴⁹

- 1,160 reported incidents of non-consensual sharing of intimate images from April 2015 to December 2015;
- three victims were 11 years old with some 30% of offences involving young people under 19;
- the average age of victims of non-consensual sharing of intimate images was 25;
- around 11% of reported offences resulted in the alleged perpetrator being charged, 7% in a caution and 5% in a community resolution;
- some 61% of reported offences resulted in no action being taken against the alleged perpetrator. The main reasons cited by police include a lack of evidence or the victim withdrawing support; and
- Facebook was used by perpetrators in 68% of cases where social media was mentioned in reports. Then came Instagram (12%) followed by Snapchat (5%).

The UK Crown Prosecution Services in its 2015-16 crime report reported that 206 prosecutions for the non-consensual sharing of intimate images were commenced since the legislation came into force.⁵⁰ 'Successful' prosecutions of non-consensual sharing of intimate images in the United Kingdom have largely been resolved by guilty pleas.

6.5.2 New Zealand

The *Harmful Digital Communication Act 2015* (NZ) (the HDC Act), was enacted on 2 July 2015.

The HDC Act created a new civil enforcement regime that includes: setting up an approved agency to be the first port of call for complaints; establishing a mechanism whereby people can now take serious complaints to the District Court, which can issue take-down orders, cease-and-desist notices and impose penalties; the adoption of 10 statutory 'communication' principles recommended by the Law Commission based on criminal and civil law and regulatory rules; the introduction of new offences (to post a harmful digital communication with the intent to cause harm, and incitement to commit suicide, even in situations when a person does not attempt to take their own life); and the introduction of a standard takedown procedure for removing content on request (i.e. that provides online content hosts with an optional process for handling complaints that, if followed, will allow people easily and quickly to request the removal of harmful

⁴⁸ Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [3.44].

⁴⁹ [http://www.bbc.com/news/uk-england-](http://www.bbc.com/news/uk-england-36054273?ns_mchannel=social&ns_campaign=bbc_daily_politics_and_sunday_politics&ns_source=facebook&ns_link_name=news_central)

36054273?ns_mchannel=social&ns_campaign=bbc_daily_politics_and_sunday_politics&ns_source=facebook&ns_link_name=news_central.

⁵⁰ Crown Prosecution Service, *Violence Against Women and Girls, Crime Report 2015-16*, p.90.

and illegal content posted by others, while limiting the host's liability for that content – a safe harbour provision).

The new offence of greatest relevance to this report is found in section 22 of the HDC Act (causing harm by posting digital communication). It requires that three things be established:

- posting a digital communication intending that it cause harm to the victim;
- posting the digital communication would cause harm to an ordinary reasonable person in the position of the victim; and
- posting the digital communication causes harm to the victim.

Harm is defined to mean 'serious emotional distress'. Posting of a digital communication is defined in section 4 of the HDC Act as follows:

- (a) means transfers, sends, posts, publishes, disseminates, or otherwise communicates by means of a digital communication—
 - (i) any information, whether truthful or untruthful, about the victim; or
 - (ii) an intimate visual recording of another individual; and
- (b) includes an attempt to do anything referred to in paragraph (a).

Section 4 of the HDC Act defines 'intimate visual recording' as follows:

- (a) means 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 thing.

A person who commits an offence against section 22 of the HDC Act is liable to imprisonment for no more than 2 years or a fine not exceeding \$50,000.

The challenge with this approach is that the prosecutor would need to establish actual harm to the victim and intention to cause such harm. However, the approach would cover instances where the body is not directly exposed but visible through the clothing.

6.6 Conclusion

There are varying approaches with respect to the nature of the offence that ought to be captured by any criminal sanction. The New Zealand approach seems to acknowledge that non-consensual sharing of intimate images is only a part of the concerning behaviour that occurs in the online environment and that, more broadly, the prevalence of online harassment is damaging and ought to attract criminal sanction.

It is clear that there is a need for the harmonisation of criminal sanctions that attach to online conduct, however, this is more appropriately part of a broad national debate, and that addressing non-consensual sharing of intimate images is an important step in the right direction.

Recommendation 2

The Northern Territory Parliament should enact appropriate legislation to protect all persons resident or present in the Northern Territory from lasting harm or distress caused to any person by what is colloquially known as ‘revenge porn’, but more accurately described as the ‘non-consensual sharing of intimate images’.