

# **NORTHERN TERRITORY LAW REFORM COMMITTEE**

## **Report on the Non-Consensual Sharing of Intimate Images**

**Report No. 43**

**November 2016**

**MEMBERS OF THE NORTHERN TERRITORY LAW REFORM COMMITTEE**

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**ABBREVIATIONS**

ALRC	Australian Law Reform Commission
DVO	Domestic Violence Order
Committee	Northern Territory Law Reform Committee
Senate Committee	Senate Legal and Constitutional Affairs References Committee
Standing Committee	New South Wales Standing Committee on Law and Justice

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## 1.0 TERMS OF REFERENCE

On 25 February 2016, the Attorney-General and Minister for Justice, JOHAN WESSEL ELFERINK, asked the Northern Territory Law Reform Committee to investigate, examine and report on law reform in relation to the practice of using intimate personal material to intimidate, hurt or extort others.

### **Matters for the Northern Territory Law Reform Committee's consideration and report**

1. Advise on the structure, nature and scope of some form of new offence in this regard:
  - (a) where a person intends to hurt, humiliate or gain an advantage over another person by making, or threatening to make, intimate personal materials, publi[sh] or share them with another person or persons;
  - (b) where a person records, obtains or procures intimate personal material of another person for those purposes;
  - (c) where a person is reckless as to the harm or humiliation caused to another person by distributing intimate personal material;
  - (d) where a third person obtains intimate personal materials of a person for the purposes of publication or distribution, whether for profit or some other purpose, and is reckless as to the harm or humiliation caused to that person by its distribution;
  - (e) the possible range of intimate personal materials to be considered for this purpose, including images, recordings, writings or similar;
  - (f) whether and how the consent of a person, in providing or producing the intimate personal materials at the time, may play any part in the subsequent offence.
2. Does the Northern Territory require legislation, similar in character to that proposed in other jurisdictions, to adequately capture this offending behaviour?

Thank you for your attention in this matter and I look forward to your considered response. I request that the committee present to me a completed report by 31 July 2016 [\*].

[\*Due to the complexity and significance of issues to be considered, on 21 June 2016 the Northern Territory Law Reform Committee was granted an extension to 30 November 2016 to complete its Report].

## 2.0 RECOMMENDATIONS

### Recommendation 1

Civil remedies of injunction or damages resulting from publication or non-consensual sharing of intimate images, presently within the jurisdiction of the Local and Supreme Court of the Northern Territory, should continue in force.

### 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'.

### Recommendation 3

The term 'intimate image' should be defined to mean a moving or still image that depicts:

- (a) a person engaged in a 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 or a transgender or intersex person and who identifies as female, the breasts.

### Recommendation 4

Legislation should include specific public interest defences. It is recommended that conduct be 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.

There should also be an exclusion for persons that collect, prepare or disseminate material having the character of news, current affairs, information or a documentary or material consisting of commentary or opinion of this material.

### Recommendation 5

Legislation should make it an offence to:

- (a) publish, by any means, intimate images of a person without that person's consent. It is not relevant to the offence that consent was given to create the images. The onus for

establishing that consent was given for the publication should rest upon the person publishing the intimate images; and

(b) threaten to publish intimate images.

### **Recommendation 6**

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

### **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 Northern Territory 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.



### **3.0 THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE'S RECOMMENDATIONS**

The Committee acknowledges the work of the Commonwealth's Senate Legal and Constitutional Affairs References Committee (Senate Committee) and their report of February 2016 headed 'Phenomenon colloquially referred to as "revenge porn"' which has been of great assistance in the development of this report.

The Committee agrees with the use of 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. The Committee also accepts that there is a need for harmony and consistency between Australian jurisdictions, and for any Northern Territory legislation to take into account any relevant offences enacted by the Commonwealth. The Committee also supports the Commonwealth Government empowering a Commonwealth agency to issue take down notices for non-consensually shared intimate images.

The Committee also accepts the need for all Australian police officers to undertake basic training in relation to the non-consensual sharing of intimate images, and in particular, any new offences in the relevant jurisdiction, to ensure they are equipped to respond to offences of this nature and are aware of the gravity of failure to acknowledge the seriousness of the offence.

## 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.’<sup>1</sup>

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.<sup>2</sup> 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).<sup>3</sup>

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.<sup>4</sup> 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’.<sup>5</sup>

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

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

<sup>2</sup> 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.

<sup>3</sup> 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.

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

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

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

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<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.

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<sup>10</sup> 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.

<sup>11</sup> [http://www.endrevengeporn.org/main\\_2013/wp-content/uploads/2014/12/RPStatistics.pdf](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.<sup>12</sup> The impact on victims is clearly significant and cases of suicide have been linked to non-consensual sharing of intimate images.<sup>13</sup> 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.

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

<sup>13</sup> 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.

## 5.0 CIVIL REMEDIES

In determining whether criminalising certain types of behaviour is an appropriate course to take, it is necessary to understand what civil remedies are currently available to Territorians for the disclosure and distribution by another of images which, when taken, were meant to be kept confidential. Suffice to say that this is an area that has received considerable attention by law reform and parliamentary bodies in recent years,<sup>14</sup> and, therefore, the topic will be addressed only briefly in this report.

Currently, at a Commonwealth level, there is no statutory cause of action for a ‘serious invasion of privacy’, although such a cause of action has been recommended by the Australian Law Reform Commission (ALRC) in two reports.<sup>15</sup> Further, no State or Territory has yet enacted such legislation, although in March 2016, the New South Wales Legislative Council Standing Committee on Law and Justice<sup>16</sup> (Standing Committee) recommended that such a cause of action be enacted based on the model outlined by the ALRC in its report titled ‘Serious Invasions of Privacy in the Digital Era’.<sup>17</sup> No such cause of action exists currently in the Northern Territory, and to the Committee’s knowledge, a statutory cause of action for a serious invasion of privacy is not being considered currently by the Northern Territory Parliament.

Actions available at common law to address the type of conduct under consideration in this inquiry fall into two broad categories: an action in tort for invasion of privacy; and an action in equity for breach of confidence. The first is at an embryonic stage of development in Australia, whereas the second is more established.

### 5.1 Invasion of privacy

Before 2001, the generally held view was that a common law right to privacy was not recognised in Australian law. This view was based on an interpretation of the High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.<sup>18</sup>

In *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, the High Court left open the possibility of the development at common law of an action in tort for invasion of privacy. Justices Gummow and Hayne, with whom Gaudron J agreed,<sup>19</sup> noted at [106]-[107]:

‘Lenah suggested in its submissions that to date the Australian courts most probably had not developed “an enforceable right to privacy” because of what generally was taken to follow from the failure of the plaintiff’s appeal in *Victoria Park Racing and Recreation*

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<sup>14</sup> *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) Ch 74; *Invasion of Privacy* (NSWLRC Report No 120, 2009); *Surveillance in Public Places* (VLRC Report No 18, 2010); *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (Issues Paper, Dept of PMC, 2011); *Too Much Information: a Statutory Cause of Action for Invasion of Privacy*, (SALRI Issues Paper 4, 2013); Parliament of Victoria, *Inquiry into Sexting* (Parliamentary Paper No 230, 2013); *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014); Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for Serious Invasion of Privacy in New South Wales* (2016).

<sup>15</sup> *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) Rec 74-1; *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014) Recs 4-1 and 4-2.

<sup>16</sup> Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for Serious Invasion of Privacy in New South Wales* (2016) at Recs 3 and 4.

<sup>17</sup> *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014).

<sup>18</sup> For a discussion of the *Victoria Park Racing* case see: D Butler, ‘A Tort of Invasion of Privacy in Australia?’ (2005) 29 *Melbourne University Law Review* 339 at 341.

<sup>19</sup> *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 at [58].

*Grounds Co Ltd v Taylor. Victoria Park* does not stand in the path of the development of such a cause of action.’

To date, the invitation extended by the High Court to develop a tort of invasion of privacy in Australia has been taken up by only two lower courts: the Queensland District Court in *Grosse v Purvis* [2003] QDC 151; and the Victorian County Court in *Doe v Australian Broadcasting Corporation* [2007] VCC 281. No appellate court has recognised such a tort, leading the ALRC to conclude that the ‘cases suggest that the future development of the common law [tort of privacy] is, at best, uncertain’.<sup>20</sup>

## 5.2 Breach of confidence

A more fruitful common law remedy to address in a civil action the conduct under consideration in this report is the equitable action for breach of confidence. In *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39 at 50, Mason J enunciated the equitable principle relating to the disclosure of confidential information as follows:

‘The principle is that the court will ‘restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged’ (Lord *Ashburton v Pape*,<sup>21</sup> per Swinfen Eady LJ).’

With the advent of digital technology, and the increasing ease with which intimate personal images shared in confidence can be taken and distributed, the courts have exhibited a willingness to use the action in breach of confidence to direct that the disclosed images be removed, prohibit the further distribution of the images by a defendant and award damages to the wronged party. Two Australian cases can be used to illustrate how the action for breach of confidence has been applied in such a context.

*Giller v Procopets* (2008) 24 VR 1 dealt with the aftermath of the breakdown of a de facto relationship. Between November and December 1996, the respondent had videotaped the parties engaging in sexual activity in the privacy of their bedroom. Some of the videos were taken without the appellant’s knowledge.<sup>22</sup> She did, however, subsequently become aware of later recordings. After the relationship ended, the respondent:

‘...showed a video of the sexual activities of the parties to one person, left a video with the plaintiff’s father and threatened to show the video to a number of people including the plaintiff’s employer. He made contact with the employer on 9 December [1996]. He was taken into custody by the police early the following day. He did not attempt to show the video again until about the middle of the following year when he showed it to a female friend of his.’<sup>23</sup>

The Victorian Court of Appeal found that the actions of the respondent constituted a breach of confidence. Further, the Court held that the appellant was entitled to monetary compensation for the emotional distress caused by the release of the video tapes. Finally, the Court held that such

<sup>20</sup> *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014) at [3.56].

<sup>21</sup> *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475.

<sup>22</sup> *Giller v Procopets* (2008) 24 VR 1 at [359].

<sup>23</sup> *Giller v Procopets* [2004] VSC 113 at [10] (reversed *Giller v Procopets* (2008) 24 VR 1).



compensation was available both in the exercise of the Court's jurisdiction to award damages in equity, and pursuant to the Victorian version of *Lord Cairns' Act* (21 & 22 Vic c 27).<sup>24</sup>

In the Supreme Court of Western Australia case of *Wilson v Ferguson* [2015] WASC 15, the Court summarised the issue before the court as follows:

'The issue raised is how an Australian court exercising equitable jurisdiction should respond to the publication by a jilted exlover, to a broad audience via the internet, of explicit images of a former partner which had been confidentially shared between the sexual partners during their relationship.'<sup>25</sup>

Like *Giller*, the breach at issue in *Wilson v Ferguson* involved the non-consensual distribution by the male defendant of naked and semi-naked photographs of the parties, and videos of the parties engaged in sexual activities, which images were taken on their mobile phones. The plaintiff maintained that the 'photographs and videos were intended for the exclusive enjoyment and gratification of the plaintiff and defendant for so long as their relationship lasted'.<sup>26</sup>

Following the breakup of the relationship, the defendant posted 16 explicit photographs and two explicit videos on his Facebook page. Included in the post was the defendant's comment, 'Happy to help ya boys at home ... enjoy!!'. Later the same day, the defendant also posted the following: 'Let this b a fkn lesson. I will shit on anyone that tries to fk me ova. That is all!'.<sup>27</sup> At the time of the post, the defendant had approximately 300 Facebook 'friends' who would have been able to view and download the images. Further, the damage to the plaintiff was exacerbated by the fact that the parties worked at the same mining site, and many of the defendant's Facebook 'friends' also were the plaintiff's co-workers.

In upholding the plaintiff's claim for breach of confidence, Mitchell J held that:<sup>28</sup>

- (a) the intimate nature of the images clearly had about them the necessary quality of confidence;
- (b) any reasonable person standing in the shoes of the defendant would know that the images were only for his viewing and were not to be shared;
- (c) the defendant was aware that disclosure of the images would cause immense embarrassment and distress to the plaintiff; and
- (d) the defendant's disclosure of the pictures and videos on his Facebook page was motivated by his knowledge of the embarrassment and distress the disclosure of the images would cause to the plaintiff.'

By way of remedy, the Court granted injunctive relief to the plaintiff. The injunction restrained the defendant from publishing, either directly or indirectly, the images other than on the terms specified in the order.<sup>29</sup> The Court also ordered that the defendant pay to the plaintiff equitable

<sup>24</sup> *Supreme Court Act 1986* (Vic) s 38.

<sup>25</sup> *Wilson v Ferguson* [2015] WASC 15 at [1].

<sup>26</sup> *Wilson v Ferguson* [2015] WASC 15 at [4].

<sup>27</sup> *Wilson v Ferguson* [2015] WASC 15 at [27].

<sup>28</sup> *Wilson v Ferguson* [2015] WASC 15 at [56]-[58].

<sup>29</sup> *Wilson v Ferguson* [2015] WASC 15 at [90]. The terms were: as required by law; to professional advisers for the purpose of obtaining professional advice; with leave of the WASC; or with the express written consent of the plaintiff.

compensation in the sum of \$48,404; which consisted of lost wages in the sum of \$13,404, and \$35,000 for the embarrassment and distress suffered by the plaintiff as a result of the disclosure of the images.

Support for an award of equitable damages for embarrassment and distress arising from a breach of confidence can be found in the decision in *Giller*.<sup>30</sup> Maxwell P, for example, after an extensive review of the relevant authorities, stated:

‘The present case involved a deliberate course of conduct on the part of Mr Procopets, intended to cause maximum distress to Ms Giller. The judge found that this conduct had caused her great distress. In my opinion, this was a separate and distinct basis in law for the award of damages of \$40,000 which Neave JA and I would make on the claim for breach of confidence.’<sup>31</sup>

It is clear from the above that the equitable action for breach of confidence is well suited to address the non-consensual sharing of intimate images; however, it is important to note that its reach is limited. In particular, the action for breach of confidence is not suited to situations where the harm suffered by the complainant related to the threat of publication of intimate images, rather than the actual publication of such images. This limitation was highlighted by Lord Justice Toulson of the Supreme Court of the United Kingdom, a co-author of a leading text on confidentiality,<sup>32</sup> in a paper written in 2007 (when his Lordship was a member of the Court of Appeal):

‘A consequence of the development of privacy within the action for breach of confidentiality is that it is presently confined to cases involving the use of information of a private nature, whether in word or pictorial form. So however strong and understandable may be the feeling of harassment of a person who is hounded by photographers when carrying out activities of a private nature, and however unacceptable the behaviour of the pack, there will be no cause of action until an intrusive photograph is published.’<sup>33</sup>

While the above observations focused on the actions of the paparazzi, in an Australian context the same would apply to the actions of jilted ex-lover. This was emphasised by the ALRC when it noted, ‘if the UK’s approach applied, the plaintiff in *Doe v ABC* would (and did on the findings of the trial judge) have a recognised cause of action for breach of confidence, but the claimant in *Grosse v Purvis* would be without a remedy’.<sup>34</sup>

### 5.3 Relevant court

The monetary limit for the Northern Territory Local Court’s civil jurisdiction is \$250,000,<sup>35</sup> which means that generally an action framed in either breach of confidence or the tort of invasion of privacy will be commenced in the Local Court. Further, with respect to an action for breach of confidence, the Local Court can award the suite of remedies usually awarded in such an action:

<sup>30</sup> *Giller v Procopets* (2008) 24 VR 1.

<sup>31</sup> *Giller v Procopets* (2008) 24 VR 1 at [36].

<sup>32</sup> R Toulson & C Phipps, *Confidentiality* (3rd ed, Sweet and Maxwell, 2012).

<sup>33</sup> R Toulson, ‘Freedom of Expression and Privacy’ (Paper presented at the Association of Law Teachers Lord Upjohn Lecture, London, 9 February 2007, 7. See also, *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) at [74.114].

<sup>34</sup> *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) at [74.115].

<sup>35</sup> *Local Court Act*, s 12.

monetary damages<sup>36</sup> and injunctions.<sup>37</sup> Of course, as with any civil claim, legal expertise generally will be required to draft the pleadings and to prosecute the claim. The inherent cost and time involved in civil litigation, even if commenced in the Local Court, may deter many victims of the non-consensual sharing of intimate images from pursuing such remedies.

#### **5.4 Conclusion**

It can be concluded from the above that, in appropriate cases, a person who has suffered loss, including non-economic loss for distress and embarrassment, can recover monetary damages in equity arising from the disclosure of intimate images shared in confidence. Further, the equitable remedy of injunctive relief, if appropriate, will be available in such circumstances. Finally, while some lower courts in Australia have recognised a tort of invasion of privacy, whether such an action is a viable option is still uncertain.

Of course, to avail her or himself of the remedy an equitable action in breach of confidence or the tort of invasion of privacy provides, a wronged party will have to commence proceedings in court. Such a process will inevitably be time-consuming and expensive.

#### **Recommendation 1**

**Civil remedies of injunction or damages resulting from publication or non-consensual sharing of intimate images, presently within the jurisdiction of the Local Court and the Supreme Court of the Northern Territory, should continue in force.**

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<sup>36</sup> *Local Court Act*, s 13(1).

<sup>37</sup> *Local Court Act*, s 13(2).

## 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.<sup>38</sup>

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:

...

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<sup>38</sup> 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.<sup>39</sup>

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’.

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<sup>39</sup> 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'.<sup>40</sup>

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.

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<sup>40</sup> 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.<sup>41</sup>

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).<sup>42</sup> 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

<sup>41</sup> Section 41DA(3), *Summary Offences Act 1966* (Vic).

<sup>42</sup> 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).<sup>43</sup>

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

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<sup>43</sup> 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.<sup>44</sup>

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).<sup>45</sup>

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:

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

<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup>

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

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

<sup>47</sup> 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.<sup>48</sup>

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:<sup>49</sup>

- 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.<sup>50</sup> '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

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

<sup>49</sup> [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.

<sup>50</sup> 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'.**

## 7.0 CHALLENGES TO ENFORCEMENT

Enforceability of current legislation in the Northern Territory is problematic, and these problems are likely similar throughout other Australian jurisdictions. The key challenge in evidence gathering is the ability to gain access to the evidence in a timely way. The nature of the evidence is both the data on the source device used to originally capture the images and, more importantly, the websites where these images or videos are posted and subsequently accessed. As many social media services and devices are moving to cloud storage of data, there needs to be some lawful authority to obtain this information and to present it at hearing. The scope of the information required by investigators is limited to that information that is normally available to the user of the device.

Given the likely increase in the number of such offences, there needs to be available mechanisms that facilitate their ready execution and yield quick results. At present, there appear to be two main ways in which this information is obtained, both of which are problematic. The first approach is to contact the service provider directly and request the information and the second is to apply for a warrant under the *Crimes Act 1914* (Cth). Applications under the *Crimes Act 1914* (Cth) are problematic and open to criticism where they are used to enforce State legislation. Additionally, the process of obtaining such a warrant is burdensome and would need to be streamlined as it becomes increasingly relevant to more offences (for example, breach of a domestic violence order by Facebook Messenger). Applications to service providers have proven to be long and drawn out and often involve multiple agencies.

Considerations for reform of police powers include:

- the ability to use a device to access data stored online that would normally be available to the user of that device (e.g. web based email; Facebook feeds; Twitter; Snap Chat, etc.);
- the power to require biometric and password unlocking of devices (e.g. PIN; fingerprint; facial recognition, etc.); and
- the power to compel the provision of passwords for accounts in the same way as personal particulars.

In evaluating these proposals, consideration would also need to be given to the balancing of personal rights and freedoms, which is beyond the scope of this report. Examples of these challenges include:

- the potential for additional offences to be identified unrelated to the original reason for exercising the power and protections against its use;
- the risk of data loss if the device is set to remote wipe; and
- the potential to infringe the rights of innocent third parties.



## 8.0 CONSTITUTIONAL INTERACTION

Under section 51(v) of the Australian Constitution, the Commonwealth has power to make laws with respect to postal, telegraphic, telephonic, and other like services. This has been interpreted as giving the Commonwealth power to make laws with respect to 'carriage services', including telecommunications networks and the internet.<sup>51</sup>

The criminalisation of non-consensual sharing of intimate images should include the distribution of such images other than online (e.g. in hard copy). Commonwealth legislation may be restricted to online forms for constitutional reasons. The Senate Committee noted that unified and uniform legislation across Australia would substantially address jurisdictional issues within Australia that hinder both victims and police in pursuing allegations of non-consensual sharing of intimate images. Given concerns about the potential of Commonwealth legislation to invalidate inconsistent State and Territory legislation, the preference appeared to be that Commonwealth legislation operate in conjunction with that in the States and Territories.<sup>52</sup>

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<sup>51</sup> Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [3.15].

<sup>52</sup> Senate, Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) at [5.16].

## 9.0 SCOPE OF CONDUCT

The phrase non-consensual sharing of intimate images encapsulates a broad range of conduct and suggests a motive. As discussed above, it is more appropriate to describe the offensive conduct as non-consensual sharing of intimate images. It is a growing problem that requires legislative action. It frequently emerges in circumstances where the first person (the victim) willingly participates in the production of intimate images but does not consent to sharing them with another or others. The conduct that ought to be captured by the offence includes when the second person (the first offender) deliberately or recklessly shares those images with others (distribution or publication), possibly using a publication point such as a social media platform (the secondary offender). Consideration must be given to the scope of the conduct to be captured by any offence, including the mental requirements. The mental element of the offence ought to be considered and ought to capture inadvertent publication, and further, any aggravating or ameliorating elements.

The Committee also considered related issues such as whether the offence should include intimate images obtained without consent of the victim. Importantly, the offence ought not require the existence of a relationship between the victim and the offender as the Committee considers it is irrelevant that the victim consents to the initial creation of the images. Non-consensual production and distribution of intimate images such as third parties secretly recording otherwise consensual activity or the recording of sexual assault ought to also be caught within any offence provisions. Additionally, publication is not the only offence as threats to publish can cause significant harm to a victim and ought to be captured within an offence.

### 9.1 Application to children and young people

Given the prevalence of this behaviour among young people, there is no basis for excluding juveniles from being captured by a non-consensual sharing of intimate images offence. In circumstances where the victim is a child, there are already offences that would attach to the creation and possession of images. There are already specific offences in relation to creation, possession and distribution of images of people under the age of 18.

As the offence being contemplated is in relation to non-consensual sharing, consensual sharing of intimate images between people under 18 years of age ought not to be caught. If, however, the sharing of the images is not consensual, the offence should apply notwithstanding that the person sharing the images is under 18 years. Consideration ought to be given to the relative age of the offender and victim, particularly in cases where the perpetrator is over the age of 18 years and the victim is not. In that circumstance, the victim's age may be an aggravating factor.

Where the offender is a juvenile, they would be dealt with under the *Youth Justice Act* (NT).

The Committee considers that persons under the age of 18 who engage in the non-consensual sharing of intimate images should be referred to diversion (including family conferencing) in the first instance, and that the laying of charges should only be undertaken as a last resort. Accordingly, the offence of non-consensual sharing of intimate images should not be prescribed as a 'serious offence' for the purpose of section 39 of the *Youth Justice Act* (NT).

## 9.2 ‘Intimate Image’

The image(s) that would attract the offence could be both still (photographs) and/or moving (film or video). Where image(s) are altered to look like the victim (i.e. using a non-private depiction of a person’s face in an altered image of another consenting person or publicly available pornographic image(s)) should also be covered by the offence. As noted above, the Committee uses the term ‘image’ throughout this discussion in the broader sense.

It is important to define the bounds of the ‘intimate images’ that would attract sanction. Of relevance is whether the images need to have a sexual content or is it sufficient that the images are offensive? Is it necessary that the images contain nudity, which is not always offensive or sexual, or can the images be merely embarrassing?<sup>53</sup>

The South Australian provisions relate to an ‘invasive image’ which includes images of genitalia or a person engaged in a ‘private act.’ The definition of private act includes ‘a sexual act not ordinarily done in public.’ This seems broader than the Victorian provisions which have a sexual nexus or exposure of the genitals. For the purpose of the recommended Northern Territory offence the Committee is of the option that the critical consideration is whether when the images were captured, the victim had a ‘reasonable expectation of privacy’. Thus, while the image of a person exercising at the gym may be embarrassing, it is not sufficient to fall within the proposed offence.<sup>54</sup> The Committee also concluded that images of transgender individuals should not be overlooked and that, in the recommended Northern Territory offence, it was necessary to modify the Victorian provisions to ensure that transgender victims are also protected.

The Committee considered that the offence ought to be confined to sexual images and include where a person is depicted:

- naked or partially naked (irrespective of whether genitals are exposed or the type of pose);
- engaged in a sexual activity;
- in a way that suggests the image is of an intimate or private nature (for example, wearing lingerie or adopting a sexual pose); or
- which exposed the genitals, anus or breasts.

### **Recommendation 3**

**The term ‘intimate image’ should be defined to mean a moving or still image that depicts:**

- (a) a person engaged in a sexual activity; or**

<sup>53</sup> Note the ‘fat shaming’ incident of 19 July 2016 where a Playboy model Dani Mathers, posted a picture of a woman in a change room at her gym with herself in the foreground hand clasped over her mouth in mock horror with the caption ‘if I can’t unsee this then you can’t either’ <http://thenewdaily.com.au/entertainment/celebrity/2016/07/19/dani-mathers-snapchat/>.

<sup>54</sup> In response to the news that a website was sharing the intimate images of over 500 South Australian women a furore erupted when Sunrise Twitter post asked ‘when are women going to learn not to share these images’ which created a victim blaming backlash from Clementine Ford. <http://www.news.com.au/entertainment/tv/morning-shows/feminist-clementine-ford-adds-nude-post-accusing-sunrise-of-being-run-by-a-sexist-parade-of-morons/news-story/410cf98dffe515150f8c08e82ecc20c3>.

- (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 or a transgender or intersex person who identifies as female, the breasts.**

### **9.3 Distribution**

It is recommended that an offence be created to proscribe the publication and distribution of ‘intimate images.’

The *Criminal Code Act* (NT) section 125A defines ‘publish’ as including:

- (a) distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire;
- (b) have in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a); or
- (c) print, photograph or make in any other manner (whether of the same or of a different kind or nature) for the purpose of doing such an act.

Consideration was given to the need to create an offence in the Northern Territory that would capture the conduct of a secondary offender, such as the website host. Importantly, such a provision would be relatively unenforceable. It was concluded that the Commonwealth provisions adequately addressed this conduct, and similarly, such conduct ought to be explicitly excluded similar to section 26A of the *Summary Offences Act* (SA) discussed above which states: ‘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’.

The Committee was mindful that ‘distribution’ should include both physical and cyber forms of distribution so as to include, for example, the sharing or sending of a hard-copy photograph to another.

### **9.4 Consent**

Consent should be the central tenet of any non-consensual sharing of intimate image offence. The offence should capture the intentional distribution of an intimate image. The offence should not apply where the subject of the image is an adult who consents to the distribution. It is important to emphasise that it is the consent of the subject to the distribution that renders publication lawful or criminal. The consent to the creation of the image is immaterial and consent must be both to the publication of the intimate image and to the specific manner in which the intimate image is distributed. It is also recommended that there be a rebuttable presumption that consent for intimate images to be created or disseminated during the course of a relationship terminates upon the conclusion of the relationship.

It is recommended that consideration be given to a defence of consent with the onus resting on the defendant to prove, on the balance of probabilities that consent was given by the victim. To establish the defence, the defendant ought to be required to establish explicit consent to each particular image and its publication or distribution. It is not relevant to the offence that the victim

consented to the creation of the image; however, the defence must establish that consent was provided both for the creation and distribution of the image or images. There are challenges that would present to establishing such consent existed. However, at the time of establishing intent to publish or distribute, it is irrelevant that the alleged offender did not turn their mind to the presence or absence of the victim's consent. Thus it is that recklessness would be a preferable fault element in this case.

There is no requirement that the offence include 'an intent to cause harm' or 'proof of harm' element. The perpetrator's intentions and whether or not the victim is actually harmed are not pertinent – the act of non-consensually taking and/or sharing intimate images should be sufficient for an offence to have been committed.

### **9.5 Threats**

In light of the serious harm that can result, threats to publish intimate images must also be proscribed. In that circumstance, it is sufficient to threaten to distribute or publish intimate images of the victim whether or not those images exist.

### **9.6 Defences**

It is accepted that some instances ought to be excluded from the offending provision. Similar to the proposed Commonwealth provisions, specific public benefit defences should be included. It is recommended that conduct be defined as being of public benefit if it was necessary for or of assistance in:

- (e) 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.

Similarly, there ought to be an exclusion for persons that collect, prepare or disseminate material having the character of news, current affairs, information or a documentary or material consisting of commentary or opinion of this material.

#### **Recommendation 4**

**Legislation should include specific public interest defences. It is recommended that conduct be 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.**

**There should also be an exclusion for persons that collect, prepare or disseminate material having the character of news, current affairs, information or a documentary or material consisting of commentary or opinion of this material.**

### **9.7 Penalty**

In line with other Australian jurisdictions, the offence of publication ought to attract a maximum penalty of two years imprisonment. It is acknowledged that there may be circumstances where the volume or nature of the offending ought to attract a greater penalty, however, the power to impose either partially or wholly cumulative sentences as derived from section 51 of the *Sentencing Act* (NT) provides adequately for this.

#### **Recommendation 5**

**Legislation should make it an offence to:**

- (a) publish, by any means, intimate images of a person without that person's consent. It is not relevant to the offence that consent was given to create the images. The onus for establishing that consent was given for the publication should rest upon the person publishing the intimate images; and**
- (b) threaten to publish intimate images.**

## 10.0 CONDITIONS OF A DOMESTIC VIOLENCE ORDER OR SIMILAR

Non-consensual sharing of intimate images occurs in a range of circumstances, including situations of domestic or intimate partner violence.

The *Domestic and Family Violence Act* (NT) provides for the making of orders protecting people from domestic and family violence. A Domestic Violence Order (DVO) may restrain a defendant from making any contact with the ‘protected person’, including by the use of technology. Section 5, of the *Domestic and Family Violence Act* (NT) provides that ‘domestic violence’ includes ‘intimidation’, which is defined by section 6(c) as including ‘any conduct that has the effect of unreasonably controlling the person or causes the person mental harm’. A person experiencing domestic violence may apply to the Local Court for a DVO or have one issued by Northern Territory Police (see section 28 of the Act).

A DVO is a civil order; it is not a criminal charge. An application for a DVO may be accompanied by related criminal charges and criminal penalties may apply if a DVO is breached. Part 5.2 of the *Domestic and Family Violence Act* (NT) sets out the offences. If there is not, or there has not been, a ‘domestic’ relationship, provisions akin to those in the *Domestic and Family Violence Act* (NT) apply in the form of Personal Violence Restraining Orders.

In its submission to the Australian Law Reform Commission on ‘Serious Invasions of Privacy in the Digital Era’, in 2014, the North Australian Aboriginal Justice Agency noted that its clients had been able to obtain limited protection against ‘harassment and control by the uploading of sexually explicit material which can then be readily accessed on the internet’ through seeking novel forms of orders under the *Domestic and Family Violence Act* (NT) in the (then) Court of Summary Jurisdiction. By relying both on the provision under the Act that provides for orders to include restraints (section 21(1)(a)), but also the facility of orders imposing obligations (section 21(1)(b)), orders were obtained in the following terms:<sup>55</sup>

1. The defendant is restrained from posting, uploading or otherwise displaying, disseminating, duplicating or distributing any image of the protected person in any form whether electronic, digital, hard copy, video or any other form.
2. Within 24 hours of service of this order, the defendant is to permanently delete and destroy any images or video of the protected person that are in the possession of the defendant or to which the defendant has access.

A DVO in the Northern Territory can restrain the defendant from ‘intimidating’ and ‘harassing’ the protected person. This can provide protection from future threats to post or distribute material to which a reasonable expectation of privacy attaches. Accordingly, threats may constitute harassment or intimidation.

Limitations to the use of DVOs include that they are not effective until served, so if the perpetrator cannot be found, the orders cannot be enforced. Further difficulties may include the ability of Northern Territory Police to devote resources to enforcing any alleged breach of such an order or in the Court finding a particular breach is enforceable.

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<sup>55</sup> Submission: Serious Invasions of Privacy in the Digital Era (DP80), Domestic Violence Legal Service/North Australian Aboriginal Justice Agency, May 2014 pp.6-7.

## 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.<sup>56</sup>

### 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

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<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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

<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> 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'.<sup>60</sup> 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.

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<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> Similar mechanisms are also available on Facebook-owned Instagram<sup>63</sup> as well as on SnapChat<sup>64</sup> and YouTube<sup>65</sup>. To this limited extent, social media platforms

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

<sup>62</sup> Facebook, Community Standards, 2016, [www.facebook.com/communitystandards](http://www.facebook.com/communitystandards) - see also 'What Happens After You Click Report'.

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

<sup>64</sup> 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.

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<sup>65</sup> YouTube Community Guidelines [www.youtube.com](http://www.youtube.com).

## **12.0 CONCLUSION**

The Committee recommends that offences be created to deal with the non-consensual sharing of intimate images as well as threats to share such images. Importantly, consideration needs to be given to enforceability of such measures and the challenges of evidence gathering. There is a fast growing need for regulation of online behaviour and for the broad, symbolic, communicative and censoring function of the criminal law to be brought to bear. This report affirms the advantage of creating specific criminal offences rather than relying on general criminal offences or the civil law that is seeing offenders convicted according to the perceived wrongfulness of the behaviour, which communicates society's core values and confirms in the public's mind the wrongfulness of the behaviour.

## Senate Legal and Constitutional Affairs References Committee's Recommendations

### **Recommendation 1**

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**

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**

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**

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**

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**

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**

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**

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.