

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

14 January 2016

Dear Committee Secretary,

Re: Inquiry into the phenomenon colloquially referred to as 'revenge porn'

Thank you for the opportunity to make a submission in relation to the phenomenon colloquially referred to as 'revenge porn'.

Women's Legal Service Tasmania is a not-for-profit organisation providing free and confidential legal advice to women in all areas of Tasmania. As well as telephone advice, WLST can also provide ongoing legal assistance with casework and representation resources permitting.

WLST provides clients with information about their legal and non-legal options, including referral to other legal services and law firms, or to appropriate support services.

WLST represents women from low socio-economic backgrounds – those who are unable to afford legal assistance and who do not qualify for a grant of legal aid. The majority of our casework is in family law, often with a focus on family violence. WLST is committed to making the legal system more accessible and responsive to the issues affecting women in Tasmania.

WLST notes that the term 'revenge porn' does not appropriately describe the phenomenon being addressed by the enquiry. It suggests that the act is carried out in response to wrongdoing on behalf of the subject, whereas in reality it is often used as a method of control. However, WLST understands that the term is derived from popular usage, and that when referred to in our submission it denotes this broader definition.



Submission

Inquiry into phenomenon colloquially referred to as 'revenge porn'

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Introduction

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SUBMISSION

A - Importance of having specific criminal legislation targeting the release of private sexual material

WLST recognise that the threatened and actual distribution of private sexual material is often used as a means of control in abusive relationships, and that women are disproportionately the victims of such acts.¹ So long as the law does not specifically target the publishing of such material, it will continue to be viewed as an effective means of coercion and/or 'punishment'.

A recent case reported in the Mercury² (Tasmanian newspaper) resulted in a man being convicted of rape after he coerced a woman into having sex with him by threatening to distribute electronic images of her naked torso. Rape and coercion charges may apply where the material is distributed/threatened to be distributed in order to obtain sexual favours, but where the material is distributed maliciously or for personal gratification, such offences will not necessarily apply.

In another recent case in Western Australia, *Wilson v Ferguson*,³ a victim of 'revenge porn' was awarded equitable compensation for the harm caused, and an injunction for a breach of a duty of confidence.

Where acts of revenge porn against women are addressed by the law simply as tools of coercion in rape cases, or as the release of confidential information in equity, it deflects from the serious and unique nature of the act, which goes beyond many other acts of violence - using a woman's sexuality, her body and her trust, against her.⁴ Consequently, the dangerous implication is that where the images are published without the motive to obtain other favours, or where there is no demonstrable harm to the subject, then the act itself is acceptable.

Clearly, relying on civil remedies is impractical and ineffective for dealing with cases of revenge porn – the costs and time involved in bringing a civil claim are prohibitive, and pointless where the publisher is impecunious. Persons who wish to disseminate private sexual material will subsequently not be deterred by the prospect of likely or severe financial consequences.⁵ It is therefore important to enact criminal provisions that simultaneously punish and deter.

According to a study conducted by the Cyber Civil Rights Initiative in the United States, 90% of revenge porn victims are female.⁶ WLST acknowledges that this statistic reflects gender stereotypes that result in women being more likely to suffer harm from the

¹ Citron, D. K., & Franks, M. A. (2014). Criminalizing revenge porn, *Wake Forest Law Review*, vol 49, 353-354.

² <http://www.themercury.com.au/news/scales-of-justice/rape-conviction-after-woman-threatened-with-nude-pics-post-unless-she-had-sex/news-story/b346f5272cd891e18ca88acf22f37127>

³ *Wilson v Ferguson* [2015] WASC 15.

⁴ Citron & Franks, above n 1, 353.

⁵ Citron & Franks, above n 1, 349.

⁶ Mary Anne Franks, "Drafting an Effective "Revenge Porn" Law: A Guide for Legislators," (November 2, 2015), 10, accessed 5 January 2016 at <http://www.endrevengeporn.org/guide-to-legislation/>

distribution of their images than men,⁷ and that societal attitudes also need to change in order to effectively reduce the prevalence of revenge porn. The *Criminal Code Amendment (Private Sexual Material) Bill 2015* ("the *Private Sexual Material Bill*") is an important step towards reducing the use of such threats in violent and controlling relationships, and towards condemning the associated attitudes.

B - Current criminal offences that deal with instances of 'revenge porn'

There is a notable lack of specific legislative provisions addressing revenge porn. Victoria has recently amended the *Summary Offences Act 1966* to address the deficiency. South Australia and New South Wales are the only other states that have relevant provisions. The sections are outlined below and discussed further under subsequent headings.

VICTORIA – SUMMARY OFFENCES ACT 1966

Section 41DA - Distribution of intimate image

- (1) A person (A) commits an offence if—
 - a. A intentionally distributes an intimate image of another person (B) to a person other than B; and
 - b. the distribution of the image is contrary to community standards of acceptable conduct.
- (2) A person who commits an offence against subsection (1) is liable to level 7 imprisonment (2 years maximum).
- (3) Subsection (1) does not apply to A if—
 - a. B is not a minor; and
 - b. B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to—
 - i. the distribution of the intimate image; and
 - ii. the manner in which the intimate image was distributed.

Section 41D - Threat to distribute intimate image

- (1) A person (A) commits an offence if—
 - a. A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and
 - b. the distribution of the image would be contrary to community standards of acceptable conduct; and
 - c. A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.
- (2) A person who commits an offence against subsection (1) is liable to level 8 imprisonment (1 year maximum).
- (3) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit.

⁷ Citron & Franks, above n 1, 353.

SOUTH AUSTRALIA – SUMMARY OFFENCES ACT 1953

Section 26C—Distribution of invasive image

- (1) A person who distributes an invasive image of another person, knowing or having reason to believe that the other person—
- a. does not consent to that particular distribution of the image; or
 - b. does not consent to that particular distribution of the image and does not consent to distribution of the image generally,

is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (2) It is a defence to a charge of an offence against this section to prove—
- a. that the conduct constituting the offence—
 - i. was for a purpose connected to law enforcement; or
 - ii. was for a medical, legal or scientific purpose; or
 - b. that the image was filmed by a licensed investigation agent within the meaning of the *Security and Investigation Agents Act 1995* and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit and the distribution of the image was for a purpose connected with that claim.

(An **invasive image** is defined as one involving a person engaged in a 'private' act, or in a state of undress such that the person's bare genital or anal region is visible. A **private act** is defined as a sexual act of a kind not ordinarily done in public or the use of a toilet).

NEW SOUTH WALES – CRIMES ACT 1900

Section 578C - Publishing Indecent Articles

- (1) A person who publishes an indecent article is guilty of an offence.

Maximum penalty: in the case of an individual-100 penalty units or imprisonment for 12 months (or both), and in the case of a corporation-200 penalty units.

C - The need for separate offences for threatening and actually publishing images

WLST supports the proposed amendment to the Criminal Code insofar as it increases the penalty to a maximum of five years imprisonment for *actually* releasing private sexual material, as opposed to a maximum of three years for *threatening* to publish that material. This is an important safeguard for those who may otherwise refrain from reporting the threat fearing that it will be carried through without additional consequences.

Furthermore, any law criminalising threats to publish private sexual material needs to apply whether or not the material actually exists. Clearly the motive and effect on the alleged subject is the same in either instance.

Notably, the *Summary Offences Act 1953* (SA) does not make it an offence to threaten the release of invasive images, only to actually release them. This fails to address circumstances in which victims are being manipulated into remaining in an abusive

relationship by threats that private images will be published,⁸ or where images are used to discourage rape victims from reporting an attack,⁹ for example.

D - Whether necessary to demonstrate that harm actually suffered by the victim.

The proposed reforms in the *Private Sexual Material Bill* apply only where a victim can demonstrate distress or harm, or that there is a risk of distress or harm. WLST believes that the relevant test should simply be consent.

Arguably, it would be relatively easy to demonstrate a risk of harm in most instances of revenge porn, but it is important that laws addressing revenge porn condemn the actual or threatened non-consensual release of private photographs, regardless of the actual or intended impact on the subject. By doing so, the criminal law will embody the message that our society does not tolerate the non-consensual appropriation of private sexual images to any end.

Determining the harm resulting from the non-consensual release of private images is also problematic in that in some instances the harm may not be experienced until well after charges are laid. Consider for example an instance in which the subject is not immediately overly distressed to find that her image has been shared on social media, but at a later date is refused employment¹⁰ because of the image and only then becomes aware of the implications and subsequently becomes upset.

The recently amended provisions in the *Summary Offences Act 1966* (Vic) do not require any demonstration of harm to the victim, nor do they require any intention to cause harm. The relevant tests are the intention to distribute the material, and the lack of consent by the victim either in relation to distribution in general or the *manner* in which the material was distributed.

Part 5A of the *Summary Offences Act 1953* (SA) is concerned with filming offences and prohibits the non-consensual distribution of an 'invasive' image. There is no requirement to demonstrate harm to the subject nor the intention to cause harm.

The *Crimes Act 1900* (NSW) prohibits the publishing of indecent articles. The offence is very broad and is committed whether or not there is consent, and whether or not there is harm caused. However, the NSW legislation determines whether the distribution of an image is an offence based on the 'decency' of the article, rather than the consent of its subject. This inappropriately places the focus on the act of the subject rather than the act of the publisher. It tends to suggest that the offence is against the public (being subjected to the indecency) rather than against the subject, whose privacy and trust has been betrayed.

There is no evidence in any of these jurisdictions that removing the requirement for harm to have been suffered by the victim has resulted in the opening of a 'floodgate' of prosecutions.

⁸ Citron & Franks, above n 1, 351.

⁹ Franks, above n 6, 3.

¹⁰ Ibid, 352.

E - Consent

It is important that any law criminalising the non-consensual distribution of intimate or private sexual material applies to both photographs that were taken with permission and those that were not. A person should feel free and safe to take and provide photographs of them-self in a private context without it amounting to an implied consent to publish. Furthermore, where a person is pressured into participating in/providing a photograph, the line between consent and non-consent becomes blurred.

Consent in other areas of law is widely accepted as being context-specific, and the distribution of private images should be no different. A person reasonably expects that information disclosed to a medical professional with consent, or even disclosed to another relevant third party remains confined to the limits of that consent.

Rather than focusing on educating (predominantly) women and girls on the dangers associated with sharing private images, campaigns could more effectively target revenge porn by educating (predominantly) men and boys about the severe criminal consequences for sharing or threatening to share those images without the subject's consent. This would reduce the instances in which such images are procured under pressure and place the onus on the perpetrator rather than the victim. Clearly this approach cannot be adopted without effective criminal legislation.

CONCLUSION

In summary, WLST support the introduction of specific criminal legislation targeting acts of revenge porn, and in most part support the specific amendments proposed to the *Private Sexual Material Bill*. The current civil and criminal remedies are inadequate as discussed in this submission. At the very least, any effective law will need to take into consideration:

- The need to have separate offences for threatening to publish material and actually publishing material.
- Whether non-consensual distribution of private sexual material should be illegal regardless of whether or not there is harm - or a risk of harm - to the subject.
- That consent is context specific.