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The Director, Online Content
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To the Director,

Submission to the consultation on a civil penalty regime for non-consensual sharing of intimate images

We refer to the government's discussion paper for consultation on a civil penalties regime for non-consensual sharing of intimate images. The following submission is in response to the government's discussion paper.

Non-consensual sharing of intimate images

On 8 May 2017, RMIT University released the first comprehensive research on 'revenge porn' which revealed that 1 in 5 people across Australia are suffering from image-based abuse.

Sexual images and videos that are taken within the context of an intimate relationship may be exploited for a variety of reasons.

During a relationship, a perpetrator might use sexual images or films as a tool to control their partner – the threat of it being sent to others might be enough to keep someone in an abusive relationship or control their behaviour.

Non-consensual sharing of intimate images is the most extreme example of how some men are using new technologies to exercise power and control over the women in their lives.

Labor acknowledges that the term ‘revenge porn’ does not indicate the diversity of behaviours and harm that may be experienced and prefers the terms ‘image-based abuse’ or ‘non-consensual sharing of intimate images’.

Labor’s private member’s bill

In October 2015, Labor MPs introduced to Parliament a Private Member’s Bill to amend the Criminal Code to create an offence for the non-consensual sharing of intimate images.¹

This Bill was the result of extensive consultation following the release of an exposure draft. This consultation highlighted the need for a specific federal offence that would target the non-consensual sharing of intimate images and send a clear message to the community that this behaviour is not acceptable.

The Criminal Code Amendment (Private Sexual Material) Bill 2015 targets individuals who share, or threaten to share, private sexual images or records of others without consent and with the intention of, or where there is the risk of, causing that person harm or distress. The Bill also targets those who operate ‘revenge porn’ websites.

This Bill lapsed with the prorogation of Parliament in 2016, was re-introduced in October 2016, and was removed from the Notice Paper on 23 May 2017 because the Government refused to call it on for debate for eight consecutive sitting Mondays.

Existing Commonwealth offence

The Government has justified its failure to introduce a specific Commonwealth offence for the non-consensual sharing of intimate images on the basis that there is an existing offence under section 474.17 of the Criminal Code for misuse of telecommunications services to menace, harass or cause offence.

As part of Senate Estimates, Labor has put Questions on Notice to the Attorney-General’s Department about the specific number of charges that have been proven against defendants for ‘revenge porn’ conduct.

In response to Labor’s Questions on Notice, the Australian Federal Police confirmed² that:

Since the introduction of s474.17 in 2004 there have been 844 charges proven against 410 defendants from prosecutions conducted by the CDPP. These statistics are current up to 5 December 2016.

Given the breadth of cases prosecuted under s474.17 the CDPP does not have a mechanism, without expending significant time and resources, of identifying which of these prosecutions relate to the non-consensual sharing of intimate images.

Although the existing offence may have been used in a number of cases in relation to the non-consensual sharing of intimate images, it is unclear how many of the 844 charges

¹http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5552

²http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUK Ewjoo4X4qeLUAhUDvrvwKHUNJA6EQFggkMAA&url=http%3A%2F%2Fwww.aph.gov.au%2F~%2Fmedia%2FCommittees%2Flegcon_ctte%2Festimates%2Fsup_1617%2FAGD%2FQoNs%2FSBE16-095.pdf&usq=AFQjCNEhcXx0ZBx_FEVrf-6JajDx4DGX7Q

referred to by the AFP are specifically for this type of conduct as opposed to a broader range of conduct that menaces, harasses or causes offence.

Senate inquiry – submissions make clear the need for a criminal offence

Shortly after the introduction of Labor's Private Member's Bill in 2015, the Senate Legal and Constitutional Affairs References Committee established an inquiry into this issue.

The Commonwealth Director of Public Prosecutions (CDPP) expressed concerns during the Senate inquiry that there are limitations on existing Commonwealth laws to adequately deal with revenge porn conduct.

The CDPP's submission to the inquiry acknowledged that existing commonwealth laws capture only part of 'revenge porn' conduct. The submission said that "there are limitations on existing Commonwealth laws to adequately deal with 'revenge porn' conduct."

At a Senate hearing the AFP said that "uniformity in legislation across Australia would be most helpful for police" to be able to investigate and charge perpetrators.³

Academics Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn submitted to the inquiry that the existing offence is "too broad in scope to capture the types of harms caused when intimate or sexually explicit images are distributed or disseminated without consent."

Many other submitters discussed the need for consent to be a primary focus of any responses to non-consensual sharing of intimate images, and particularly in any legislative reform.

The Committee recommended that the Commonwealth government legislate to create offences for knowingly or recklessly recording or sharing an intimate image without consent, and threatening to take or share intimate images without consent.

But even after the Senate inquiry's recommendations, the government has still failed to agree to take action to criminalise the non-consensual sharing of intimate images.

The Turnbull government has claimed that Commonwealth legislation to criminalise the non-consensual sharing of intimate images is unnecessary because existing laws are sufficient. The CDPP and AFP evidence to the Senate inquiry make clear that the government's claim is incorrect.

There has been no clear justification from the Government for why they cannot introduce a new specific criminal offence alongside other responses to image-based abuse, such as the proposed civil penalty regime.

Council of Australian Governments

The Council of Australian Governments (COAG) Advisory Panel on Reducing Violence against Women and Their Children, chaired by Ken Lay, and also comprising former

³http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/e32082ed-1321-4536-85b1-b8687a1dce0c/toc_pdf/Legal%20and%20Constitutional%20Affairs%20References%20Committee_2016_02_18_4174_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/e32082ed-1321-4536-85b1-b8687a1dce0c/0000%22

Australian of the Year Rosie Batty, and the head of the Australian National Research Organisation on Women's Safety, Heather Nancarrow, released a report⁴ in April 2016 recommending:

Existing laws that govern such offences do not adequately capture the scope or nature of these offences. To clarify the serious and criminal nature of the distribution of intimate material without consent, legislation should be developed that includes strong penalties for adults who do so.

The panel explicitly called on the Commonwealth, among other jurisdictions, to criminalise revenge porn, recommending:

RECOMMENDATION 4.4

All Commonwealth, state and territory governments should introduce legislation that reinforces perpetrator accountability by removing uncertainty and explicitly making it illegal to use technology to distribute intimate material without consent.

Governments should:

- *introduce and enforce strong and consistent penalties for adults who distribute intimate material without consent*
- *improve community understanding of the impacts and consequences of distributing intimate material.*

Other jurisdictions – a patchwork of laws

In parallel, some—although not all—states have begun to criminalise this conduct at the state level. But even at the conclusion of this COAG process, there will still be no overarching Commonwealth law that can provide consistency—a baseline of protection—across the nation, and there may still be inconsistencies from state to state.

Victoria and South Australia have made distributing intimate and sexually explicit images without consent a criminal offence. In November 2016, Western Australia passed laws allowing family violence restraining orders to be used in the case of non-consensual sharing of intimate images. In June 2017, New South Wales made it an offence to intentionally record or distribute an intimate image of a person without their consent.

Other jurisdictions have yet to introduce bills in relation to the non-consensual sharing of intimate images. It is clear that this is a piecemeal approach to responding to image-based abuse. Each of the provisions in each jurisdiction is different; there is no national approach.

There needs to be strong and consistent specific criminal laws making clear that sharing intimate images without consent, or threatening to do so, is not acceptable behaviour.

Australian laws have failed to keep up with the new ways technology is being used to cause harm, particularly to women, and the law must be brought up to date without any further delay.

⁴<http://www.coag.gov.au/sites/default/files/communique/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>

Thank you for the opportunity to make this submission.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Mark Dreyfus', written in a cursive style.

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