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## **Submission to the inquiry into the Civil Penalties Regime for non-consensual sharing of intimate images**

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| Submitted by:                | Victorian Women Lawyers Association Inc ( <b>VWL</b> )   |
| Submitted electronically to: | The Director, Online Content<br>Department of Communications and the Arts<br>GPO Box 2154<br>Canberra ACT 2601 |
| Contact:                     | Bianca Quan, Convenor  |



## About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 800 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community. VWL has undertaken research into work practices affecting women in the legal profession, and provided protocols and training to effect change.

Details of our publications and submissions are available at [www.vwl.asn.au](http://www.vwl.asn.au) under the 'Publications' tab.

### a) Private sexual material – overview

Since forming in 1996 VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in law and the legal system, and seeking to achieve justice and equality for all women.

VWL welcomes the opportunity to make this submission to the Australian Government's (**Government**) Discussion Paper (**Discussion Paper**) and inquiry into the civil penalties regime at the Commonwealth level to deal with what is sometimes colloquially referred to as 'revenge porn'.

VWL considers that image-based abuse is a form of family violence and sexual assault and is therefore gendered violence. VWL considers that any law reform in relation to this issue ought to be inclusive and sensitive to the needs of victims. VWL encourages the Government's proposal that legislative change be part of a broader policy approach to this issue. Appropriate education and principles should provide guidance in all jurisdictions regarding the state-based criminal offences which will work in conjunction with the civil penalty regime, education, prevention and support measures.<sup>1</sup>

VWL supports the eSafety Commissioner's (**Commissioner**) preferred use of the term 'image-based abuse' to describe the non-consensual sharing of intimate images, as the term 'revenge porn' encourages victim blaming. Further, the use of the word 'porn' is not consistent with this form of abuse. Research has demonstrated that not all forms of sharing, or threats to share private sexual material, may be intended for the purpose of sexual gratification. That meaning should not be imputed once the material is no longer private and the material is no longer held in the context

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<sup>1</sup> Australian Government, Department of Communication and the Arts, Civil Penalties Regime for non-consensual sharing of intimate images discussion paper, May 2017, 7.



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in which it was created or initially shared.<sup>2</sup> The above considerations raise the potential for victims to be blamed for non-consensual distribution of what would otherwise be private material by the inclusion of the word 'revenge'. The legal concern is in the practice of distribution, or threat, not the content of material. Any legislative response should therefore be targeted solely at this practice.

**b) Definitions and key terms and behaviours**

- Cyberbullying material - VWL adopts the definition published by the Commissioner<sup>3</sup>:

*Cyberbullying is the use of technology to bully a person or group with the intent to hurt them socially, psychologically or even physically.*

- Image-based abuse - VWL adopts the definition as described in a summary report published by RMIT and Monash universities<sup>4</sup>:

*the highly diverse and complex ways in which images are being used as a form of control, abuse, humiliation and gratification that goes well beyond the 'jilted ex-lover' scenario... many victims of image-based abuse may be simply unaware that their images are being traded and shared via mobile phones and on internet sites. We label this phenomenon 'image-based abuse' or 'image-based sexual abuse'. We recognise that for many victims, discovering that their images have been made public, constitutes a violation of their sexual autonomy and dignity. These behaviours can have significant and long-term implications and impacts. As such, it is important to label this behaviour for what it is - a form of abuse. Government agencies, such as the Australian Office of the e-Safety Commissioner, are likewise increasingly replacing the term 'revenge pornography' with 'image-based abuse', and are beginning to recognise the serious nature, scope and impact of such harms.*

- Private sexual material - VWL reiterates its submission made to the Legal and Constitutional Affairs References Committee and the Legal and Constitutional Affairs Committee in 2015:<sup>5</sup>

*Human sexuality is complicated, and the definition of private sexual material should reflect this. It needs to take into account the intent of*

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<sup>2</sup> Victorian Women Lawyers, Submission to the Legal Constitutional Affairs References Committee, *Phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm*, 14 January 2016, 2.

<sup>3</sup> Office of Children's eSafety Commissioner: <https://www.esafety.gov.au/esafety-information/esafety-issues/cyberbullying>.

<sup>4</sup> Henry, N., Powell, A. & Flynn, A. (2017). *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse*. A Summary Report. Melbourne: RMIT University 4.

<sup>5</sup> Annexure A.



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*both the creator of the material and the 'consumer'. It also needs to take into account the multicultural nature of Australian society. We note that different cultures have different definitions of sexuality and different ideas of what constitutes a sexual feature. For instance, in some cultures, a woman's hair is considered sexually attractive. Any definition of 'private sexual material' needs to recognise these differences and make sure that it protects all people from the non-consensual sharing of intimate images. The phrase 'sexual pose or sexual activity' should be clearly defined to note the context of the material, including the cultural context, for this reason. Further, any definition of 'private sexual material' also needs to be trans-inclusive. VWL is concerned that exceptions to any definition will encompass material that perhaps should not be excluded from the definition of private sexual material. In particular, circumstances where material from two or more sources has been combined. For example, where Person A's head or face is edited ('photoshopped') onto an image of Person B engaging in sexual activity or in a sexual pose. Given the standard of photo editing available to the general public, it is possible that those who view or distribute an edited image may not be aware that such editing has taken place. If the perception is that the image depicts Person A only, the effect on Person A may therefore be the same as or potentially greater than if it did in fact, only depict Person A. VWL recommends that consideration be given to what kinds of altered or combined images are intended to be encompassed within the definition of private sexual material.*

- Victim blaming - VWL adopts the definition as presented by Victoria Laughton from South Australia's Victim Support Service:<sup>6</sup>

*Victim blaming occurs when the victim, rather than the perpetrator, of a crime or act is given part or all of the blame for its commission. The result is that victims are seen to be responsible for their own misfortune to some extent. Although victim blaming is most often discussed in the context of sexual assault, it can also apply to less serious crimes, such as blaming a person who is pickpocketed for carrying their wallet in their back pocket.<sup>7</sup> In the context of non-consensual sharing of images, this most often involves arguments that parties should not take images in the first place if they didn't want them to become public.<sup>8</sup> This inappropriately shifts blame from*

<sup>6</sup> Lucy Martin, 'Revenge porn crackdown hampered by victim blaming, inconsistent laws, experts say' *ABC News* (7 July 2015) <<http://www.abc.net.au/news/2015-07-07/revenge-porn-crackdown-hampered-victim-blaming-inconsistent-laws/6601164>>

<sup>7</sup> Kayleigh Roberts, 'The Psychology of Victim-Blaming' (5 October 2016) <<https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/>>.

<sup>8</sup> Lucy Martin, 'Revenge porn crackdown hampered by victim blaming, inconsistent laws, experts say' *ABC News* (7 July 2015) <<http://www.abc.net.au/news/2015-07-07/revenge-porn-crackdown-hampered-victim-blaming-inconsistent-laws/6601164>>



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*the perpetrator to the victim. As a result of victim blaming, individuals are known to experience shame which is in addition to the myriad of negative psychological affects experienced by victims.*

**c) How a proposed civil penalty regime might best complement existing regulation and other initiatives, and how it might be framed.**

**i. Existing Regulation**

Civil law in Australia provides few remedies for the victims of non-consensual sharing of intimate images, as there is no general individual right to privacy in Australia.<sup>9</sup> Victims might obtain a civil remedy under copyright, defamation<sup>10</sup>, breach of confidence<sup>11</sup> or the criminal offence of stalking.

The *Criminal Code Act 1995* (Cth) provides for offences relating to the misuse of telecommunications services to menace, harass or cause offence, carrying a maximum penalty of three years imprisonment and/or a fine of up to \$32,400.<sup>12</sup> There are also a range of existing state-based laws used in cases of sharing of intimate images without consent, including laws in Victoria that are specific to this form of abuse. However, these laws differ between the different states and territories.

VWL contends that the introduction of a civil penalty regime at the Commonwealth level encourages the Government to develop specific criminal provisions relating to non-consensual sharing of intimate images. This would contribute to developing clear and consistent regulations to penalise and deter this behaviour Australia-wide. VWL supports the Government's proposal that a regime specific to the non-consensual sharing of intimate images should include provisions ensuring offending images and videos are removed quickly through the issue of take-down notices, a measure not covered by existing Commonwealth legislation.

**ii. Framing a Civil Penalty**

When making a claim to the Commissioner, VWL highlights the importance of this process not attracting a filing fee as a general civil claim would. This is important because civil remedies are commonly sought at considerable risk and expense through lawsuits, which is not an option that is available to all women.

The discussion paper suggests the prohibition could be framed in the following terms:

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<sup>9</sup> Defamation law is unlikely to provide an avenue for compensation for the reputational harm that results from the publication of imagery now that truth is an unqualified defence in all states. See: Nicolas Suzor, Bryony Seignior and Jennifer Singleton, 'Non-Consensual Porn and the Responsibilities of Online Intermediaries' (2016) 40(3) Melbourne University Law Review (advance), 4.

<sup>10</sup> Ibid.

<sup>11</sup> Above n 5.

<sup>12</sup> *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth), s 474.17.



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*A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, without that other person's consent on a relevant electronic service or social media service.*

VWL notes that it is important to ensure that any definitions are cast widely enough to account for the variety of ways in which images may be shared, so that the civil penalty regime has maximum impact. Framing a civil penalty will be addressed further in section (d) of these submissions.

**d) The expansion of the role of the Commissioner to administer the new scheme, and how the Commissioner might enforce the civil penalty regime.**

**iii. The Commissioner**

- *Current role of the Commissioner*

Currently, the Commissioner has a wide range of functions to enhance online safety for Australian children and to protect against cyberbullying. The Commissioner does so by administering a complaints system to ensure the quick removal of material from social media sites that is targeted at, and harmful to, an Australian child. Under the *Enhancing Online Safety for Children Act 2015* (Cth), the Commissioner has the power to investigate complaints about serious cyberbullying material targeted at an Australian child.<sup>13</sup> Additionally, the Commissioner has the power to issue notices to individuals who post cyberbullying material and request them to take the material down, refrain from further cyberbullying or apologise to the victim.<sup>14</sup>

- *Expansion of the role of Commissioner*

VWL supports the Government's proposal to expand the Commissioner's role to include adults affected by non-consensual sharing of private sexual material. However, VWL expresses concern over the proposed enforcement procedures.

VWL supports the Government's proposal to expand the Commissioner's role because victims of image-based abuse do not currently have specific legal avenues in civil law, and are limited to taking the actions discussed above. Further, Commonwealth legislation does not provide for take down notices to be issued for the misuse of intimate images. VWL is of the view that having a single Commonwealth agency empowered to administer a civil penalty regime specific to image-based abuse will assist victims in seeking recourse that is applied in a consistent and more effective manner.

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<sup>13</sup> *Enhancing Online Safety for Children Act 2015* (Cth), s 5.

<sup>14</sup> *Ibid*, s 42



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VWL proposes that in addition to an online portal, victims also have access to telephone and in-person counselling, and advice services. An online portal may deter some victims who are particularly vulnerable such as victims of domestic violence, young persons, and people from culturally and linguistically diverse communities, including Aboriginal and Torres Strait Islanders who may require culturally relevant information. Therefore, it is crucial that reforms recognise and provide appropriate remedies for victims who require different avenues of support.

- *Threat to share*

The summary report entitled 'Not Just 'Revenge Pornography': Australians; Experiences of Image-Base Abuse'<sup>15</sup> relevantly discusses that images are being used to coerce, threaten, harass, objectify and abuse persons known to victims or strangers. Research also demonstrates that image-based abuse may also be directed to temporary visa migrants, sex workers or trafficked persons in order to preclude them from settling in Australia or returning to their communities by using intimate images as a form of blackmail or extortion.<sup>16</sup>

Within this context, the Discussion Paper refers to a civil penalty regime for the sharing of private sexual images without consent, where the breach of privacy is *serious*. VWL is concerned that with the current language as it stands, the proposed regime will not protect victims in circumstances when the offender has threatened to share nude or sexual images. Threats to share nude or sexual images are often used to force the victim to engage in unwanted sexual acts, prevent them from leaving a relationship or obtaining an intervention order, or other forms of blackmail such as monetary payment.<sup>17</sup>

VWL therefore supports a civil penalty regime that includes both a prohibition against the sharing of and threat to share intimate images without consent. VWL recommends that victims need not establish the threat is 'serious' before civil penalty action can be taken.

**iv. *Proposed enforcement tools for civil penalty regime***

VWL believes that the Commissioner should have increased power to protect the victims of image-based abuse. VWL supports the policy approach in the Discussion Paper, namely a civil penalty regime that includes enforcement mechanisms similar to those provided under the current cyber-bullying regime.

- *Take down notices*

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<sup>15</sup> Henry, N., Powell, A. & Flynn, A. (2017). *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse*. A Summary Report. Melbourne: RMIT University 8.

<sup>16</sup> Ibid.

<sup>17</sup> Above n 8, 1.



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While some victims may wish to pursue criminal or civil action against their perpetrator, many will, first and foremost, wish to have their images removed from the hosting site or from people's phones before pursuing legal action to prevent any further circulation<sup>18</sup>. Consequently, it is imperative the Commissioner is empowered to issue take down notices to individuals and content hosts.

It is concerning that although women are less likely to share intimate images, they are equally as likely as men to be victims of misuse, and more likely than men to report feeling afraid for their safety as a result of the misuse.<sup>19</sup> This suggests that for some female victims, image-based abuse is associated with stalking and/or domestic violence<sup>20</sup>. Furthermore, victims of image-based abuse are almost twice as likely than non-victims to experience high levels of psychological distress, which demonstrates the severe mental impact that misuse of such images can have on its victims.<sup>21</sup> An example of this was provided in the Discussion Paper where a Brisbane man superimposed his ex-girlfriend's head on images of naked women with her address and phone number, inviting men to rape and torture her.<sup>22</sup>

If actioned swiftly, take down notices may mitigate this type of harm by reducing visibility of the misuse by ensuring the image does not appear on popular social media platforms such as Facebook, adult websites or an online search of the victim's name<sup>23</sup>. However, given the nature of the internet, a takedown notice is only effective if actioned promptly to prevent any further misuse of the image. VWL strongly encourages that the Commissioner consistently engage with online content hosts to coordinate the timely take down of misused images and to create a safe online environment for its users. In VWL's view, the civil penalty regime should also make content hosts accountable if they fail to comply with the take down notice.

#### **v. Other enforcement tools**

Other enforcement mechanisms to address imaged-based abuse such as civil penalties, injunctions, and enforceable undertakings should also be put in place. Any civil monetary penalty will need to be carefully formulated in order to appropriately recognise the serious nature of the harm and to act as an effective deterrent. VWL supports the introduction of a civil penalty in relation to threats to share private sexual material. Although a similar offence was introduced in Victoria in 2014,<sup>24</sup> VWL believes that any future formulation of an offence should not require the victim to believe the threat will be carried out.

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid 6.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 5.

<sup>22</sup> Australian Government, Department of Communications and Arts, *Civil penalties regime for non-consensual sharing of intimate images* Discussion Paper (2017) 8.

<sup>23</sup> Nicolas Suzor, Bryony Seignior and Jennifer Singleton, 'Non-Consensual Porn and the Responsibilities of Online Intermediaries' (2016) 40(3) Melbourne University Law Review (advance) 10.

<sup>24</sup> *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), ss 41DA & 41DB.





VWL also considers that any offence introduced should be capable of application to a situation where third party imagery is used. It is important that victims be protected from all forms of intimidation and sexual violence, even if it does not directly involve their own sexual images.

- *Information gathering powers*

Under section 19 of the *Enhancing Online Safety for Children Act 2015* (Cth), the Commissioner may, for the purposes of an investigation, obtain information from such persons, and make such inquiries, as he or she thinks fit.<sup>25</sup> This is also mirrored in clause 28 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) and in clause 45 of Schedule 7. Additionally, clause 44 of Schedule 7 of the *Broadcasting Services Act 1992* (Cth) provides that a Commissioner may on his or her own initiative or in response to a complaint made, investigate any of the following matters:

- whether end-users in Australia can access prohibited content or potential prohibited content provided by a content service;
- whether a hosting service is hosting prohibited content or potential prohibited content;
- whether end-users in Australia can access prohibited content or potential prohibited content using a link provided by a links service;
- whether a person has breached a designated content/hosting service provider rule that applies to the person;
- whether a person has committed an offence against this Schedule;
- whether a person has breached a civil penalty provision of this Schedule;
- whether a participant in the content industry (within the meaning of Part 4 of this Schedule) has breached a code registered under that Part that is applicable to the participant.

The Commissioner may also request a carrier or service provider to perform certain functions and exercise their powers under section 581(2A) of the *Telecommunications Act 1997* (Cth). The Australian Media Communications and Media Authority ('**the ACMA**') may obtain information from carriers, service providers and other persons if the information is relevant to the ACMA's functions and powers.

VWL considers that the current assortment of information gathering powers should be consolidated as one piece of legislation. This would enable the information gathering powers to be clear and consistent.

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<sup>25</sup> *Enhancing Online Safety for Children Act 2015* (Cth) s 19.



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Further, social media sites should be required to publish information about the Commissioner's information gathering powers on their websites, along with guidelines to access the Commissioner's assistance for victims.

- *Complaints process*

VWL is supportive of the proposed complaints process which will allow victims of image-based abuse to lodge complaints as an initial step with certain site operators that operate established complaints mechanisms. Currently, an Australian child or a person responsible for an Australian child may make a complaint to the Commissioner, if the child has reason to believe that he or she was or is the target or cyber-bullying material that has been, or is being, provided on a particular social media service or relevant electronic service.<sup>26</sup> VWL supports the extension of this complaints process to image-based abuse, for adults as well as children.

VWL supports the idea that victims should first attempt to contact social media sites to request take-down of images or videos, when appropriate. Additionally, companies such as Google, Facebook and other platforms that allow for distribution of images of private sexual material, should be required to assist in preventing image-based abuse. Any complaints process should be prominently displayed on the website and user friendly. However, VWL believes that victims should not be compelled to use established complaints processes prior to lodging a complaint with the Commissioner as the image may have been shared on multiple forums and it may be extremely burdensome for the victim to contact all social media sites separately to request that the image is taken down. Further, there may be circumstances where the perpetrator is sharing the image with friends and family of the victim, or with other people that the victim knows such as work colleagues. It is therefore more appropriate to ensure that victims can make a complaint to the Commissioner, as soon as they are aware of the material.

In Japan, the law extends further to allow internet service providers to delete suspected images that were shared without the uploader's consent, if the images are still there two days after a complaint is made.<sup>27</sup> VWL supports allowing third parties to delete suspected images that were shared without consent in certain circumstances.

#### **e) Policy**

VWL hopes that legislative change will be part of a broader policy approach including a criminal penalty regime, providing funding to appropriate programs, encouraging corporate responsibility, and community education to address gender violence and victim blaming. Given that a culture of victim blaming still exists in Australia, it is important that a community education campaign is developed to highlight awareness

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<sup>26</sup> Ibid s 18.

<sup>27</sup> *Revenge Porn Prevention Act* (2014) Japan, article 4.



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of the effects of image-based abuse. Image-based abuse is not only a gendered violence but also disproportionately victimises lesbian, gay, bisexual, trans, and/or intersex ('**LGBTI**') Australians and individuals with disabilities. As such, VWL urges the Government to consider developing education programs in consultation with domestic violence resource centres, LGBTI and disability support networks to take into account the diverse range of victims and the differences in experiences they may have with image-based abuse.

**f) Recommendations**

In VWL's submission, the proposed regime should:

1. not require the victim to pay a fee to enliven the legal redress that the Commissioner offers;
2. not require the victim to establish that the threat is 'serious' before proceedings can be brought against the accused;
3. not require the victim to establish a belief that a threat will be carried out;
4. include penalties for image-based abuse. Any penalty introduced should be capable of application to a third party image-based abuse situation;
5. consolidate the current assortment of information gathering powers into the reforms as one piece of legislation;
6. include provisions ensuring that offending images and videos are removed quickly through the issue of take down notices;
7. allow third parties to delete suspected images that were shared without consent in certain circumstances; and
8. provide professional training for relevant professions such as the police force in relation to the threats posed by image-based abuse.

**g) Conclusion**

The repercussions of non-consensual sharing of intimate images towards (primarily) women are grave. Developing the law is necessary to punish, deter and respond to image-based abuse. A civil penalty regime at the Commonwealth level would complement existing criminal law. However, going forward, VWL considers that the Government should focus its policy response on providing criminal remedies for victims.

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## SUBMISSION TO

**Phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm**

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|------------------------------|---|
| Submitted by:                | Victorian Women Lawyers Association Inc (VWL)   |
| Submitted electronically to: | Legal and Constitutional Affairs References Committee<br>Committee Secretary<br>Senate Legal and Constitutional Affairs Committee<br>PO Box 6100<br>Parliament House<br>Canberra ACT 2600 |
| Contact:                     | Stephanie Milione, Convenor, or   |



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## About us

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## Private sexual material - overview

Since forming in 1996 VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in law and in the legal system, and achieving justice and equality for all women.

VWL welcomes the opportunity to make this submission to the Legal and Constitutional Affairs References Committee and supports the creation of specific criminal offences at the Commonwealth level to deal with 'revenge porn'. We believe that there is currently a gap in the law in relation to this issue and that it ought to be addressed in order to protect women from an emerging form of intimate partner violence.

VWL considers that revenge porn is a form of family violence and sexual assault and is therefore gendered violence.<sup>1</sup> VWL hopes that any law reform in relation to this issue will be inclusive and sensitive to the needs of victims. VWL also hopes that legislative change will be part of a broader policy approach including providing funding to appropriate programs, encouraging corporate responsibility, and community education to address gender violence and victim blaming.

## Comments on the issues for consideration

- 1. The phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm**

VWL supports the introduction of an offence in relation to threats to share private sexual material. A similar offence was introduced in Victoria in 2014 but requires the victim to believe the threat will be carried out. VWL believes that any formulation of an offence should not require the victim to establish such a belief.

VWL is not in favour of any requirement that the threat be carried out using a carriage service. This would exclude verbal threats made in an intimate relationship in order to coerce

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<sup>1</sup> See Victorian Law Reform Committee, 'Enquiry into sexting' (2013)



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or control the victim. VWL considers that consideration is required in relation to whether all threats should be included, regardless of the method of delivery.

Any offence that is introduced should be capable of application to a third party revenge porn situation. It is important that women be protected from all forms of intimidation and sexual violence, even if it does not directly involve their own sexual images.

**2. The impact this has on the targets of revenge porn, and in the Australian community more broadly**

VWL disagrees with any requirement to show that the victim suffered distress. VWL considers that the absence of consent should be sufficient. Further, there should be no requirement to demonstrate distress or harm as the threat to distribute should be sufficient to constitute an offence. The Victorian sexting laws do not require the demonstration of harm or distress as an element of the offence.

In prosecuting other forms of sexual assault the impact on the victim, while relevant, is not a necessary element of the offence. Providing evidence of the harm or distress also has the potential to cause further harm to the subject of the material. VWL recommends further consideration of whether the requirement to demonstrate harm or distress is necessary.

VWL has concern about the use of the term 'revenge porn'. In particular, the term 'porn' imputes a subjective meaning to private sexual material. Such a meaning may or may not be intended by the person who is the subject of the private sexual material, however that meaning should not be imputed once the material is no longer private and the material is no longer held in the context in which it was created or initially shared.

The above considerations raise potential for victims to be blamed for non-consensual distribution of what would otherwise be private material. The problem is in the practice of distribution, not the content of the material. Any legislative response should be targeted solely at the practice.

**3. Potential policy responses to this emerging problem, including civil and criminal remedies**

The law needs to respond to such criminal behaviour by condemning it and providing victims with suitable avenues to seek remedies which will hopefully act as a deterrent for potential perpetrators. In order to best address incidents of revenge porn, a legal approach must be found that offers both legal recourse for victims and creates law that provides a deterrent.

VWL supports the policy approach currently being considered by the Committee, namely the proposed Criminal Code Amendment to criminalise revenge porn. VWL believes that a criminal offence will offer the best type of remedy for victims and will provide greater access to justice. Furthermore, a criminal offence would provide a clear statement of condemnation of acts of revenge porn on behalf of the federal government. It would also encourage the community to become more educated about the problem. The definition and details of the offence will need to be carefully formulated in order to be beneficial for victims and provide adequate recourse. For more detail, please see Appendix 1 containing VWL's submission to



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the Australian Labor Party in relation to the Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft.

By contrast, civil remedies are likely to be prohibitively expensive and inaccessible for most victims of revenge porn. A privacy tort may provide redress for some victims but VWL is of the opinion that it should not be the focus of policy development.

It must be noted that despite the need for the law to institute change and provide protection for victims of revenge porn, private actors can also play a role. Companies such as Google, Facebook and other platforms that allow for distribution of images of private sexual material, should be required to assist prosecutors of revenge porn crimes.

As mentioned above, the VWL urges legislative change to occur as part of a broader policy approach including funding appropriate programs, encouraging corporate responsibility, and community education to address gender violence and victim blaming.

**4. The response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions**

*Australian state jurisdictions<sup>2</sup>*

South Australia and Victoria are examples of jurisdictions with criminal offences specifically tailored towards 'revenge pornography'.

The South Australian legislation focuses on the consent of the person who is depicted in the private sexual material, which VWL supports.

The Victorian offence was introduced in 2014, but requires the victim to believe the threat will be carried out. VWL believes that any formulation of an offence should not require the victim to establish such a belief.

In New South Wales, whilst there are no provisions specifically directed at this issue, the criminal code provides that a 'person who publishes an indecent article is guilty of an offence'. Successful prosecution of offenders under this section includes a man who posted naked images of a former intimate partner to Facebook.<sup>3</sup>

*United Kingdom*

The UK criminal offence requires the offender to have the intention of causing distress to the person who appears in the photograph or film. As explained above, VWL believes the offence should focus on the practice, rather than the intended impact on the victim.

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<sup>2</sup> NSW Parliamentary Research Service, *Revenge pornography, privacy and the law*, July 2015, available at: [http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/Revengepornographyprivacyandthelaw/\\$File/revenge+pornography+privacy+and+the+law.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/Revengepornographyprivacyandthelaw/$File/revenge+pornography+privacy+and+the+law.pdf)

<sup>3</sup> *Usmanov v R* [2012] NSWDC 290.



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*Japan*

In 2015, Japanese law was amended to make it a crime to disclose sexually explicit images or videos of former spouses or friends who can be identified to an unspecified number of people. The law also allows internet service providers to delete suspected revenge porn images without the uploader's consent, if the images are still there two days after a complaint is made. VWL supports allowing third parties to delete suspected revenge porn images in certain circumstances.

*Canada*

Amendments to the Canadian criminal code in 2015 now make it an offence to publish, distribute and transmit videos or photos of a person in an intimate setting without that person's consent. VWL supports this formulation.

*Israel*

In 2014, new Israeli law was passed to make it an offence to post sexually explicit media without the depicted person's knowledge or consent. The law also covers content shared on social media.

The law stipulates that those found guilty of posting such content will be prosecuted as sexual offenders, while those who are targeted will be recognised as victims of sexual assault. VWL supports this formulation of offenders and victims, as it falls within a broader framework of criminal law and policy applicable to sexual offences.

*Philippines*

The Philippines introduced a specific revenge porn law in 2009, which applies regardless of whether the original image was taken with permission or not. VWL supports this formulation.

*United States*

A number of US states now have specific revenge porn legislation, but some only apply if the images were taken without the consent of the person shown. VWL does not recommend such a formulation.

**5. Any other related matters.**

*The meaning of 'private sexual material'*

Human sexuality is complicated, and the definition of private sexual material should reflect this. It needs to take into account the intent of both the creator of the material and the 'consumer'. It also needs to take into account the multicultural nature of Australian society. We note that different cultures have different definitions of sexuality and different ideas of what constitutes a sexual feature. For instance, in some cultures, a woman's hair is considered sexually attractive. Any definition of 'private sexual material' needs to recognise these differences and make sure that it protects all people from revenge porn. The phrase 'sexual pose or sexual activity' should be clearly defined to note the context of the material, including the cultural context, for this reason.





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Further, any definition of 'private sexual material also needs to be trans-inclusive. The proposed definition contained in the Commonwealth draft bill includes material that depicts 'the breasts of a female person.' VWL queries whether this would include female-identifying people.

VWL is concerned that exceptions to any definition will encompass material that perhaps should not be excluded from the definition of private sexual material. In particular, circumstances where material from two or more sources has been combined. For example, where Person A's head or face is edited ('photoshopped') onto an image of Person B engaging in sexual activity or in a sexual pose. Given the standard of photo editing available to the general public, it is possible that those who view or distribute an edited image may not be aware that such editing has taken place. If the perception is that the image depicts Person A only, the effect on Person A may therefore be the same as or potentially greater than if it did in fact, only depict Person A. VWL recommends that consideration be given to what kinds of altered or combined images are intended to be encompassed within the definition of private sexual material.

## **Concluding remarks**

Revenge porn is a significant issue that must be addressed as soon as possible. The repercussions of this ugly conduct towards (primarily) women is grave and needs to be remedied when it does occur. Developing the law in a broad way is necessary in order to punish, deter and respond to revenge porn. VWL believes that the focus of any government policy response should be on providing criminal remedies for victims. Whilst civil remedies would offer legal avenues for victims, they would be sought at considerable risk and expense through lawsuits, which is not an option that is available to all women.

**Stephanie Milione**  
Convenor, Victorian Women Lawyers (VWL)

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VWL Law Reform Committee



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## Appendix 1

### **SUBMISSION IN RELATION TO**

### **The Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft**

|                         |  |
|-------------------------|--|
| <b>Submitted by:</b>    | Victorian Women Lawyers' Association Inc   |
| <b>Submission date:</b> | 2 October 2015   |
| <b>Submitted to:</b>    | The Australian Labor Party   |
| <b>Sent by email:</b>   | <a href="mailto:Tim.Watts.MP@aph.gov.au">Tim.Watts.MP@aph.gov.au</a> and via online portal |
| <b>Contact:</b>         | Kirsten Adams, Convenor: tel. ; email <a href="mailto:vwvl@liv.asn.au">vwvl@liv.asn.au</a> |



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## About us

Victorian Women Lawyers (VWL) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 500 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and the broader community. VWL has undertaken research into work practices affecting women in the legal profession, and provided protocols and training to effect change.

Details of our publications and submissions are available at [www.vwl.asn.au](http://www.vwl.asn.au) under the 'Publications' tab.

## Private sexual material - overview

Since 1996 VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, and achieving justice and equality for all women.

VWL welcomes the opportunity to make this submission to the Australian Labor Party (ALP) in relation to the exposure draft of the Criminal Code Amendment (Private Sexual Material) Bill 2015 (Draft Bill).

VWL supports the creation of specific criminal offences at the Commonwealth level to deal with 'revenge porn', as is proposed under the Draft Bill. We believe that there is currently a gap in the law in relation to this issue and that it ought be addressed in order to protect women from an emerging form of intimate partner violence.

VWL considers that revenge porn is a form of family violence and sexual assault, and that accordingly it constitutes gendered violence.<sup>1</sup> VWL hopes that any law reform in relation to this issue will be inclusive and sensitive to the needs of victims. VWL also hopes that legislative change will be part of a broader policy approach, including funding of appropriate programs, encouraging corporate responsibility and community education to address gender violence and victim blaming.

## Comments on the issues for consideration

### 1. Threats to share private sexual material

VWL supports the introduction of an offence in relation to threats to share private sexual material. A similar offence was introduced in Victoria in 2014 under the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014, which amended the *Summary Offences Act 1966* (Vic) and the *Crimes Act 1958* (Vic). However, that offence requires the victim to believe that the threat will be carried out. VWL agrees with the Draft Bill's formulation of the offence, in that it does not require the victim to establish such a belief.

Nevertheless, VWL is concerned by the requirement that the threat be carried out using a carriage service. This appears to exclude verbal threats made in an intimate relationship in order to coerce or control the victim. If so, **VWL considers that further consideration should be given to including all threats, regardless of the method of delivery.**

**Any offence that is introduced should apply to third party revenge porn situations.** It is important that women be protected from all forms of intimidation and sexual violence, even if it does not directly involve their own sexual images.

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<sup>1</sup> See discussion in Victorian Law Reform Committee, 'Enquiry into sexting' (2013)



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## 2. The meaning of 'private sexual material'

The current definition of 'private sexual material' in the Draft Bill includes a number of requirements. Human sexuality is complicated, and the definition of 'private sexual material' should reflect this.

The definition needs to take into account the intent of both the creator of the material and the 'consumer' of the material. It also needs to take into account the multicultural nature of Australian society. We note that different cultures have different definitions of sexuality and different ideas as to what constitutes a sexual feature. For instance, in some cultures, a woman's hair is considered sexually attractive.

**Any definition of 'private sexual material' needs to recognise cultural differences and ensure that all members of the community are protected from revenge porn, as it may be experienced by them.**

**In particular, the phrase 'sexual pose or sexual activity' should be clearly defined to note the context of the material, including the cultural context.**

**Further, any definition of 'private sexual material' should be trans-inclusive.** The current definition refers to material that depicts 'the breasts of a female person.' VWL queries whether this would include a female-identifying person.

VWL is concerned that the exceptions in subsection 474.24D(4) of the Draft Bill could potentially encompass material that ought not be excluded from definition of 'private sexual material'. In particular, composite material created from the combination of material originating from two or more separate sources.

For example, where Person A's head or face is edited (or 'photoshopped') onto an image of Person B engaging in sexual activity or in a sexual pose. It appears this may not be considered private sexual material depicting Person A as it would fall within the exception set out in subparagraph 474.24D(4)(b)(iii); that is, it is only because of the combination of the two images that it depicts Person A.

Given the standard of photo editing readily available to members of the community, it is possible that those who view or distribute an edited image may not be aware that such editing has taken place. In the above example, if the perception is that the image is a depiction of Person A (and Person A only), the effect on Person A may be the same as, or potentially greater than, the effect on them where the image actually depicted Person A only. **VWL recommends that consideration be given to the kinds of altered or composite images that are intended to be encompassed within the definition of 'private sexual material'.**

## 3. Intentions of perpetrators and effects on victims

The proposed offence under the Draft Bill requires, as an element of the offence, that the conduct causes, or there is a risk that it will cause, distress or harm to the subject of the material. In prosecuting other forms of sexual assault the impact on the victim, while relevant, is not a necessary element of the offence. **VWL proposes that the requirement of demonstrating distress or harm be reconsidered and further, that the absence of consent should be sufficient grounds for the establishment of the offence.**

Relevantly, the requirement to demonstrate distress or harm is inconsistent with the 'threaten to distribute' offence under subparagraph 474.24F which does not require harm to be demonstrated – rather, only that the threat occurred. Another relevant comparison is the



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Victorian offence under section 41DA(1) of the *Summary Offences Act 1956* (Vic) which do not require the demonstration of harm or distress as an element of establishing the offence.

## **Concluding remarks**

VWL supports the introduction of the Draft Bill. VWL's main concern in relation to the Draft Bill is to ensure that the broad range of conduct that may potentially constitute revenge porn is captured by the amendments to the Criminal Code.

Our suggestions above are aimed at ensuring that the concept of private sexual material appropriately reflects cultural and diverse gender and sexuality differences, that unlawful threats should not be limited by the method of their delivery and that the effect on victims should not be a factor in establishing the offence.

**Victorian Women Lawyers**  
**2 October 2015**