

2 October 2015

Mr Tim Watts MP  
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By email: [Tim.Watts.MP@aph.gov.au](mailto:Tim.Watts.MP@aph.gov.au)

Dear Minister,

**CRIMINAL CODE AMENDMENT (PRIVATE SEXUAL MATERIAL) BILL 2015**

1. Thank you for the opportunity to provide comments to the Australian Labor Party's Exposure Draft Criminal Code Amendment (Private Sexual Material) Bill 2015 (the Bill).
2. The treatment of revenge pornography deserves further consideration by the Commonwealth Parliament. Advances in technology through the emergence of the internet, social media and the proliferation of mobile devices have given rise to the practice of revenge pornography. As noted in the Bill's accompanying Discussion Paper, revenge pornography involves:  
  
*... sharing private sexual images of film recordings via SMS, email, websites and social media platforms, without the subjects consent. This can cause harm and distress – usually the sharer's intention.*  
  
...  
  
*'Revenge porn' can have a devastating impact on its victims including severe psychological distress and damage to relationships, community standing and career prospects.<sup>1</sup>*
3. Central to the Commonwealth Parliament's consideration of this issue should be whether revenge pornography is already adequately caught by existing Commonwealth, State and Territory legislative remedies and, if not, whether it ought to be criminalised.
4. This submission focuses on examining the need for a specific Commonwealth revenge pornography offence. It also provides specific comments regarding the drafting of the Bill, which would need to be addressed should it be further pursued.

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<sup>1</sup> Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft Discussion Paper (September 2015) 4.

## The need for specific revenge pornography offences

5. Currently in Australia there are a number of offences which may cover some aspects of revenge pornography. For example, in Victoria, under section 41DA and 41DB of the *Summary Offences Act 1966* (Vic) it is illegal to maliciously distribute, or threaten to distribute, intimate images of another person without their consent. In South Australia, section 26C of the *Summary Offences Act 1953* (SA) sets out an offence of distributing an 'invasive image' without consent. In New South Wales, section 578C of the *Crimes Act 1900* (NSW) makes it illegal to publish an indecent article. Under Commonwealth law, section 474.17 of the *Criminal Code Act 1995* (Cth) involves the use of a carriage service to menace, harass or cause offence. Criminal charges may also be laid in other Australian states and territories for stalking<sup>2</sup>, blackmail<sup>3</sup>, unlawful surveillance<sup>4</sup> or indecency.<sup>5</sup>
6. However, there are concerns that the existing criminal offences do not adequately cater for the range of behaviours encapsulated in the concept of 'revenge pornography', and that they fail to adequately capture the social and psychological harm that results from the use of sexual imagery to harass, coerce or blackmail women.<sup>6</sup>
7. The offence of stalking may be one example of the inability of current laws to adequately accommodate the harms associated with technology facilitated sexual violence and harassment. An offence of stalking requires a course of conduct<sup>7</sup> to be established, which means that a one-off action such as posting an explicit video or picture to social media would not be captured.<sup>8</sup> Similarly, an offence of misuse of a surveillance device<sup>9</sup> could be used to respond to sexual images taken without the victims' knowledge or permission, but would not cover a situation where consensually taken explicit images are later distributed without consent.<sup>10</sup>
8. The Commonwealth offence of using a carriage service to menace, harass or cause offence may not be the most appropriate offence to deal with revenge pornography given its broad scope. For example subsection (2) of the offence section refers to its applicability to emergency call persons and APS employees among other professionals<sup>11</sup>. While it seems that a revenge pornography scenario could be captured under the Commonwealth legislation, a more targeted offence may be a more effective solution to addressing revenge pornography behaviour.
9. In their article, *Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women*, Dr Nicola Henry and Dr Anastasia Powell argue that:

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<sup>2</sup> For example s338E of the *Criminal Code Act Compilation Act 1913* (WA), section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), and section 21A of the *Crimes Act 1958* (Vic).

<sup>3</sup> For example section 249K of the *Crimes Act 1900* (NSW), and section 87 of the *Crimes Act 1958* (Vic).

<sup>4</sup> For example *Surveillance Devices Act 1999* (Vic) s11; *Surveillance Devices Act 2007* (NT) s15.

<sup>5</sup> Dr Nicola Henry and Dr Anastasia Powell, 'Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women' (2015) 48(1) *Australian & New Zealand Journal of Criminology* 110

<sup>6</sup> *Ibid*, 104

<sup>7</sup> In Victoria, section 21A of the *Crimes Act 1958* defines stalking as a person 'engaging in a course of conduct which causes apprehension or fear'.

<sup>8</sup> Dr Nicola Henry and Dr Anastasia Powell, 'Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women' (2015) 48(1) *Australian & New Zealand Journal of Criminology* 110

<sup>9</sup> For example *Surveillance Devices Act 1999* (Vic) s11; *Surveillance Devices Act 2007* (NT) s15.

<sup>10</sup> Dr Nicola Henry and Dr Anastasia Powell, 'Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women' (2015) 48(1) *Australian & New Zealand Journal of Criminology* 111

<sup>11</sup> Although it is noted that the list does not limit the application of subsection 1.

*The limited scope of current legislative frameworks, the lack of case law, the uncertainty around whether Commonwealth or state/territory law should apply, as well as the lack of specific legislation to tackle technology-facilitated sexual violence and harassment, means that Australian law at present ‘does not sufficiently accommodate the intent, magnitude, and range of harms’ that are committed through offensive behaviours involving technology.*<sup>12</sup>

10. The introduction of specific revenge pornography legislation may also increase public awareness of the “revenge porn” phenomenon, increase the frequency with which victims report the matter to the police, and increase the willingness of the police and prosecution agencies to bring prosecutions.<sup>13</sup>
11. In recognition of the seriousness of revenge pornography, other jurisdictions, including the United Kingdom and some states in the United States have introduced specific revenge pornography laws. The United States has 21 states which individually outlaw the offence, and a Federal bill is soon to be introduced for consideration.<sup>14</sup> The United Kingdom introduced a specific revenge pornography offence in April this year. Under section 33 of the *Criminal Justice and Courts Act 2015* it is an offence for a person to disclose a private sexual photograph or film if the disclosure is made without the consent of an individual who appears in the photograph or film, and with the intention of causing that individual distress.
12. While the current Inquiry intends to focus on the possibility of a criminal law amendment, Parliament should also consider the adequacy or otherwise of private law remedies to deal with ‘revenge pornography’ in making an assessment as to whether criminalisation is needed. As the Discussion Paper notes, such remedies may include seeking an injunction or damages for the equitable wrong of breach of confidence, claiming breach of copyright, where the victim owns the copyright of the offending material, pursuing defamation proceedings, or pursuing action of a tort of an invasion of privacy.<sup>15</sup>

### Comments on the Bill

#### *Causing harm or distress to a subject*

13. There does not seem to be any logical reason to require proof of actual (or potential) harm or distress in the substantive offence of using a carriage service for private sexual material (s474.24E) and then not to require it in the offence of merely threatening to engage in the conduct (s474.24F). Actual (or potential) harm or distress should be required for both offences.

#### *Using a carriage service to make a threat about private sexual material*

14. The threat should be a threat to transmit, make available, publish, distribute, advertise or promote private sexual material *in circumstances where the offender knows or believes that the subject does not consent*. The mental elements of knowledge or recklessness are required for the substantive offence in s 474.24E.

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<sup>12</sup> Dr Nicola Henry and Dr Anastasia Powell, *Submission to the Australian Law Reform Commission’s Discussion Paper: Serious Invasions of Privacy in the Digital Era* (2014), referencing Victorian Parliamentary Law Reform Committee (2013) *Inquiry into Sexting: Report of the Law Reform Committee Inquiry into Sexting*. Parliamentary Paper No.230, Session 2010-2013. Melbourne: State Government of Victoria, 140.

<sup>13</sup> David Cook, ‘Revenge Pornography’, *Criminal Law & Justice Weekly* (27 February 2015)

<sup>14</sup> Mary O’Hara, ‘[A federal revenge-porn bill is expected next month](#)’, *The Daily Dot* (21 June 2015)

<sup>15</sup> Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft Discussion Paper (September 2015) 6.

Given that s474.24F is a threat to commit an offence knowledge or belief should be required. Proof of this should not be overly difficult if revenge is the motive.

15. There does not seem to be a constitutional barrier to the Commonwealth proscribing a verbal or written (on paper or otherwise not using a carriage service) threat to transmit etc. if the threatened conduct is to be carried out using a carriage service. The currently worded section only creates an offence if the *threat* is made using a carriage service.
16. It does not seem rational that possession of images with the intention of using them to commit the substantive and threat offences (s474.24G) has a higher maximum penalty than those offences. It may make sense if an additional element were present such as 'for commercial purposes' or 'for financial or material gain' – if in fact this section is aimed at revenge pornography websites.

#### *'Fake' revenge pornography*

17. Consideration should be given to whether 'fake' revenge pornography – such as using a non-private depiction of a person's face in an altered image of another consenting person or publicly available pornographic image – should be proscribed. Advances in modern technology allow fake images to be very convincing and may also result in psychological detriment to a victim or social and financial difficulties. This detriment may be different to that suffered by a victim where the material has not been altered.
18. Currently, a faked image using a person's face would only be proscribed if the face were taken from for example a photograph which originally depicted something which it would be expected to be kept private. Using a non-private depiction of a person is not proscribed.

#### *Definition of 'private'*

19. The definition of 'private sexual material' in s474.24D provides that the material 'must depict something that, in the circumstances in which the material was produced, a reasonable person would expect to be kept private'.
20. The definition of 'private' may be problematic given the various levels of 'privacy' on social media. For example, is an image which is available to hundreds of Facebook friends, but not to anyone who searches the internet or Facebook 'private'? To aid clarity, the term 'private' should be defined in the Bill.
21. Thank you for the opportunity to provide these observations.
22. Please contact Dr Natasha Molt, Senior Policy Lawyer on 02 6246 3754 or [natasha.molt@lawcouncil.asn.au](mailto:natasha.molt@lawcouncil.asn.au) should you require further information.

Yours sincerely,



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**CHIEF EXECUTIVE OFFICER**