



13 January 2016

Senator Glenn Lazarus
Chair
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator

Inquiry into the phenomenon colloquially referred to as ‘revenge porn’

1. Thank you for the opportunity to make a submission to the above inquiry.
2. The Law Council acknowledges the assistance of the Law Society of South Australia, the South Australian Bar Association, the Law Institute of Victoria, and the Human Rights Committee of the Law Society of New South Wales in the preparation of this submission.
3. Attached to this letter is a copy of a Law Council submission made on 2 October 2015 to Mr Tim Watts MP in respect of a private members Bill seeking to introduce a specific offence for the phenomenon colloquially referred to as ‘revenge porn’ (Annexure A).
4. The attached submission may assist the Senate Legal and Constitutional Affairs References Committee’s (the Committee) consideration of paragraphs (c) and (d) of the Terms of Reference for its current inquiry, namely:
 - (c) potential policy responses to [the emerging revenge pornography] problem, including civil and criminal remedies; and
 - (d) the response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions.
5. The current submission focuses on the following observations.

Criminalisation of ‘revenge pornography’

6. A question arises as to whether ‘revenge pornography’ is adequately addressed by existing offences, including section 474.17 of the *Criminal Code Act 1995* (Cth) (Criminal Code) (using a carriage service to menace, harass or cause offence) and/or state based offences.¹

¹ For example, section 26C of the *Summary Offences Act 1953* (SA) (distributing an ‘invasive image’ without consent); *Summary Offences Act 1966* (Vic), section 41DA, ‘distribution of an intimate image’ and section 41DB, ‘threat to

7. On one view, in light of these existing offences, a separate specific offence to address 'revenge porn' may be unnecessary and would potentially complicate and confuse matters.
8. The Law Council encourages the Committee to make enquiries with the Commonwealth Director of Public Prosecutions as to the number of successful prosecutions made under section 474.17 of the Criminal Code in cases of 'revenge porn' as this may indicate its effectiveness of addressing the problem.
9. As noted in the attached submission, the United Kingdom (UK) introduced a specific revenge pornography offence in April 2015, under section 33 of the *Criminal Justice and Courts Act 2015*. Since the introduction of the offence, nearly 830 cases of revenge pornography have allegedly been reported to police, with the first offender sentenced on 7 August 2015.² There have since been a number of other successful 'revenge porn' prosecutions in the UK, which have largely been resolved by pleas of guilt.³ The fact that specific offences for 'revenge pornography' have been prosecuted in such a manner in the UK may indicate its usefulness as a potential criminal response to the problem. The United States federal government has also drafted specific legislation addressing the problem and 26 states are reported to have reformed their laws in response to revenge pornography.⁴
10. As evidenced by the UK prosecutions of 'revenge pornography' to date (set out in Annexure B), it is clear that currently the majority of reported victims of 'revenge pornography' are women.
11. Technology is now being used as a tool in serious cases of gender-based violence, and to date, little attention has been given to the ways 'new technologies are used to facilitate or perpetrate technology-facilitated sexual violence or harassment against adult women'.⁵ Legislation that effectively addresses the problem of 'revenge pornography', in light of any possible barriers to prosecution under the existing offences, would be a positive step in combatting violence against women.

The Victorian and South Australian approach

12. The Law Institute of Victoria has highlighted the introduction of new offences in Victoria under the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), which address the phenomenon of 'revenge porn'. The amendments create two new offences in the *Summary Offences Act 1966* (Vic), section 41DA, 'distribution of an intimate image' and section 41DB, 'threat to distribute intimate image' in circumstances where that distribution would be 'contrary to community standards of acceptable conduct'. These standards are defined by reference to 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.

distribute intimate image' in circumstances where that distribution would be 'contrary to community standards of acceptable conduct'; and subsection 578(2) of the *Crimes Act 1900* (NSW) (publishing an indecent article).

² Lydia Willgress, '[11-year-old is youngest victim of revenge porn: Nearly 830 cases have been reported to police - around 24 a week - since new laws came into force last April](#)', *Daily Mail* (online), 2 January 2016.

³ See attached table, Annexure B.

⁴ Nina Funnell, 'Revenge Porn needs more than a slap on the wrist', *Sydney Morning Herald* (online), 15 September 2015.

⁵ Nicola Henry and Anastasia Powell, Beyond the 'sext': Technology-facilitated sexual violence and harassment against adult women, *Australian and New Zealand Journal of Criminology* 2015, Vol 48(1) 104-118, 105.

13. The new offences do not apply to intimate images of adults who have ‘expressly or impliedly consented, or could reasonably be considered to have expressly or implied consented’ to the ‘distribution of the intimate image’ and the ‘manner in which the intimate image was distributed’. ‘Consent’ is defined as ‘free agreement’. Importantly, paragraph 41DA (3)(a) provides additional protection to minors by stating that the exception for consent does not apply to minors.
14. The South Australian Bar Association notes that state laws, as exist presently, including section 23C of the *Summary Offences Act 1953 (SA)*, do not adequately address all aspects of revenge porn. The South Australian legislation, for example, prohibits the publication of ‘invasive’ images without consent, meaning offensive or intrusive images. In many instances of revenge pornography, the capturing of the image is originally done consensually and as an expression of sexual intimacy, and therefore would not be offensive or intrusive. Also, the South Australian legislation requires proof of knowledge of or reason to believe the victim’s lack of consent, whereas the South Australian Bar Association agree that the offence (as drafted in the Criminal Code Amendment (Private Sexual Material) Bill 2015) ought to extend to reckless indifference.
15. The Law Council encourages the Committee to make enquiries with the Victorian and also the South Australian Director of Public Prosecutions as to the number of successful prosecutions made under their specific offences for ‘revenge porn’ as this may also indicate the effectiveness of specific offences for addressing the problem.

Anonymity for Victims

16. Proposals are now being considered in the UK to provide automatic anonymity to a complainant of ‘revenge pornography’, rather than requiring specific individual suppression orders on a case by case basis.⁶ Such an approach warrants consideration. Given the public nature of the humiliation and damage that ‘revenge pornography’ causes, automatic anonymity for any complainant should be considered as it may assist in ameliorating factors impeding reporting to police and will generally provide ongoing protection for the complainant.

Education

17. Any legislative change to introduce new offences relating to ‘revenge pornography’ should be accompanied by a program of both public education, and education for police and prosecutors. Education that facilitates improved investigation of complaints relating to ‘revenge pornography’ should be encouraged.

Relationship between Commonwealth and State legislation

18. A uniform approach to the regulation of ‘revenge porn’ is warranted. In the digital age where images can be distributed and accessed instantly in any jurisdiction, it is important that uniform laws apply; otherwise anomalies and injustices may arise. For example, if different ‘revenge porn’ offences are created it may lead to confusion regarding the elements of the offences and whether an offence has been committed at all. While the specific offences and exceptions will need to be tailored to fit the existing laws in each jurisdiction, the aim should be to ensure that the offences and exceptions are as consistent as possible across all Australian jurisdictions.

⁶ Sarah Bell, [‘Call for ‘revenge porn’ victims to be kept anonymous’](#), *BBC News* (online), 15 December 2015.

19. ‘Revenge pornography’ should not be seen as a creature solely of the cyber domain. Although it has reached its zenith in use via Facebook and Twitter for example, such humiliating actions do not require the internet. One of the recent UK prosecutions for ‘revenge pornography’ involved intimate images being physically distributed outside a supermarket frequented by the victim.⁷ Criminalisation of ‘revenge pornography’ should include physical and non-online forms of action. However, the Commonwealth legislation may be restricted to online forms for Constitutional reasons, and this issue would therefore need to be addressed in State legislation.

Civil cause of action for serious breach of privacy

20. While the Law Council’s Business Law Section’s Media and Communications and Privacy Law Committees have previously queried the need for a civil cause of action for serious breach of privacy,⁸ the Law Society of South Australia, the South Australian Bar Association and Law Society of New South Wales have supported giving consideration to its introduction. They have noted, for example, that the current remedies available are not specifically tailored to the circumstances of ‘revenge pornography’, are expensive, are difficult to access, and do not provide a preventative/deterrent effect. They also note that, given the vastly increased technological capacity for capturing images and making recordings; and for rapid and large scale dissemination of digital material, a new cause of action in tort for serious invasions of privacy are warranted and should be available where the plaintiff had a reasonable expectation of privacy.
21. The Law Council notes that, in the absence of such a cause of action, victims of revenge pornography may in some cases seek remedies in equity for a breach of confidence.
22. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* Justices Gummow and Hayne (with whom Gaudron J agreed) suggested that, rather than developing new causes of action, privacy may best be protected by ‘looking across the range of already established legal and equitable wrongs’.⁹ In this case, Chief Justice Gleeson referred to the capacity of breach of confidence to protect activities filmed in private and to extend to third parties who end up in possession of the images.¹⁰ The equitable doctrine of breach of confidence has also previously been used in Australian cases to address revenge pornography cases such as *Wilson v Ferguson*¹¹ and *Giller v Procopets*.¹²
23. However, the Human Rights Committee of the Law Society of New South Wales has expressed doubts about whether relying on the equitable action for breach of confidence would provide equivalent protections against serious invasions of privacy. The significant and extensive common law developments in the UK, where the equitable action for breach of confidence has been extended,¹³ has been under the

⁷ See table, Annexure B.

⁸ Law Council of Australia, Business Law Section, Media and Communications Committee and the Working Party on Privacy Law, Submission to NSW Law Reform Commission, *NSW Law Reform Commission’s Consultation Paper No 1 – Invasion of Privacy*, 18 September 2007.

⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [132] (emphasis added).

¹⁰ *Ibid* at [39], also as quoted and applied by Neave J in *Giller v Procopets* [2008] VSCA 236; (2008) 24 VR 1 at [430]–[431].

¹¹ *Wilson v Ferguson* [2015] WASC 15.

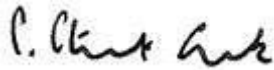
¹² *Giller v Procopets* [2008] VSCA 236.

¹³ *Campbell v MGN Ltd* [2004] 2 AC 457 as cited by the ALRC in its Report.

influence of its *Human Rights Act 1998* (UK). This Act requires courts to give effect to the protection of rights and freedoms in the European Convention on Human Rights. There is no equivalent legislative protection of human rights in the Commonwealth.

24. The Committee may wish to consider whether the development of equitable remedies is an adequate response to addressing 'revenge pornography', or whether a statutory cause of action for invasions of privacy should be introduced.

Yours faithfully

A handwritten signature in black ink, appearing to read 'S. Stuart Clark'.

S. Stuart Clark AM
PRESIDENT

2 October 2015

Mr Tim Watts MP
PO Box 6022
Parliament House
CANBERRA ACT 2600

By email: 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.¹
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.

¹ 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 stalking², blackmail³, unlawful surveillance⁴ or indecency.⁵
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.⁶
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 conduct⁷ 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.⁸ Similarly, an offence of misuse of a surveillance device⁹ 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.¹⁰
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 professionals¹¹. 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:

² 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).

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

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

⁵ 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

⁶ *Ibid*, 104

⁷ 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'.

⁸ 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

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

¹⁰ 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

¹¹ 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.*¹²

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.¹³
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.¹⁴ 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.¹⁵

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.

¹² 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.

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

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

¹⁵ 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 should you require further information.

Yours sincerely,



Michael Brett Young
CHIEF EXECUTIVE OFFICER

Annexure B

Offender	Victim	Act	Sentence
Sam Colley ¹ 35 year old male Plea of guilty	Female	Sent an intimate picture to the victim's family members via Facebook and threatened to post further pictures online.	7.7.15 12 weeks imprisonment suspended for 18 months.
Clayton Kennedy ² 21 year old male Plea of guilty	Female	Posted intimate pictures of the victim on Facebook. The victim was unaware of the photo being taken, which caused further distress.	6.7.15 12 month Community Order, fine of £110, court costs of £295, and indefinite restraining order imposed.
Paul Marquis ³ 30 year old male Plea of guilty	Female	Sent intimate image of the victim to her friend.	30.6.15 18 weeks imprisonment, suspended, tagged curfew, costs and compensation.
Jamie Law ⁴ 25 year old male Plea of guilty	Female	Sent intimate images of the victim to her brother.	2.7.15 12 weeks imprisonment, restraining order imposed for 3 years.
Luke Brimson ⁵ 29 year old male	Female	Distributed intimate images of the victim inside and outside a supermarket.	16.7.15 24 weeks imprisonment, suspended for 18 months, restraining order imposed for 2 years, costs.
Alex Till ⁶ 25 year old male Plea of guilty Also charged with failing to answer bail.	Female	Threatened to publish intimate photos after the relationship broke down. Set up a fake facebook profile under another name, used a naked picture of the victim as the profile picture, then sent the victim a message from that account.	13.8.15 12 month community order with a requirement to attend a 30 day rehabilitation programme, fine of 110, costs of 85, victim surcharge of 60, court charge of 180.

¹ ['Prosecutors being advised to learn from revenge porn cases across the country to help them tackle this "humiliating" crime'](#), Crown Prosecution Service, 7 August 2015.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ ['Revenge porn Facebook user fined over explicit picture of ex-lover'](#), *Express and Star* (online), 14 August 2015.

John Duffin ⁷ 35 year old male Plea of guilty	Female	Changed his Whatsapp profile picture to an intimate picture of the victim, allowing it to be seen by all of his friends and associates.	13.8.15 8 weeks imprisonment, suspended for two years.
Paige Mitchell ⁸ 23 year old female Plea of guilty	Female	Uploaded 4 sexually explicit pictures of the victim onto Facebook.	1.9.2015 6 weeks imprisonment suspended for 18 months
Simon Humphrey ⁹ 40 year old male Plea of guilty	Female	Changed his Facebook profile picture to an intimate picture of the victim, allowing it to be seen by all of his friends and associates.	18.09.15 4 months imprisonment suspended for 18 months, restraining order imposed for 18 months.
William Nelson ¹⁰ 52 year old male Plea of guilty	Female	Set up a fake Facebook account and posted approximately 30 intimate photographs of the victim. Sent friend requests to her friends and family from the fake account.	24.9.2015 2 months imprisonment suspended for 18 months, 100 hours of unpaid work, restraining order imposed, costs.

⁷ [‘Man avoids jail over Whatsapp revenge porn picture’](#), *Plymouth Herald* (online), 13 August 2015.

⁸ [‘Revenge porn’ woman Paige Mitchell gets suspended jail term](#), *BBC News* (online), 1 September 2015.

⁹ [‘40 year old man sentenced for revenge porn’](#), The Crown Prosecution Service, 18 September 2015.

¹⁰ [‘Man sentenced for revenge porn offence’](#), The Crown Prosecution Service, 24 September 2015.