

**Submission
No 12**

**INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION
OF PRIVACY IN NEW SOUTH WALES**

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Submission to the Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales

Introduction

I thank the Standing Committee on Law and Justice for the opportunity to engage in the consultative process during the Inquiry into Remedies for Serious Invasion of Privacy in NSW. For the purpose of this submission, I shall be confining myself to the issue of the intentional non-consensual distribution of an intimate image, and threatening to do so. I shall not address specific provisions relating to minors or the Sex Offender Register.

The issue known colloquially as ‘sexting’ or ‘revenge’ porn has become more prominent in society as Information Communications Technology (ICT) has enabled the communication of images. People can use ICT to sexually communicate in healthy and harmful ways. I claim that a new norm has emerged in society regarding when it is a breach of privacy to distribute an intimate image through ICT. I claim that the distinguishing characteristic that delineates healthy and unhealthy sexual communication mediated by ICT, is consent. The current law in NSW has not appropriately responded to this change in society. Although the criminal law is alone inadequate, it can deter and punish behaviour that breaches norms, and should be responsive to changes in society.

The Inquiry into Sexting in Victoria resulted in the Victorian Parliament passing of the *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014* on 15 October 2014, which amended the *Summary Offences Act 1966 (Vic)*, and the *Crimes Act 1958 (Vic)*. This legislation created the new offences of distribution of an intimate image (s. 41DA) and threat to distribute an intimate image (s. 41DB) under the *Summary Offences Act (Vic)*. Similarly, the South Australian Parliament has addressed this issue, and amended sections 26B and 26C of the *Summary Offences Act 1953 (SA)*. The South Australian response created the offence of distributing an invasive image. This law also makes it unlawful to film a person who is subjected to, or forced to, engage in a humiliating or degrading act, and/or distributing such a film. I claim that it is in the public interest for the NSW Parliament to legislate to bring NSW law into harmony with Victoria and SA. I submit that a new criminal offence should be introduced. This provision should:

- prohibit the intentional non-consensual distribution of an intimate image; and
- prohibit threatening to distribute an intimate image.

My Argument

Premise 1: people create intimate images;

Premise 2: images can be distributed;

Premise 3: sexual communication can be healthy;

Premise 4: being healthy is beneficial for people;

∴ Conclusion 1: creating and distributing intimate images in a healthy way can benefit people.

Premise 5: distributing images can be harmful;

Premise 6: being harmed is non-beneficial for people;

∴ Conclusion 2: creating and distributing intimate images in a harmful way does not benefit people.

I argue that the new criminal offence must distinguish between creating and distributing intimate images in healthy, and harmful ways. I claim that if I have consented to the creation of an intimate image, it should not be prohibited. If I have consented to the distribution of that intimate image, it should not be prohibited. I claim I have by my act of consent communicated my intent to diminish my privacy. If an intimate image is distributed beyond those persons to whom I have consented, it should be prohibited. I claim I have by my act of refusing consent, or omitting to consent, communicated my intent to maintain my privacy. Furthermore, I claim that the community standards of acceptable conduct is a relevant factor that should be taken into account.

As a practical matter, I submit that the relevant definitions should be, as far as practicable, be consistent across the Federation. I submit that the definitions contained in s. 40 of the *Summary Offences Act 1966* (Vic) are an appropriate guide for NSW to follow. I recognise that each jurisdiction may adapt the law to meet their specific needs.

My Proposal

I submit that where an intimate image is intentionally distributed without consent, a person may be harmed. The harm may be a violation of privacy. The violation of privacy may be serious. I propose that the NSW Parliament should introduce a new criminal offence that prohibits the intentional non-consensual distribution of an intimate image. Furthermore, making a threat to non-consensually distribute an intimate image should also be prohibited. I submit that the community standards of acceptable conduct test should be applied.

Conclusion

People can use ICT to sexually communicate in healthy and unhealthy ways. I claim that a new norm has emerged in society that delineates healthy sexting from unhealthy revenge porn. I claim the distinguishing characteristic is consent. I submit that the criminal law in NSW should be reformed to prohibit the intentional non-consensual distribution of an intimate image, and threatening to do so. I am willing to further engage with the NSW Parliament in the process of consultation in reforming the law regulating this matter.

Yours sincerely,

Rhys L.G. Michie