Submission No 13

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

Name: Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn

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Submission to the NSW Standing Committee on Law and Justice
Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales

Dr Nicola Henry, Senior Lecturer, Legal Studies, La Trobe University
Dr Anastasia Powell, Senior Lecturer, Justice & Legal Studies, RMIT University
Dr Asher Flynn, Senior Lecturer, Criminology, Monash University

Dear Hon Natasha Maclaren-Jones MLC,

We welcome the opportunity to respond to the Standing Committee Law and Justice Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales. Our submission responds to the terms of reference, with a focus specifically on the emerging phenomenon of what is commonly called "revenge pornography".

We are criminologists and socio-legal scholars working on a La Trobe University Transforming Human Societies (THS) project that examines the online distribution of intimate or sexual digital images without consent (also known as "revenge pornography"). The aims of this pilot project are to: (1) examine the scope and impacts of criminal legislation; and (2) investigate the prevalence of revenge porn and the experiences of adult victims. Two of us (Drs Powell and Henry) are also working on an Australian Research Council (ARC) Discovery project on technology-facilitated sexual violence and harassment (TFSV). The aim of the ARC project is to significantly strengthen understandings of adult experiences of technology-mediated sexual violence and harassment, and to investigate the effectiveness of legal and policy frameworks for responding to these new and emerging harms.

What is "revenge pornography"?

Revenge pornography is a media term used to describe the online distribution of sexually explicit or intimate images of another person without their consent. The term itself is a misnomer since not all perpetrators are motivated by feelings of revenge. Moreover, not all content constitutes or serves the purpose of "pornography" and indeed, labelling such images pornography may in fact be highly offensive to victims. Some scholars have alternatively labelled the behaviour as "non-consensual pornography" (Citron & Franks 2014; Franks 2015), "involuntary porn" (Burns 2015), or "non-consensual sexting" (see Henry & Powell 2015a). However, these terms are also problematic, in part because they tend to focus on the behaviour of the victim (e.g. the voluntariness of the creation and/or distribution of the image) rather than on either the *abusive impacts* of the behaviour, or the *perpetrator's actions* as a form of sexual violation or exploitation. As such, we prefer to name these harmful behaviours as they are – as a form of *image-based sexual exploitation*. Such a term better captures the diverse range of harmful behaviours increasingly reported by victims and allows for clearer distinctions between child sexual exploitation material and adult victims of image-based sexual exploitation which are not distinct in terms such as "revenge pornography" and "sexting". However, recognising that such a term does not currently carry significance in broader public understandings and debate of this issue, we do use the terms "revenge pornography" and *image-based sexual exploitation* interchangeably in this submission.

Image-based sexual exploitation (or revenge pornography) refers to the following behaviours where a person's image is disseminated online, regardless of whether the original image (photograph or video) was produced or obtained consensually:

- pornographic images that have been photoshopped with the victim's face;
- images of sexual assault;
- images obtained from the use of hidden devices to record another person;
- stolen images from a person's computer or other device; and
- images obtained (consensually or otherwise) by strangers, friends, acquaintances or intimate partners.

It need not follow that the image is necessarily a sexually explicit image (e.g. depicting a person's genital or anal region). Rather, image-based sexual exploitation can also occur where an image depicts a person in a state of undress or semi-undress (such as bathroom shots or changing clothes), or where the person depicted is engaged in a sex act (e.g. despite the level of undress). The defining qualities therefore are either that: the image was taken and/or distributed *without a person's expressed consent;* the image was used or misappropriated in a way that a reasonable person would understand to be a *violation of that person's privacy*; or the image was used or misappropriated in a way that a person would understand might *cause fear, apprehension, or mental harm to the victim*.

Perpetrators may have diverse motivations, including those who distribute or threaten to distribute images out of spite or revenge against a current or former partner; those who threaten to distribute images in order to coerce, blackmail, humiliate or embarrass another person; and those who distribute or threaten to distribute images for sexual gratification, fun, social notoriety and/or financial gain. An additional challenge is how to appropriately respond to the actions of third parties, who may not know whether the image was originally taken with the depicted person's consent for its distribution, and yet may deliberately or otherwise participate either in its continued circulation or in offensive comments and/or harassment directed at the victim.

Revenge pornography has significant long-term social, psychological and financial implications for victims. In particular the impacts of image-based sexual exploitation on victims can include:

- feeling sexually "violated", shamed and/or humiliated;
- feeling powerless and helpless, given the lack of control that victims have once their images are released into cyberspace;
- restrictions in online and face-to-face activities, and/or social withdrawal;
- being subsequently targeted online by "dispersed harassment" or *harassment from multiple others*, both known and unknown individuals, who participate in offensive comments and/or threats of sexual violence towards the victim;
- damage to professional standing, employment or reputational damage;
- experiencing fear and/or heightened anxiety as a result of uncertainty about either the true identity of the perpetrator (e.g. where this is unknown) and/or their motivations (e.g. whether their behaviour may escalate to other forms of harassment, stalking or abuse, particularly where the victim's personal information has been posted alongside the images, or where threats have been made);
- feelings of "being watched" or under surveillance, particularly where the images have been distributed after unauthorised access to one's online accounts or devices;
- experiencing fear for one's safety where the image has been created, distributed, or threats made, in the context of a pattern of harassment, stalking and/or intimate partner violence.

In our own research, through interviews with sexual assault and domestic violence services, a growing concern was expressed about the use of images as a tool for coercive control over victims

in both intimate partner and sexual violence contexts, in which women remain disproportionately affected (see e.g. Henry & Powell 2015a).

Although there is currently very little empirical data on the prevalence of image-based sexual exploitation, in one US non-representative sample, 90% of the 864 self-selected adult respondents were women, 93% of whom said they experienced significant emotional distress after their images had been distributed (CCRI 2014). In a Spanish study of 873 self-selected 18-60 year olds, Gámez-Guadix (2015) found no difference between men and women in terms of "sexting" (sending nude or sexual images via mobile phones or to the internet), however, they found that online sexual *victimisation* was more common among women, young and middle-aged adults, as well as non-heterosexuals.

The only other evidence on prevalence comes from figures obtained by police and/or revenge porn helplines internationally. For instance, since the establishment of the Revenge Porn Helpline in the UK, the latest August 2015 figures reveal that 75% of all people seeking advice and support have been female. Of the 25% of calls from men, 40% have identified as homosexual (Gov.uk 2015). In Japan, following the introduction of new laws, 110 cases of revenge porn were reported in December 2014 alone, with the majority of victims being female in their late 20s or older (with perpetrators mainly in their 30s) (Wright 2015). Although none of these studies provide any reliable data on prevalence, perpetration and victimisation according to gender, they and anecdotal accounts from victims, indicate that revenge pornography has specific *impacts* on women and LGBTI individuals because of the double sexual standards that exist around female or non-heterosexual sexualities. In other words, many perpetrators of revenge porn distribute images knowing that shame and stigma is more potent against some members of the community.

The laws on revenge pornography

A number of jurisdictions have introduced specific legislation to criminalise revenge pornography, including the Philippines, Israel, Japan, Canada, New Zealand, the UK (England and Wales), as well as 26 states in the US.

In 2013, South Australia became the first Australian jurisdiction to introduce specific criminal legislation on these acts. The offence falls under the distribution of an "invasive image" without consent (*Summary Offences (Filming Offences) Amendment Act 2013* (SA)). Under s. 26C, perpetrators face a maximum of two years' imprisonment if it can be proven that the distributor knew or should have known that the victim did not consent. "Invasive image" is defined as a "moving or still image of a person – (a) engaged in private act; or (b) in a state of undress such that the person's bare genital or anal region is visible". Although this legislation appears to capture situations where the victim originally consented to the production of the image, the term "invasive image" implies the production of the image in the first place was "invasive", when in fact the victim may have taken the image her/himself or a couple may have taken it together in the context of an intimate relationship.

In 2014, Victoria introduced a more specific offence for maliciously distributing, or threatening to distribute, intimate images without consent (*Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), s. 41D and s. 41DB of the *Summary Offences Act 1966* (Vic)), with a maximum penalty of 2 years' imprisonment for distribution and 1 year for threat of distribution. The Victorian legislation appropriately labels this "intimate images" (as opposed to "invasive images" or "indecent images"), which means it captures nude (or semi-nude), sexually explicit, or otherwise

private images. This wording is in line with criminal legislation in other international jurisdictions and although the term "intimate" is rather broad, the new law makes clear that community standards of acceptable conduct must be taken into account, including regard for the nature and content of the image, the circumstances in which the image was captured and distributed, and any circumstances of the person depicted in the image, including the degree to which their privacy has been affected. It is unclear, however, how "malicious distribution" will be interpreted, and whether third parties will be liable under the new legislation.

In other Australian jurisdictions, broader offences exist at the Commonwealth level under the *Criminal Code Act 1995* (Cth) (use of a carriage service to menace, harass or cause offence), or in stalking, blackmail, voyeurism or indecency laws at the state and territory level. However, these existing laws are arguably too broad in scope to capture the types of harms caused when intimate images are distributed online without consent. Below we address the adequacy of existing remedies (both civil and criminal) for serious invasions of privacy in New South Wales, including the equitable action of breach of confidence and the existing applicable criminal law ("publishing indecent articles"). We also propose recommendations for law reform.

Adequacy of existing laws in NSW for serious invasions of privacy

Civil laws

There are different civil avenues available to NSW victims of revenge pornography where the perpetrator resides in Australia. Such laws include anti-discrimination, copyright and breach of confidence. Since sex discrimination or sexual harassment under Australian federal, state and territory anti-discrimination laws must occur in a specified area of public life, such as the workplace, accommodation, education and goods and services, it is ill-suited in most cases of revenge pornography which take place in mostly private contexts. Similarly, copyright laws are inherently limited because remedies can only be sought by plaintiffs who own the image.

In NSW, there is no statutory cause of action for invasion of privacy by individuals under the *Privacy and Personal Information Protection Act 1998* (NSW). This legislation therefore does not apply to cases where an individual distributes online intimate images of another person without their consent. This legislation instead regulates the way public sector agencies or organisations handle personal information. Moreover, currently the Australian Communications and Media Authority (ACMA) scheme for removing offensive or illegal content on Australian internet (their "take down" powers) are limited under the *Broadcasting Services Act 1992* (Cth) because ACMA can only remove "prohibited content" and not content that invades another person's privacy. This is due to a national classification scheme which is based on balancing the principle of freedom of expression with protecting minors and the community from offensive material.

Currently, a victim of revenge pornography can seek remedy through the tort of breach of confidence. Although the current test is problematically based on proof of psychological harm (and arguably does not cover embarrassment, reputational damage and/or emotional distress), in a recent case in Western Australia (*Wilson v Ferguson* [2015] WASC 15), the court awarded almost $50,000 in damages to a woman whose ex-partner had posted explicit photos and videos onto his Facebook page. In making this judgment, the Western Australian Supreme Court recognised the importance of law keeping pace with the development of new technologies and awarded damages on the basis of embarrassment and distress to the plaintiff, even though usually damages would only be awarded for financial harm. Although this was a ground-breaking case, there is no guarantee

that the decision will be followed in other courts and the tort remains problematic for victims of revenge porn.

Unfortunately, existing civil laws are inherently limited in addressing revenge pornography in NSW (and elsewhere in Australia) for a number of reasons. First, as described here, these laws are ill-suited in their applicability and language to revenge pornography. Second, there are significant costs associated with civil litigation which may be insurmountable for ordinary Australians without the financial means to bring civil action. Third, the civil laws privatise the issue of revenge porn and do not provide an effective deterrent against future behaviours. And finally, the civil laws (as well as criminal laws) do not have the capacity to stop the image from spreading once it has been released into cyberspace.

Criminal laws

In relation to criminal laws in NSW, although revenge pornography can be charged as stalking, blackmail or voyeurism offences, these provisions are ill-suited to revenge pornography behaviours. The only criminal legislation that has been (and might in future be) used to address image-based sexual exploitation against adults is s. 578C of the *Crimes Act 1900* (NSW): publishing indecent articles. While an "article" can include more broadly anything that can be read or looked at, the term "indecent" is highly problematic in cases of revenge pornography since it is defined in the Act as "contrary to the ordinary standards of respectable people in this community", thus implying that it is the image itself that is indecent, not the actual act of distributing the image without consent. As such, this existing offence is ill-suited to addressing these behaviours (note: a Sydney man was convicted under this offence in 2012 after he posted six nude images of his former girlfriend on Facebook (*Police v Ravshan Usmanov* [2011] NSWLC 40)).

In summary, Australian law has not sufficiently kept pace with evolving behaviours where technology is used in some way to perpetrate violence or harassment. It is important that privacy legislation is strengthened at the state, territory and federal levels. The most pressing issue, however, is that criminal legislation is introduced that specifically captures the harms related to the non-consensual distribution of intimate images.

Recommendations

1. We strongly support a wide range of civil and criminal remedies for responding to revenge pornography behaviours in Australia.

2. We support, first and foremost, the introduction of specific criminal offences in NSW, in line with the offences introduced via the *Summary Offences Act 1966* (Vic) in Victoria in 2014, as well as legislation introduced in international jurisdictions.

3. In addition to criminal laws, we support the establishment of a statutory cause of action for serious invasions of privacy in NSW. Revenge pornography (as we have defined it above) does not constitute acts in the public interest and criminal offences or unlawful civil behaviours do not pose any threat to other rights, such as freedom of expression, freedom of speech or national security. We support the cause of action being expressed as a right of action for invasion of privacy, accompanied by a non-exhaustive list of circumstances (which explicitly includes the behaviours amounting to technology-facilitated sexual violence and harassment as identified in this submission). A statutory model that extends the laws to capture individual violations of privacy would ensure that persons are protected from "unwanted intrusions into

their private lives or affairs" by other individuals and by corporations and governments (NSWLRC 2009: 11).

4. The introduction of a statutory cause of action for serious invasions of privacy in NSW should not come at the expense of introducing specific criminal offences. Criminal offences clearly indicate the seriousness of revenge pornography. Addressing these behaviours solely through the civil law alone runs the risk of privatising the issue and placing the onus on the victim to seek remedies through their own financial means. This will leave a large proportion of victims unable to access any form of justice in relation to the harms they have experienced.

5. In relation to action for breach of confidence, damages should encompass other harms such as humiliation, embarrassment and emotional distress, and damages should not be restricted to financial loss owing to the breach of confidence. Moreover, consent to the original creation of a sexually explicit image should not serve to waive the plaintiff's reasonable right to privacy when the perpetrator goes on to distribute the images without consent.

6. We support the Australian Law Reform Commission's proposal for an independent regulator who may be able to bring proceedings on behalf of another person. We support the establishment of a tribunal to process complaints of serious invasion of privacy in order to remove some of the barriers to accessing justice for many disadvantaged members of the community who do not have the resources or means to commence litigation in the civil courts.

7. We support the broadening of ACMA's take-down scheme so that content constituting a serious invasion of privacy be removed from internet sites.

8. Ultimately, we support a range of legal and non-legal remedies for addressing revenge pornography. The law should not be relied upon as the only mechanisms for addressing these behaviours. Other measures should include those focused on corporate and organisational "bystanders". For example: government and community representatives working collaboratively with internet, website, social media and other service providers in order to promote service agreements and community codes of conduct that include clear statements regarding the unacceptability of "revenge pornography"; strategies for victims and other users to report content in violation and have it removed; and appropriate consequences for an individual's violation of such terms of service/codes of conduct.

9. We support the development of information resources (such as a website and print materials) for victims of image-based sexual violation advising them of their legal and non-legal options. This might be delivered via existing victims of crime, legal aid, health and other information services as well as through existing national hotlines (such as 1800 RESPECT, the Men's Referral Service and Kids Helpline). Staff responding to these hotlines should also be trained in legal and non-legal options so as to effectively respond to and advise victims of image-based sexual violation.

10. Finally, we suggest the development of prevention strategies (such as through public education campaigns in traditional and digital media, workplace harassment and anti-discrimination resources, and school curriculum packages) that include content which: (a) identifies and challenges the gender and sexuality-based *social norms* and *cultural practices* that underlie the stigma that is directed at victims of technology-facilitated sexual violence and harassment; (b) redirects the responsibility onto the perpetrators of image-based sexual exploitation; and (c)

encourages and provides tools for individuals to *take action as bystanders* and support a victim, report content for removal, and/or call-out victim blaming and shaming where they encounter image-based sexual exploitation of others.

Thank you for considering our submission.

Yours sincerely,

Dr Nicola Henry (La Trobe University)
Dr Anastasia Powell (RMIT University) and
Dr Asher Flynn (Monash University)

Contact for this submission:
Dr Nicola Henry
Legal Studies
Department of Social Inquiry
College of Arts, Social Sciences and Commerce
La Trobe University
Bundoora VIC 3086

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