

# TOP END WOMEN'S LEGAL SERVICE INC.

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29 January 2018

c/o Ms Julia Knight  
Committee Secretary  
Social Policy Scrutiny Committee  
GPO Box 3721  
DARWIN NT 0801

*By email: [SPSC@nt.gov.au](mailto:SPSC@nt.gov.au)*

Dear Ms Knight,

## **Submission to the Criminal Code Amendment (Intimate Images) Bill 2017**

The Top End Women's Legal Service ("TEWLS") welcomes the opportunity to make a submission to the Social Policy Scrutiny Committee's inquiry into the Criminal Code Amendment (Intimate Images) Bill 2017 ("the Bill").

Our submission will be focused on our experience of assisting women in the Northern Territory ("NT"), including Aboriginal and Torres Strait Islander women, and women from culturally and linguistically diverse backgrounds. In addition to the below submission, we note our previous three submissions to recent Federal inquiries regarding the practice of non-consensual sharing of intimate images in both criminal and civil contexts, and **enclose** these submissions for your reference at Annexure A.

### About TEWLS

TEWLS is a community legal centre focused on the advancement of women's rights. Founded in 1996, we are funded by the Commonwealth Departments of the Attorney General and Prime Minister & Cabinet to provide high quality, responsive, and culturally appropriate legal advice, casework, community legal education, and advocacy to women living in the Greater Darwin region.

We provide advice and assistance in a number of areas of law, including:

- Family law;
- Domestic and family violence;
- Housing and tenancy;
- Consumer law;
- Debts, fines and welfare rights;
- Sexual assault;
- Discrimination;
- Compensation for victims of crime; and
- Complaints about government and other services.

We provide outreach services for Aboriginal and Torres Strait Islander women in the town communities surrounding Darwin, women incarcerated in the Darwin Correctional Precinct,

women being treated at the Royal Darwin Hospital, and culturally and linguistically diverse women within the Greater Darwin region.

#### Our submission

### **A Support for amendments to the *Criminal Code* (NT)**

TEWLS supports the proposed amendments to the *Criminal Code* (NT) as an effective and appropriate response to the practice of non-consensual sharing of intimate images. As noted in our previous submissions, it is our view that in providing a tailored offence, the “wrongfulness” of this practice would be highlighted and reinforced. Further, we note the benefit of criminal offences often serving both symbolic and educative functions for society.<sup>1</sup>

### **B Comments to the Bill**

TEWLS wishes to make particular comments to the Bill, as follows:

#### *I Section 208AA – Definitions*

TEWLS supports the definitions and expressions in the proposed section 208AA of the *Criminal Code* (NT), and particularly supports the proposed breadth of the word “image” and term “intimate image”. We note that previous iterations of similar offences in South Australia have been viewed as restrictive as a consequence of their definition of “invasive image”,<sup>2</sup> which is arguably too prescriptive to capture all offences which may be capable of being within the practice of non-consensual sharing of intimate images.

#### *II Section 208AB – Distribution of intimate image without consent*

TEWLS supports the proposed section 208AB of the *Criminal Code* (NT), particularly endorsing the inclusion of a non-exhaustive list of circumstances in which consent to the distribution of an intimate image may be vitiated. Similar to examples provided in the *Domestic and Family Violence Act* (NT), it is our submission that this list will be of assistance to both victims and support services, including legal services, in their interpretation of the new offence.

In response to the positive definition of consent provided in the proposed sub-section 208AB of the *Criminal Code* (NT), TEWLS supports the Bill’s move away from a “risk management approach”, which has been at the core of previous iterations of similar offences in Victoria. TEWLS notes that while concerns of online safety are valid and important considerations in this context, the excessive focus on individual responsibility can obscure gendered inequities and can serve to amplify existing cultural norms that blame women who experience gendered violence.<sup>3</sup>

#### *III Section 208AC – Threaten to distribute intimate images*

TEWLS supports the proposed section 208AC of the *Criminal Code* (NT) and particularly endorses the guidance provided in sub-section 208AC(2) of the Bill. Similar to our comments

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<sup>1</sup> See generally Andrew Ashworth and Jeremy Horder, ‘Principles of Criminal Law’ (OUP Oxford, 2013) 1.

<sup>2</sup> *Summary Offences (Filming Offences) Amendment Act 2013* (SA) s26A.

<sup>3</sup> See Michael Slate and Thomas Crofts, ‘Responding to Revenge Porn: Challenges to Online Legal Impunity’ in Lynn Comella and Shira Tarrant (eds), *New Views on Pornography: Sexuality, Politics and the Law* (Westport, 2015) 223, 235.

in Section II above, it is our view that this guidance will be of assistance to both victims and support services in their interpretation of the new offence.

#### IV Section 208AE – Court may order rectification

TEWLS supports the proposed section 208AE of the *Criminal Code* (NT), which will serve to empower a court, where a person has been found guilty of an offence under either of the proposed sections 208AB or 208AC of the Bill, to order to the person to take reasonable steps to remove, delete or destroy any images related to the offence within a specified time. We note that currently, the only recourse available to persons who are the victim of the practice of non-consensual sharing of an intimate image is by way of obtaining a domestic violence order, which often serve only to restrain any further distribution, as opposed to remedying past distributions.

In addition, we note the recent expansion of powers of the Office of the eSafety Commissioner, where victims are able to report incidents of non-consensual sharing to the Commissioner so as to have the content removed from the respective host website and/or server. The Office of the eSafety Commissioner promotes 100 per cent compliance from industry to requests for prohibited material hosted in Australia to be taken down. Whilst the Commissioner has enjoyed expanded powers, the civil action able to be taken remains restricted, with the Officer of the eSafety Commissioner prioritising, "serious content such as child sexual abuse material, pro-terrorist content and content that promotes, incites or instructs in crime or violence."<sup>4</sup> In our view, incidents of non-consensual sharing of intimate images are able to fall outside of these priority areas, where TEWLS would welcome further civil reform so as to complete necessary legislative change in this space.

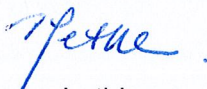
#### C Conclusion

We thank you for your consideration of the above and would be pleased to be contacted by phone on (08) 8982 3000 or email to [admin\\_tewls@clc.net.au](mailto:admin_tewls@clc.net.au) should you wish to discuss this submission further.

We look forward to the outcome of the Social Policy Scrutiny Committee's inquiry.

Yours faithfully,

**TOP END WOMEN'S LEGAL SERVICE INC.**



Vanessa Lethlean  
Managing Solicitor

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<sup>4</sup> Office of the eSafety Commisssioner, accessed 29 January 2018 <<https://www.esafety.gov.au/complaints-and-reporting/offensive-and-illegal-content-complaints/what-we-can-investigate>>.

**ANNEXURE A**

The Bill provides for the removal of the name of a person from the list of persons who are entitled to the benefit of the trust in the event of the death of a person who is a beneficiary of the trust. The Bill also provides for the removal of the name of a person from the list of persons who are entitled to the benefit of the trust in the event of the death of a person who is a beneficiary of the trust.

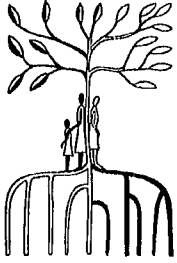
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FOR THE WORKS & SOCIAL SERVICE DEPT.

*[Signature]*  
Minister of Works & Social Services



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30 June 2017

The Director  
Online Content Section  
Department of Communications and the Arts  
GPO Box 2154  
Canberra ACT 2601

*By email to [onlinesafety@communications.gov.au](mailto:onlinesafety@communications.gov.au)*

Dear Sir or Madam,

## **Submission to the civil penalty regime for non-consensual sharing of intimate images Discussion Paper – Department of Communication and the Arts, Australian Government**

Thank you for inviting submissions to the civil penalty regime for non-consensual sharing of intimate images Discussion Paper issued by the Department of Communication and the Arts, Australian Government ("the Discussion Paper"). The Top End Women's Legal Service Inc. ("TEWLS") welcomes the opportunity to make submissions to the Discussion Paper, and note that we have previously made submissions to similar consultations, being the Commonwealth Senate Inquiry into the phenomenon colloquially referred to as 'revenge porn' ("the Inquiry") and to the *Criminal Code Amendment (Private Sexual Material) Bill 2015* ("the Bill"). Our submission to the Discussion Paper will reference and in part build on our previous submissions to the Inquiry and the Bill, which we **attach** to this submission for your reference.

### About TEWLS

TEWLS is a community legal centre focused on the advancement of women's rights. We are funded by the Commonwealth Attorney General's Department to provide referrals, legal advice, casework and community legal education to women in the Top End of the NT. TEWLS provides assistance in a number of areas of law, including domestic and family violence, sexual assault, family law, compensation for victims of crime, housing, credit and debt, discrimination, workplace health and safety, and employment law. We provide outreach services for culturally and linguistically diverse women, Aboriginal women in the town communities surrounding Darwin, and women incarcerated in the Darwin Correctional Precinct.

### Our Submission

TEWLS approaches this submission from our front-line experience in the Northern Territory. We note that as we have not had the benefit of reviewing draft legislation, our submission is

based on the conceptual questions posed in the Discussion Paper. Further, we submit that the operation of the proposed civil penalty regime will be inadequate without criminal penalties and sanctions; it is our view that the issue requires both criminal and civil processes working in tandem to appropriately respond to the non-consensual sharing of intimate images.

#### **A The gendered context of non-consensual sharing of intimate images**

Our submission to the Discussion Paper builds upon the discussion of the impact of non-consensually sharing intimate images contained in our submission to the Inquiry. This section will briefly summarise the salient points made in that discussion.

In our experience, the non-consensual sharing of intimate images is a highly gendered activity that is primarily committed by males and disproportionately targets women.<sup>1</sup> As evidence suggests, domestic and family violence offenders currently use private sexual material as a tool to intimidate, harass and/or control current and former partners;<sup>2</sup> technology has been harnessed as a new method of facilitating violence and control. The threat of using such material can cause similar harms to the actual distribution of images<sup>3</sup> in that victims may feel powerless, vulnerable, fearful, ashamed, self-harm and/or or anxious.<sup>4</sup>

We submit that technologically facilitated intimate violence occurs in situations including;

- Women 'agreeing' to intimate images being taken in the context of an already violent relationship, where refusing may not be safe;
- Partners recording intimate partner sexual assaults; and
- Situations where a partner threatens to distribute private material, including sexual material (whether originally taken with consent or not) to third parties such as the children of the relationship, extended family, or employers, as a means of punishment and control.<sup>5</sup>

Further, we note that the non-consensual production and distribution of intimate images also occur outside of a relationship context, including third party sharing and the victimisation of males. Notably, in these instances as well as in the context of a personal relationship, material may not be initially obtained with the consent of the subject of the relevant image; instead, intimate images are acquired through hacking into the subject's personal technological hardware, and subsequently distributed to selected third parties or the general public.

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<sup>1</sup> See also Janice Richardson, 'If I Cannot Have Her Everybody Can: Sexual Discourse and Privacy Law' in *Feminist Perspectives on Tort Law*, ed. Jane Richardson and Erica Rackley (Routledge, 2012) 145.

<sup>2</sup> Danielle Citron and Mary Anne Franks, 'Criminalising Revenge Porn' (2014) 49 *Wake Forest Law Review* 345, 351.

<sup>3</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 18, 35-36.

<sup>4</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 20.

<sup>5</sup> Nicola Henry and Anastasia Powell, 'Beyond the 'Sext': Technology Facilitated Violence and Harassment Against Adult Women' (2015) *Australian and New Zealand Journal of Criminology* 48, 104, 113.

## **B The development of a civil penalty regime**

As expressed in previous submissions on this topic, TEWLS encourages policy development in both criminal and civil law to appropriately respond to the practice of non-consensually sharing intimate images. We endorse the proposals made in the Discussion Paper regarding the range of civil penalties to be made available to a decision-maker, including enforceable undertakings, injunctions, and take down notices. However, TEWLS submits that any future policy response must recognise the power of criminalising behavior, where there are significant questions as to the extent to which civil regulation can comprehensively deter people who share intimate images without consent. We note that we are concerned that, if the proposed civil penalty regime were to stand without corresponding criminal sanctions, that the non-consensual sharing of intimate images would be at risk of being characterised as a misuse of technology. Based on our experience of non-consensual sharing of intimate images as a technologically facilitated form of sexual and/or intimate partner violence, we submit that a criminal offence would appropriately capture the legal wrong attached to the act, with civil provisions providing support to remove the relevant images from an external source, such as a website.

Further, we note that the proposed civil penalty regime is prefaced on the provision of efficient action/powers to have images removed, as well as limiting the further distribution of the relevant material. It is our submission that having the primary focus of removing content potentially sidelines the responsibility for the abusive conduct, as well as the fundamental breach of trust and agency at the heart of non-consensual sharing of intimate images; it is the actual behaviour to be deterred. While removing and preventing further distribution of material may allow the subject of the intimate image to regain some sense of control, it does not attempt to impose a criminal conviction and/or sanction. The proposed regime does include civil sanctions and TEWLS understands that the civil penalty regime is intended to complement state and territory criminal offences, however our submission is that this falls short of what is required to fully address this phenomenon.

### *I The role of the Commissioner*

As detailed in the Discussion Paper, it is proposed that the administration of the proposed civil penalty regime would lie with the office of the Commissioner. TEWLS endorses this role, on the provision that the office of the Commissioner is adjunct to the criminal law, and holds or requires appropriate expertise in family and domestic violence.

In the Commissioner's current role, the role of technology is communicated as the cause and facilitator of both cyber bullying and the non-consensual sharing of intimate images. TEWLS acknowledges that unique difficulties arise when non-consensual sharing of intimate images occurs via text message, email, uploading images to pornography websites, to social media, message board websites;<sup>6</sup> however, we are concerned that should the office of the Commissioner continue to emphasise technology in this way, this may obfuscate that the non-consensual sharing of intimate images is a method of exerting control, power and manipulation over others. This could result in artificial distinctions between complaints, which arise through distributions in the digital space, and those physically distributed.

We endorse the existing expertise within the Commissioner's office, including its work in the education of young persons, as one of the key benefits of a civil penalty regime. However,

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<sup>6</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 3.

we submit that given the intersection between non-consensual sharing of intimate images and domestic violence, expertise in gender disparity and power and control dynamics beyond the technological will also be required effectively operate the proposed regime. We submit that the Commissioner should also be conferred with the Australian Communications and Media Authority information gathering powers, as this would be a useful extension of their ability to navigate technological enforcement difficulties. In addition, on our reading, it appears that the benefits of the regime would be largely contingent on the ability to engage with content hosts, as well as individuals, in order to remove content. We submit that this contingency must be addressed through the office of the Commissioner, where our experience is that content hosts are typically reluctant, if not hostile towards requests to remove material that has been non-consensually shared.

Further to the Commissioner's current role, we submit that while education must be an integral part of a policy response to non-consensual sharing of intimate images, this should not overshadow the societal denunciation of this behaviour; hence the need for criminal sanctions. It is critical that an appropriate balance is found between providing information about protective measures that can be adopted by those concerned about the potential non-consensual sharing of their intimate images, and reiterating that only the perpetrator is responsible for this conduct.

## *II Formulation of a prohibition*

The formulation of a prohibition is key to the imposition and enforcement of subsequent penalties; it must frame the issue at hand. As proposed in the Discussion Paper, the prohibition put forward for comment notably excludes occasions where a subject of an intimate image may have the relevant image used against them as a threat or leverage. In our experience, the threat of distributing intimate images can be a significant tool for manipulation and the exertion of control, particularly in inter-personal and family relations affected by domestic and family violence.<sup>7</sup> An example of this is the use of an intimate image as leverage by one party to force the other party to remain in a violent and/or abusive relationship. Individuals may be assisted not only by injunctions prohibiting a perpetrator from re-uploading or continuing to distribute images, but by preventing the distribution in the first place, where this is possible. If the prohibition is articulated in a way that extends to threats, we foresee that the Commissioner (which we will assume will be the appropriate decision-maker) could impose a restraining injunction to prohibit a potential perpetrator from carrying out their threat of distributing the intimate images.

## *III Consent to share*

In the context of formulating a consent-based defence for a cause of action, TEWLS supports the elements of consent articulated by the Australian Law Reform Commission ("ALRC") in their 2014 report;<sup>8</sup> consent to share an intimate image must be freely given and may be express or implied from conduct or circumstances.<sup>9</sup> As each expression of consent must be specific to the particular disclosure complained of, we submit that consent to share will not apply where the distribution is of a materially different nature than the original

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<sup>7</sup> See also Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 18-20.

<sup>8</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 195-202.

<sup>9</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 198.



consent.<sup>10</sup> The consent to share must relate to the extent of the actual distribution so that consent to disclose an image to one audience cannot be exchanged with another.<sup>11</sup> Similarly, TEWLS submits that a distribution method (for instance email, social media, or access to cloud) cannot be alternated without a further expression of consent that relates to that relevant method. Consent should be non-transferable and each instance of distribution requires consent. In this way, TEWLS conceptualises consent to share as being similar to consent to sexual activity; consent to participate in one sexual act does not automatically equate to consent to any other sexual act.

In circumstances where consent is given but is later withdrawn, TEWLS advocates that these cases should be treated the same way as sexual activity. We submit that there is a continuing obligation to obtain consent and ensure that consent is being freely given on the part of the party sharing an intimate image. We submit that the burden of proof should lie with the sharer of an intimate image, as it is this person who is best placed to put forward reasons as to why the autonomy and trust of the subject was not breached.

#### IV Definition of an "intimate image"

We submit that the definition of an "intimate image" should encompass all visual recordings including photographs, films and video recordings. In addition, we submit that the definition should also extend to digitally altered images, such as where the subject of the intimate image's face has been superimposed on another body, or where attempts have been made to conceal the relevant subject's identity, but the subject is still able to identify themselves.

In order to encompass culturally and linguistically diverse community values, we would suggest that the compilation of a civil penalty regime take note of the United Kingdom's understandings of "private" and "sexual" under the *Criminal Justice and Courts Act 2015* (UK) ("the Act"). Section 33(1) of the Act creates an offence for a person to disclose a private sexual photograph or film if the disclosure is made "without the consent of the [subject] with the intention of causing that individual distress".<sup>12</sup> Although TEWLS disagrees with centering the provision around the perpetrator's intent, we note that the pairing of discrete understandings of private and sexual are helpful. Section 35 of the Act provides that a private image or recording is one which reveals something, "not of a kind ordinarily seen in public",<sup>13</sup> and that a sexual photograph or recording is one that, "shows all or part of an individual's exposed genitals or pubic area; it shows something that a reasonable person would consider to be sexual because of its nature, or its content, taken as a whole, is such that a reasonable person would consider it to be sexual".<sup>14</sup> In the context of creating a civil penalty regime in Australia, we would suggest making the understandings of private and sexual as alternatives, rather than cumulative definitional elements. If an intimate image only has to be characterised as private or sexual this would more fully encompass what may be capable of constituting an intimate image. We note that previous inquiries have highlighted that examples such as showing a Muslim woman without her hijab could constitute an intimate image, where the hijab was forcibly removed.<sup>15</sup> Although this would not necessarily be

<sup>10</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 198.

<sup>11</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 198.

<sup>12</sup> *Criminal Justice and Courts Act 2015* (UK) s 33(7)(a).

<sup>13</sup> *Criminal Justice and Courts Act 2015* (UK) s 35(2).

<sup>14</sup> *Criminal Justice and Courts Act 2015* (UK) s 35(3).

<sup>15</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 2, 31.

characterised as a sexual image under current Australian criminal offence provisions, it would be captured if an intimate image were to be defined as one that is private or sexual.

#### V *Intent to cause harm and seriousness*

TEWLS endorses the proposals made in the Discussion Paper that “intent to cause harm” and “seriousness” should not be included as elements in the prohibition for the purpose of the proposed civil penalty regime. On a practical level, we submit that it may be difficult to prove that the relevant intimate images were shared to cause harm. This is particularly relevant in the digital age, where “memes” have become an integral part of popular culture. In support of “intent to cause harm” and “seriousness” not being included as elements in the prohibition, we submit that orientating the prohibition around these elements would limit its potential to uphold the sexual autonomy and integrity of potential subjects of intimate images. If behavior were to be denounced only in situations where the sharer of the intimate image deliberately intended to cause harm rather than recognising the innate harm, which results from violating a subject’s trust and agency, the prohibition would be rendered effectively useless.

Further, TEWLS suggests that it would be appropriate to incorporate the “intent to cause harm” and “seriousness” elements as factors, which may be considered by the Commissioner when determining whether or not to pursue a civil penalty or other enforcement, measure. For instance, in a similar manner to the aggravation of an offence, evidence of malicious intent and the seriousness of the harm caused could suggest that the Commissioner pursue a more severe penalty or action. In our experience, the Commissioner, in their determination of the appropriate penalty, could consider circumstances such as where an estranged partner publishes intimate images without their former partner’s consent as an act of revenge. Further, we endorse the proposal of the Discussion Paper that there would exist a scaled remedy process to account for the particular context of the non-consensual sharing of the intimate image.

With regard to the conceptualisation of “actual harm” in the context of non-consensual sharing of intimate images, TEWLS supports the position of the ALRC, where “the harm is inherent in the wrong”;<sup>16</sup> harm occurs the moment an intimate image is shared without the relevant subject’s consent. It is our submission that any penalty regime, ideally criminal and civil, that is established to address the phenomenon of non-consensual sharing of intimate images should not be orientated around establishing the damage suffered to the complainant, but rather the interference with their personal autonomy and freedom. This means that subjects of intimate images shared without consent would not be burdened by substantiating the actual harm done to them; instead, there would be an acknowledgement that harm is inherent in the act of non-consensually sharing the relevant image/s. TEWLS also notes that this would address the practical consequences of online distribution, in that once an image is disseminated it may be impossible to ensure it is no longer available in the public sphere.<sup>17</sup> As such the actual harm suffered can never be definitely assessed as images or videos may reappear after the initial distribution of material has been ceased or removed. In light of the above, we submit that any consideration of harm should be framed in terms of the likely degree of harm, rather than “actual harm” as typically conceptualised.

#### VI *Sharing of intimate images*

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<sup>16</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 138.

<sup>17</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as ‘Revenge Porn’* (2016) 25.

As noted in the Discussion Paper, "sharing" is a term that can be interpreted both broadly and narrowly. In our experience, the "sharing" of intimate images can be through a variety of different methods, where it would be arbitrary to limit the interpretation of "sharing" in an environment that is constantly evolving. Consequently, we submit that "sharing" should be defined broadly to include both one-to-one personal communications, as well as wider distribution which may occur through uploading the image to a website, through a group of individuals, printing leaflets, etc. As previously noted, TEWLS believes that central element of the non-consensual sharing of intimate images is the breach of trust and autonomy of the subject of the relevant intimate image. As this behaviour can be perpetrated beyond the digital space, such as through the distribution of leaflets and posting images in the mail, we believe that it would be arbitrary to exclude sharing beyond the digital space from the proposed civil penalty regime.

With respect to the "harm" incurred by the non-consensual sharing of intimate images, we note that the sharing of intimate images may be targeted at particular individuals in order to obtain the greatest degree of reputational damage or leverage attempts to extort the subject of the relevant intimate image, among others. It is a misnomer to suggest that the non-consensual sharing of an intimate image with one person will cause less harm to the subject of the intimate image than a situation where the intimate image is shared with a wider audience; such a generalisation excludes the reality of the subject of the intimate image, where an intimate image shared with an individual employer may be more harmful than the same intimate image being shared with an unknown, larger audience. We submit that generalisations about which situations are more or less harmful based on the number of people the image is distributed to should be avoided.

#### VII *"Romeo and Juliet" circumstances*

The provision of intimate images to a partner has become a common aspect of many modern relationships, particularly in the context of young Australians. The inadequacy of existing criminal laws to address these situations have been a topic of discussion in both the public and political arenas, where it is clear that lesser sanctions and penalties are generally more appropriate to be imposed on persons under the age of 16, rather than adults. Similar to current practice regarding persons under the age of 16, TEWLS submits that the civil penalty regime should include guidelines about the exercise of discretion, particularly to reflect the serious impacts of penalties on this age group. We submit that these "Romeo and Juliet" guidelines could operate to reduce the penalties awarded to a minor, where the issue has previously been fleshed out in the findings of the Parliament of Victoria's 2013 Inquiry into Sexting.<sup>18</sup> We note that while there may be situations where it is appropriate for the actions of the young person to be held at the same standard of an adult, it will often be the case that reduced penalties, such as cautions and warnings, are more appropriate to address the legal wrong.

#### C Conclusion

We appreciate the opportunity to make this submission. We support ongoing policy and legal development in responding to the non-consensual sharing of intimate images in Australia, and note that we would be glad to be consulted regarding any proposed changes.

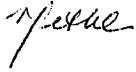
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<sup>18</sup> Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting* (2013) xxiii-xxiv.

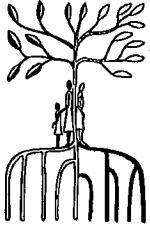
Should you require further information, please contact Caitlin Weatherby-Fell, Solicitor of our office on (08) 8982 3000.

Yours faithfully,

**TOP END WOMEN'S LEGAL SERVICE INC.**



Vanessa Lethlean  
Managing Solicitor



# Top End Women's Legal Service Inc.

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18 December 2015

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Sir or Madam,

**Re: Inquiry into 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**

Thank you for inviting comments to the inquiry into the phenomenon generally referred to as 'revenge porn' ('the Inquiry'). The Top End Women's Legal Service Inc. ('TEWLS') welcomes the opportunity to make submissions to the Inquiry, noting that we have recently made submissions to the *Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft* ('Exposure Draft') proposal to amend the *Criminal Code Act 1995* (Cth) to criminalise non-consensual pornography under federal law.

TEWLS notes that this submission to the Inquiry will reference and in part build upon our October 2015 submission to the Exposure Draft.

## About TEWLS

Top End Women's Legal Service ('TEWLS') is a community legal centre focused on the advancement of women's rights. We are funded by the Commonwealth Attorney General's Department and the Department of Prime Minister and Cabinet to provide legal advice, casework and community legal education to women living in the Top End of the Northern Territory ('NT'). TEWLS provides assistance in a number of areas of law including family law, domestic and family violence, housing and tenancy, credit and debt, employment law, sexual assault, discrimination and compensation for victims of crime. We provide outreach services for culturally and linguistically diverse women, Aboriginal women in the town communities surrounding Darwin and incarcerated women in the Darwin Correctional Precinct.

## Our Submission

### **A Defining 'revenge porn'**

Consistent with academic and media rhetoric, the Inquiry refers to the phenomena of 'revenge porn' as the dissemination of a person's private sexual material without their consent, with the intention to cause that person harm. In our experience, non-consensual distribution of private sexual material typically occurs in the context of a relationship breakdown, where an individual may have been initially willing for the material to be produced and the relationship has consequently deteriorated. However, we note that revenge porn material is not always initially obtained with the consent of the subject. In these cases, private sexual material may be acquired through 'hacking' into the subject's personal technological hardware, e.g. phone or cloud storage, which is then made publicly available.<sup>1</sup>

TEWLS also acknowledges that the concept of revenge porn may involve circumstances of non-consensual production and distribution of sexual material outside the context of a relationship, such as third parties secretly recording otherwise consensual activity or the recording of sexual assault.<sup>2</sup> We note that the distribution of such material is especially damaging for victims located in small and remote communities given the lack of anonymity and close interpersonal relations within the community. This is especially concerning given the prevalence of online mobile platforms, which allow such material to be easily and quickly disseminated to the entire community and beyond.

Despite the common usage of the term revenge porn, TEWLS is uncomfortable with this expression as conceptions of revenge generally associate the vengeful act as being some form of retribution and is therefore somewhat justified.<sup>3</sup> We submit that this is by no means the case and that revenge porn clearly intersects with a number of wider concerns beyond the context of the 'broken-down' relationship. Nevertheless, given the general acceptance and widespread use of the term revenge porn, TEWLS will use this expression throughout this submission to refer to the non-consensual behaviour outlined by the Inquiry.

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<sup>1</sup> See generally Rachel Budde, 'Taking the Sting Out of Revenge Porn: Using Criminal Statutes to Safeguard Sexual Autonomy in the Digital Age' [2014] *Georgetown Journal of Gender and Law* (forthcoming) 19.

<sup>2</sup> TEWLS notes that when this conduct involves minors, such behaviour will intersect with federal and state child-pornography offences.

<sup>3</sup> Nicola Henry, Anastasia Powell and Asher Flynn, Submission No 13 to New South Wales Legislative Council Standing Committee on Law and Justice, *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*, 4 September 2015, 1; Zac Franklin, 'Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites' (2014) 102 *California Law Review* 1303, 1307.

## **B The impact of revenge porn**

In our experience, revenge porn is a highly gendered activity that is primarily committed by males and disproportionately targets women, although males may also be victimised.<sup>4</sup> As such, TEWLS welcomes the Inquiry, noting that to date, there has been inadequate consideration given to how technologies are being used to facilitate or perpetrate technology-facilitated sexual violence or harassment against women.<sup>5</sup>

TEWLS notes that the impact of non-consensual distribution of private sexual material is arguably associated with more serious consequences for females than those that may arise when revenge porn targets men. Put simply, female social status has traditionally been intertwined with perceptions of chastity and modesty, making women particularly more exposed to harm when their private sexual life is made public. As such, many suggest that revenge porn is a means where male offenders seek to instrumentalise these double standards in sexual norms to punish an ex-partner for a perceived wrong by distributing the material to either specific third parties or the general public.<sup>6</sup>

In light of the above, TEWLS is particularly concerned about the ways in which private sexual material can be exploited in contexts of family or interpersonal violence. Specifically, we note that there is evidence to suggest that domestic and family violence offenders use private sexual material as a tool to intimidate, harass and/or control both current and former partners.<sup>7</sup> This technology-facilitated sexual violence has been noted to take place in a number of situations such as;

- partners recording intimate partner sexual assaults;
- women 'agreeing' to intimate images being taken in the context of an already violent relationship, where refusing may not be a safe option; and situations where a partner threatens to distribute private sexual material (whether originally taken with consent or not) to third parties such as, the children of the relationship, extended family, or employers as a means of punishment and control.<sup>8</sup>

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<sup>4</sup> See also Janice Richardson, 'If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law,' in *Feminist Perspectives on Tort Law*, ed. Jane Richardson and Erica Rackley (Routledge, 2012) 145.

<sup>5</sup> See generally Citron, D. K., & Franks, M. A. (2014). Criminalizing Revenge Porn. *Wake Forest Law Review*, 49, 345.

<sup>6</sup> Michael Salter and Thomas Crofts, 'Responding to Revenge Porn: Challenges to Online Legal Impunity' in Lynn Comella and Shira Tarrant (eds), *New Views on Pornography: Sexuality, Politics and the Law* (Westport, 2015) 223, 235.

<sup>7</sup> Danielle Citron and Mary Anne Franks, 'Criminalising Revenge Porn' (2014) 49 *Wake Forest Law Review* 345, 351.

<sup>8</sup> Nicola Henry and Anastasia Powell, 'Beyond the 'Sext': Technology Facilitated Violence and Harassment Against Adult Women' (2015) *Australian and New Zealand Journal of Criminology* 48 104, 113.

## **C Potential policy responses**

TEWLS notes that one potential policy response currently being considered is the proposed Criminal Code Amendment to criminalise revenge porn under federal law.<sup>9</sup> Generally, TEWLS supports the Exposure Draft as an effective response to the issue of revenge porn as it;

1. expressly recognises the way in which an individual can consent to the distribution of private sexual material;
2. includes an offence capturing the scenario where victim's may have their private sexual material used against them by a partner through the threat of publication; and
3. the relevant offence does not provide that the distribution must be intentional, only that the subject experienced harm or distress or that there was a risk of harm or distress.

We note that our specific comments to this Exposure Draft can be accessed through our October 2015 submission.

In principle, TEWLS generally supports policy development in both, criminal and civil law to appropriately respond to the issue of revenge porn. However, TEWLS considers that future policy responses should focus on specifically criminalising revenge porn, as criminal offences effectively serve as a symbolic and educative function for society.<sup>10</sup> Specifically, TEWLS notes that by providing a tailored offence for criminal porn, this behaviour would be appropriately identified to the public and would clearly highlight and reinforce the 'wrongfulness' of revenge porn. TEWLS therefore considers that policy efforts should be focused on refining the Exposure Draft, as the Bill would provide a clear message to the Australian public of the wrong committed and precisely how the offender has 'failed' in her or his basic duties as a citizen.<sup>11</sup>

## **D Current domestic responses**

In recent years, revenge porn has come to be regarded as an issue seriously affecting many people. However, to date, only Victoria and South Australia have enacted statutes that can directly be used against revenge porn perpetrators.<sup>12</sup> In contrast, all other states and territories rely on previously enacted criminal law provisions as a

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<sup>9</sup> *Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft* (Cth).

<sup>10</sup> Ashworth, *Principles of Criminal Law*, 1.

<sup>11</sup> See Jeremy Horder, 'Rethinking Non-Fatal Offences Against the Person,' (1994) 14(3) *Oxford Journal of Legal Studies*, 339.

<sup>12</sup> *Summary Offences (Filming Offences) Amendment Act 2013* (SA); *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).



form of catchall offence, which may or may not encapsulate the relevant individual occurrence.<sup>13</sup>

## ***I Victoria***

Victoria is the most recent state to instigate specific criminal law provisions to target revenge porn. In 2014, the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) amended the *Summary Offences Act 1966* (Vic) ('SOA') to introduce the offences:

1. the 'distribution of intimate image' under s 41DA; and
2. the 'threat to distribute intimate image' under s 41DB.

Section 41DA of the SOA prohibits the intentional distribution 'of an intimate image where the distribution is contrary to community standards of acceptable conduct.' The offence is not applicable where the subject of the image is an adult and consents to the distribution' and carries a two year maximum jail term.

Section 41DB of the SOA 'prohibits a person from making a threat to distribute such an image and carries a maximum one-year jail term.' The inclusion of s 41DB of the SOA recognises that the use of revenge porn is frequently accompanied by threats of distribution and controlling behaviour. The section emphasises that it is the consent of the subject that renders publication lawful or criminal and explicitly takes into account the contextual nature of consent. Specifically, s 41DA(3)(b) of the SOA provides that the respective consent must be to the 'distribution of the intimate image' and the specific 'manner in which the intimate image was distributed'.

Whilst the Victorian offences clearly provide protection for revenge porn victims, by examining the amendment's political context, it is clear that several misconceptions of revenge porn currently exist. Firstly, one of the key reasons for the 2014 amendment was not so much to protect the immediate well-being of victims, but to protect their job prospects and life outcomes.<sup>14</sup> In our experience, the non-consensual distribution of private sexual material can have devastating impacts on an individual's professional capacity and career prospects. However, the discussion surrounding the harm of revenge porn should not be limited to this concern. Instead, it must be recognised that revenge porn is a destructive, multi-faceted experience and that consideration of the victim's agency and sense of self must remain paramount throughout the revenge porn discourse.<sup>15</sup>

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<sup>13</sup> Tim Gotsis, 'Revenge Pornography, Privacy and the Law' (Briefing Paper No 7, Parliamentary Library, Parliament of New South Wales, 2015) 3.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

Another concern is that the discussion surrounding the Victorian revenge porn amendment focused significantly on a 'risk management approach.' For example, it was highlighted that there is a pressing 'need to educate parents about devices'<sup>16</sup> and the need to 'educate children about understanding consequences, as we do in many other areas of concern.'<sup>17</sup> TEWLS notes that concerns of online safety are certainly valid and important considerations in the context of revenge porn. However, the emphasis placed on this risk minimization model has been met with significant criticism. For example, given the disproportionate victimization of females in this context, Crofts, Salter and Lee argue that the excessive focus on individual responsibility obscures the gendered inequities and amplifies existing cultural norms that blame women who experience gendered violence.<sup>18</sup>

Similarly, TEWLS notes that in mass media, women are consistently urged to avoid the risks that are said to arise from the production of private sexual images, alongside the message that women who take such risks are personally responsible for harms that subsequently befall them.<sup>19</sup> TEWLS notes that this approach to issues such as revenge porn not only suggest that women are responsible for male perpetration, but overlooks the fact that digital and online technology has become highly integrated in modern sexual life. Put simply, by emphasising the need to avoid sending images to a partner, rather than to not distribute the images that a partner has been trusted with implicitly justifies the harm experienced by revenge porn victims.

## **II South Australia**

In 2013, South Australia became the first state to introduce revenge porn oriented criminal law provisions. Introduced under the *Summary Offences (Filming Offences) Amendment Act 2013* (SA), section 26C makes it an 'offence to distribute... invasive images in a situation where the distributor knows, or should know, that the person depicted did not consent to the distribution'. It carries a maximum sentence of \$10,000 fine or imprisonment for 2 years, and carries similar requirements to the Victorian offences detailed above.

It is important to note that the term 'invasive image' is defined as 'a moving or still image of a person engaged in a private act or in a state of undress such that the

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Michael Salter and Thomas Crofts, 'Responding to Revenge Porn: Challenges to Online Legal Impunity' in Lynn Comella and Shira Tarrant (eds), *New Views on Pornography: Sexuality, Politics and the Law* (Westport, 2015) 223, 235. See also Julia O'Connor, Ann Shola Orloff, and Sheila Shaver, 'States, Markets, Families: Gender Liberalism and Social Policy in Australia, Canada, Great Britain and the United States' (Cambridge University Press, 1999).

<sup>19</sup> See generally Moira Carmody and Kerry Carrington, 'Preventing Sexual Violence' (2000) 33(3) *The Australian and New Zealand Journal of Criminology* 341, 344.

person's bare genital or anal region is visible'.<sup>20</sup> TEWLS notes that this does not fully encompass what may be capable of constituting revenge porn and that it arguably creates a high threshold to be satisfied in order for a particular image to attract criminal sanction for its distribution. TEWLS also notes that the SA legislation does not concern itself with occasions where a victim may have their 'invasive images' used against them by a partner through the threat of publication. This is a significant issue, as this submission notes that revenge porn has the capacity to be used as a tool of control and oppression in interpersonal and family relations.

## **E Current international responses**

### **I Unites States**

Like the Australian context, there are a number of jurisdictions in the United States ('US') that have responded to growing concerns that the criminal law is not adequate to address revenge porn. The State of New Jersey was the first US State to introduce a law relating to revenge porn. Enacted in 2003, the Criminal Code of New Jersey states that a person commits an offence.

if, knowing that he is not licensed ... he discloses any photograph ... or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or contact, unless that person has consented to such disclosure.<sup>21</sup>

It is important to note that under this provision, there is no requirement for ulterior intent. This suggests that the state of New Jersey recognises that the harm experienced by revenge porn stems from the breach of a person's autonomy and right to control their own image, rather than because an individual acts maliciously towards another party. The omission of the requirement of intent and the focus on the subject's consent has been praised by many as the appropriate response to revenge porn as it privileges an individual's right to sexual agency and identity. In light of this, this offence is widely considered as providing the model approach in the legal system's response to revenge porn.<sup>22</sup>

However, we note that this provision provides a potential loophole in that a defence applies where the actor provides prior notice of what he or she intends to do, and he or she acts for a lawful purpose.<sup>23</sup> 'Lawful purpose' is not defined, but if it is taken to encompass both civil and criminal matters there are those that are concerned that this could seriously weaken the offence.

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<sup>20</sup> *Summary Offences (Filming Offences) Amendment Act 2013* (SA) s 26A.

<sup>21</sup> New Jersey Code 2C:14-9(c).

<sup>22</sup> Ave Mince-Didier, 'Revenge Porn: Law and Penalties' (2015) *Criminal Defense*.

<sup>23</sup> New Jersey Code 2C:14-9(d)(1)-(2).

## II *United Kingdom*

In 2015, the United Kingdom ('UK') enacted a specific offence to respond to the challenge of revenge porn under the *Criminal Justice and Courts Act 2015* (UK). Under s 33(1) *Criminal Justice and Courts Act 2015* (UK), it is an offence for a person to disclose a private sexual photograph or film if the disclosure is made 'without the consent of the [subject] with the intention of causing that individual distress.'

Unlike the New Jersey approach or the Exposure Draft, the UK's revenge porn provision is centered on the perpetrator's intent to cause distress. This focus on the ulterior intent of the distributor, rather than the harm that arises from non-consensual distribution, creates a serious limitation for the protection of potential revenge porn victims. Specifically, TEWLS notes that it may be difficult to prove the images were shared to cause harm, rather than to make a profit or as some sort of joke. As such, the UK provision is significantly limited in upholding the sexual autonomy and integrity of potential victims, as it does not recognise the harm to victims as occurring through violations of their trust and agency as it only considers this behaviour to be 'wrong' where the offender deliberately intended to incite such harm.

However, whilst this provision is somewhat limited by its requirement of intent, the UK offence provides a sophisticated and flexible response to the issue of consent. Traditionally, the position of consent has been framed as a simple binary choice: you either consent to disclosure or you do not. However, this approach is now recognised within the contemporary discourse as too simplistic.<sup>24</sup> Instead, it is now largely accepted that consent can be limited to certain circumstances and particular people – in other words, just because an individual chooses to give an image to a particular individual does not mean that they agreed to have the material being disclosed to others.

In recognition of this understanding, the UK response to revenge porn states that 'consent' to a disclosure [of private sexual material] includes general consent covering the disclosure, as well as consent to the particular disclosure.<sup>25</sup> TEWLS considers that the express inclusion of consent to "particular" conduct as vital in the context of revenge porn as it expressly affirms that consent can be limited to certain people and circumstances. Expressly incorporating the concept of specific or particular consent is a fundamental part of sexual autonomy and identity, and by recognising this, TEWLS suggests that the provision provides greater certainty regarding the ways in which individuals may provide consent to the distribution or use of their private sexual material.

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<sup>24</sup> Joan McGregor, 'When She Says No She Doesn't Mean Maybe and She Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex and the Law' 1996 2(3) *Legal Theory* 175.

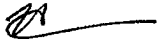
<sup>25</sup> *Criminal Justice and Courts Act 2015* (UK) s 33(7)(a).

Conclusion

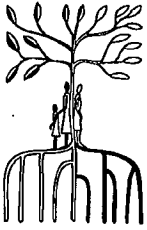
We appreciate the opportunity to make this submission. We support ongoing policy and legal development in responding to revenge porn in Australia, and note that we would be glad to be consulted regarding any proposed changes. Should you require further information, please do not hesitate to contact our office on (08) 8982 3000.

Yours faithfully,

**TOP END WOMEN'S LEGAL SERVICE INC.**



Vanessa Lethlean  
Managing Solicitor



# Top End Women's Legal Service Inc.

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2/5 Edmunds Street, Darwin • GPO Box 1901, Darwin NT 0801 • ABN: 42 830 944 1784

2 October 2015

Mr Tim Watts  
PO Box 6022  
House of Representatives  
Parliament House  
Canberra ACT 2600

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

Dear Mr Watts,

**Re: Proposed Criminal Code Amendment (Private Sexual Material) Bill  
2015 Exposure Draft**

Thank you for inviting comments to the Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft ('Exposure Draft'). The Top End Women's Legal Service Inc. ('TEWLS') welcomes the opportunity to make a submission to the Exposure Draft proposal to amend the *Criminal Code Act 1995* (Cth) to criminalise non-consensual pornography under federal law.

In principle, TEWLS supports the Exposure Draft. In our experience, the non-consensual dissemination of private sexual material is typically through acts of revenge or intimidation where perpetrators aim to control subjects of the material.

## About TEWLS

TEWLS is a community legal centre focused on the advancement of women's rights. We are funded by the Commonwealth Attorney General's Department to provide referrals, legal advice, casework and community legal education to women in the Top End of the Northern Territory. TEWLS provides assistance in a number of areas of law including domestic and family violence, sexual assault, family law, compensation for victims of crime, housing, discrimination, workplace health and safety, employment law, motor vehicles and consumer credit debts. We provide outreach services for culturally and linguistically diverse women, Aboriginal women in the town communities surrounding Darwin and women in prison.

## Our Submission

### **Definition of 'private sexual material'**

We support the Exposure Draft discussion paper's question as to the inclusivity of section 474.24D of the Exposure Draft. So as to ensure that the

proposed offences capture private sexual material depicting all members of the community, particularly those who identify as lesbian, gay, bisexual, transgender, intersex or queer, we recommend that section 474.24D(3)(c) of the Exposure Draft be amended to read:

- 3) ..
- a) ..
- b) ..
- c) The breasts of a female person or person who identifies as female.

### **Causing distress or harm**

We submit that there is a potential contradiction in the operation of sections 474.24E(1)(e)(ii) and 474.24E(4)(b) of the Exposure Draft, where the first section discusses 'risk' and the second effectively creates a barrier to the interpretation of 'causing distress or harm'. We propose that clarification is provided with regard to whether 'distress or harm' to a subject will be ascertained via a subjective or objective test.

### **Penalties**

We support the proposed penalties in that they are proportionate to 'revenge porn' offences, including the proposed three years imprisonment for using a carriage service for private sexual material or making a threat to transmit private sexual material, as well as the proposed five years imprisonment for possessing, controlling, producing, supplying or obtaining private sexual material for use through a carriage service.

In addition to jail terms, we propose that penalties should also include forfeiture of any profits derived from the distribution of private sexual materials. We propose that this forfeiture would act as a disincentive for any existing revenge porn websites, such as those references in the Exposure Draft discussion paper.

### **Aggravating circumstances**

~~We propose for aggravating circumstances to be considered in any amendments to the Exposure Draft so as to reflect the seriousness and repercussions of disseminating private sexual material. Aggravating circumstances could include:~~

1. Whether the private sexual material was photographs or videos. We note that videos will invariably consist of multiple frames, meaning that a number of frames should be considered as a number of offences and consequently, an aggravating factor;
2. Whether the private sexual material was consensually taken or recorded. If photos or videos were taken with a hidden camera, long

lens, or otherwise, that non-consensual taking or recording of private sexual material should be considered an aggravating factor; and

3. The circumstances surrounding the dissemination of the material. We propose that this could include whether the device holding private sexual material was stolen, lost or otherwise ascertained by an uninvolved third party to a respective relationship where private sexual material was shared within the confines of the relationship.

Further, we propose that consideration is given to circumstances where private sexual material is disseminated by an offender and then later disseminated by another person, such as a revenge porn or photo sharing website. In these circumstances, the subject of private sexual material suffers further distress and harm as a result of multiple disseminations, which were caused by the first offender's actions. We propose that the subsequent dissemination, if it has already occurred prior to a first offender's proceedings, be accounted as an aggravating factor in that offender's sentencing.

#### Case Study – Mary's Story

Mary is a woman living in the Northern Territory. She and her ex-partner Tom were in a long-term relationship and had children together. During their relationship, Mary allowed Tom to take intimate photos of her.

After Mary and Tom separated, he uploaded photos to a website without Mary's permission. Mary wrote to the site requesting the photos be taken down. The website removed the photos. However, Tom uploaded the photos, along with Mary's name and address, to another website. Mary found out about these photos after someone she knew saw them, and told her which site they were on.

Mary asked TEWLS to help remove the photos. We requested the website remove the photos and the photos were removed. Mary was also successful in obtaining a domestic violence order which restrained Tom from distributing the photos. This was the only legal recourse available.

Several months later, the photos appeared on other websites. It is unclear whether Tom had uploaded the photos again or someone else had downloaded the initial photos, and then distributed them to other websites.

Some of these websites had feedback or complaint forms, which TEWLS used to request the removal of the photos. Other sites did not, and considerable research was undertaken to identify the 'host' for the sites so the request to remove the photos could be made. While two websites took down the photos, other websites did not respond or appeared to be inactive.

In response to this case, TEWLS developed a framework for people who want to lodge website complaints in the context of the unauthorised transmission of private sexual material (see Appendix A).



## **Defences – dissemination of private sexual material by the media**

We support the inclusion of defences through the proposed section 474.24H of the Exposure Draft, including protections for the media (section 474.24H(4) of the Exposure Draft). However, we share similar concerns to those raised in the Exposure Draft discussion paper in that there is a risk private sexual images shared by the media may extend and prolong the damage caused by victims. We suggest a narrow exception for media disclosures and disclosures made for the public benefit.

### **'Photo sharing' websites**

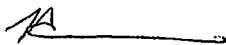
As noted in the Exposure Draft discussion paper, 'photo sharing' websites have become prominent and often lucrative points of dissemination for non-consensual private sexual material. While TEWLS supports the Exposure Draft's criminalisation of operating these websites through section 474.24G of the Exposure Draft, we note that there is often no mechanism for reporting material and/or making complaints on these websites for subjects to have the respective private sexual material removed. This removal would ideally happen in the interim between reporting the material and the completion of criminal proceedings.

### **Bi-partisan support**

We note previous endorsement of this proposal to criminalise the dissemination of non-consensual pornography by the now Minister for Women Senator Michaelia Cash in the presence of the now Prime Minister Malcolm Turnbull.<sup>1</sup> So as to progress the proposed Exposure Draft amendments to the *Criminal Code Act 1995* (Cth), we would welcome bipartisan support.

We thank you for your consideration of the above and would be pleased to be contacted should you wish to discuss this submission further. Should you require further information, please do not hesitate to contact our office on (08) 8982 3000.

Yours sincerely,  
**TOP END WOMEN'S LEGAL SERVICE INC.**



Vanessa Lethlean  
Managing Solicitor

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<sup>1</sup> Transcript of The Hon Malcolm Turnbull MP and Senator The Hon Michaelia Cash – Doorstop Interview, Parliament House, Canberra 7 September 2015  
<<http://www.malcolmturnbull.com.au/media/transcript-doorstop-interview-parliament-house-canberra-7-september-2015>>.

## APPENDIX A: Pathway to Lodge Website Complaint

If an individual or organisation needs to find out who is operating a website and web administrator contact details are not listed on the site:

1. Identify the "registrant" of the domain name.

You can do this by going to [www.whois](http://www.whois) and entering the website domain name (e.g. [nakedmompictures.com](http://nakedmompictures.com)) into the search box.

Top level domains are domain names ending in .com, .net, .org etc. Use of these domains are regulated by the Internet Corporation for Assigned Names and Numbers ('ICANN').

A **registrar** of a top level domain name is a company authorised by ICANN to provide services to people who want to register a new domain name, renew their existing domain name, or make changes to their domain name record.

Australia has its own regulatory authority that deals with domain names ending with .au

A registrar sells domain names to a **registrant** (or "**registered name holder**" - the person or company that owns the particular domain name) or to a "**reseller**" who then sells it to the registrant.

2. Contact the **registrant** directly to complain about site content.

The registrar is obliged to provide an individual or an organisation with the contact details for the registrant if the details on Whois are incorrect or out of date.

The registrar is obliged to provide Whois with the name, postal address, e-mail address, voice telephone number, and (where available) fax number of the administrative contact for the Registered Name Holder. (see ICANN registrar Accreditation Agreement, [https://www.icann.org/resources/pages/ra-agreement-2009-05-21-en?routing\\_type=path](https://www.icann.org/resources/pages/ra-agreement-2009-05-21-en?routing_type=path))

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~~Under this same policy, the registered name holder of a domain name must represent to the registrar that the registration of the domain name and the manner in which the domain name is used will not infringe upon the legal rights of any third parties.~~