



Top End Women's Legal Service Inc.

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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

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.

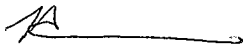
Bi-partisan support

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.¹ 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

¹ 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** and entering the website domain name (e.g. 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)

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.

