

## ***Criminal Code Amendment (Private Sexual Material) Bill 2015 – Exposure Draft***

### **SASS Submission**

**1 October 2015**

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#### **Issues for Consideration**

##### **1. Threats to share private sexual material**

- *Do you support the creation of a specific criminal offence in relation to “revenge porn” threats?*
- *Should the offence apply to a situation where a person (Person A) makes threats to a person (Person B) that they will share a private sexual image or recording of another person (Person C)?*

SASS supports the creation of a specific criminal offence, in relation to ‘revenge porn’ actions and threats. We concur with Drs Henry, Powell and Flynn that existing laws are “arguably too broad in scope to capture the types of harms caused when intimate images are distributed online without consent.”<sup>1</sup> As far as we aware, no ‘revenge porn’ cases have been prosecuted in Australia, to date. Another option for victims is to pursue civil litigation; however, this likely to be prohibitively expensive. We support Dr Nicola Henry’s argument that implementing explicit legislation sends a strong public message that the behaviour is unacceptable.<sup>2</sup>

With regard to the second question, SASS agrees that the offence should cover the scenario outlined, in line with s. 41DB of the *Summary Offences Act 1966* (Vic). In our field of practice, we recognise that the possession of intimate images and recordings can provide a harmful means for an individual to threaten, intimidate and/or extort family members (and support persons) of the person depicted. We recommend that the wording of @474.24F (1) (b) be amended slightly, to remove the reference to ‘fear’, which may be the subject of different interpretations. The Victorian Act, cited above, provides the following wording:

(c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.<sup>3</sup>

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<sup>1</sup> Henry, N., Powell, A., & Flynn, A. (2015). Submission to the NSW Standing Committee on Law and Justice *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*. p.4. Available at: [https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/ca14a42a8fa16e5cca257eb9001443db/\\$FILE/28494134.pdf/0013%20Dr%20Nicola%20Henry,%20Dr%20Anastasia%20Powell%20and%20Dr%20Asher%20Flynn.pdf](https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/ca14a42a8fa16e5cca257eb9001443db/$FILE/28494134.pdf/0013%20Dr%20Nicola%20Henry,%20Dr%20Anastasia%20Powell%20and%20Dr%20Asher%20Flynn.pdf)

<sup>2</sup> See <http://www.abc.net.au/7.30/content/2015/s4257906.htm> and <http://www.2ser.com/component/k2/item/18004-is-revenge-porn-a-crime>

<sup>3</sup> See s.41DB of *Summary Offences Act 1966* (Vic).

Another option is to incorporate a ‘reasonable person’ test in the wording, e.g. “Any reasonable person, by their actions, would know that these actions could cause the other person to fear that the threat will be carried out”.

Broadly speaking, we believe that the term ‘revenge porn’ is misleading, as it implies a single motive for the behaviour. We recognise that the term is frequently used in research articles and media pieces; however, with regard to the legal context, we prefer the term ‘image-based sexual exploitation’<sup>4</sup>, as it does not reflect a limited notion of motive. We recommend that policymakers use this term when discussing the offence and proposed changes to legislation, to broaden community understandings of the behaviour and its prevalence.

## 2. The meaning of “private sexual material”

- *What should be the meaning of “private sexual material”?*
- *How can we ensure that the offence is inclusive of all persons regardless of gender or gender identity?*

SASS supports the use of the term ‘intimate image’, which has been adopted in Victorian legislation. With reference to the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic), Drs Henry, Powell and Flynn appraise the term as follows:

[...] 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.<sup>5</sup>

We concur with the authors that an intimate image or recording need not depict a person’s genitals or anal region<sup>6</sup>; and that the following types of images are all relevant:

- ‘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.’<sup>7</sup>

We believe that the term ‘intimate image or recording’ is inclusive of all genders and gender identities.

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<sup>4</sup> Henry et al (2015). p.1.

<sup>5</sup> Ibid. pp 3-4.

<sup>6</sup> Ibid. p.2.

<sup>7</sup> Ibid.

### 3. Intention of perpetrators

- *How can we ensure that the offence applies to the range of intentions, motivations or reasons for sharing private sexual images and recordings without consent?*
- *How can we ensure that the offence is responsive to the range of effects of this behaviour on victims?*

SASS agrees strongly with the second paragraph, in this section of the Exposure Draft Discussion Paper, which reads as follows:

[...] sharing private images or recordings without consent is not necessarily motivated by “revenge”. There are a range of motivations or intentions that will influence the behaviour, including the intention to cause harm, distress, anger, grief or fear. *Perpetrators may also be motivated by the desire to gain notoriety or to entertain* [our italics].<sup>8</sup>

We argue that the current wording of @474.24E addresses the first set of motivations/intentions listed in the paragraph, but does not address the second set. We are concerned that the current wording will place onus on the Prosecution to prove intent to cause harm or distress, which may not be relevant. A defendant could simply argue “I didn’t mean to cause any harm; I was just having a laugh with my mates”. The meaning of ‘harm’ could also be the subject of limited interpretation. For these reasons, we recommend one or other of the following courses of action:

1. Amend the wording of (1) (e) (i) to include ‘humiliation’ (i.e. “the conduct mentioned in paragraph (a) causes distress, harm, or humiliation to a subject of the material”); and amend (1) (e) (ii) to read “any reasonable person, by their actions, would know that these actions could cause distress, harm, or humiliation”. Remove the wording in (4) completely, as it is arguably superfluous; and would appear to create legal loopholes that may help offending persons to avoid prosecution.
2. Remove references to ‘intent to cause distress or harm’ altogether, and focus the offence on acts or intentional distribution, or threatened distribution. This would align with the Victorian legislation, which does not appear to place any onus on the Prosecution to prove intent to cause harm or distress:

(1) A Person (A) commits an offence if –

- (a) A intentionally distributes an intimate image of another person (B) to a person other than B; and
- (b) the distribution of the image is contrary to community standards of acceptable conduct.<sup>9</sup>

In a similar vein, the Legal Affairs and Community Safety Committee (2014) have recommended that “the Queensland government consider the introduction of legislation to

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<sup>8</sup> Butler, T., & Watts, T. (2015). *Criminal Code Amendment (Private Sexual Material) Bill 2015* Exposure Draft – Discussion Paper. p.8.

<sup>9</sup> See s.41DA of *Summary Offences Act 1966* (Vic).

create an offence for any person to intentionally distribute an intimate image or video of a person without consent.”<sup>10</sup>

We also note the reference to suicide, in the first paragraph of this Discussion Paper section.<sup>11</sup> We believe that if a victim commits suicide (or they are not able to pursue a complaint themselves for some other valid reason), a third person should be able to make a complaint on their behalf, using the same legislative provisions.

#### 4. Operating a “revenge porn” website

- *How can we ensure that the offence captures a range of scenarios that involve people who are encouraging or deliberately facilitating the large-scale sharing of private sexual images?*

SASS supports the inclusion of legislative provisions to address the operation of ‘revenge porn’ websites and forums, including those which generate income for the administrators. We respectfully submit that several examples should be provided in @474.24G, to clarify the type of behaviours that are covered under the provisions, e.g. “operating a for-profit website that distributes intimate images of individuals without their consent”. We believe that providing clarity with regard to scope is vital, especially given that offences under these provisions attract the highest penalty listed (i.e. 5 years imprisonment).

#### 5. Protections for the media

- *How can we strike the right balance between ensuring protections for the media whilst also protecting victims?*

SASS agrees strongly with the second paragraph in this section of the Discussion Paper, which reads as follows:

[...] the non-consensual sharing of private sexual images by the media may extend and prolong the damage caused to victims. The risk that private sexual images will be shared by the media may also prevent victims from pressing charges under these offences.<sup>12</sup>

Whilst we recognise that media representatives face a high degree of pressure to generate articles of public interest, we believe that articles should not include intimate images of ‘revenge porn’ victims. We believe that the rights and best interests of the victim should always take precedence over concerns and interests that media representatives may have, with regard to generating a “good story”. We argue that by publishing an intimate image to accompany a story, the media may inadvertently aid the motives of the offender, e.g. to humiliate the person depicted; provide entertainment; and/or to attain notoriety.

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<sup>10</sup> Legal Affairs and Community Safety Committee. (2014). *Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland*. Report No. 82. p.214. Available at: <http://www.parliament.qld.gov.au/documents/committees/LACSC/2014/CrimeInquiry2014/rpt-082-28Nov2014.pdf>

<sup>11</sup> Butler, T., & Watts, T. (2015). p.8.

<sup>12</sup> Ibid, p.9.



## 6. The meaning of “consent”

- *How should consent be defined in the context of sharing private sexual material?*

SASS submits that the wording used in @474.24J is reasonable and appropriate; however, we suggest that where there is any doubt, consideration should be given to whether “a person could reasonably be considered to have expressly or impliedly consented.”<sup>13</sup>

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<sup>13</sup> Our recommended wording is drawn from s.41DA of the *Summary Offences Act 1966* (Vic).

## References

- Australian Broadcasting Corporation. (2015). *Hundreds of Australian women falling victims of 'revenge porn' website raises legal questions*. 7.30 - Report transcript. Available at: <http://www.abc.net.au/7.30/content/2015/s4257906.htm>
- Butler, T., & Watts, T. (2015). *Criminal Code Amendment (Private Sexual Material) Bill 2015* Exposure Draft – Discussion Paper.
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- Legal Affairs and Community Safety Committee. (2014). *Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland*. Report No. 82. Available at: <http://www.parliament.qld.gov.au/documents/committees/LACSC/2014/CrimeInquiry2014/rpt-082-28Nov2014.pdf>
- Summary Offences Act 1966* (Vic). Available at: [http://www.austlii.edu.au/au/legis/vic/consol\\_act/soa1966189/](http://www.austlii.edu.au/au/legis/vic/consol_act/soa1966189/)
- 2ser 107.3. (2015). Is revenge porn a crime? Radio interview. Available at: <http://www.2ser.com/component/k2/item/18004-is-revenge-porn-a-crime>

**All hyperlinks current as at 1 October 2015.**

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