Online Revenge Attacks: Legislative Responses

by David Adsett[1]

> *'Unregulated, the computer data bank may foreclose the possibility of a fresh start and wreak great damage, for the record furnishes a complete inventory of events and activities over a span of time, however remote from and unrelated to the present circumstances they may be. The ineradicable record is a dangerous and intolerable thing…'*[2]

Parliamentary Committee

Less than 12 months ago the Australian Parliament referred the following to the Senate Legal and Constitutional Affairs References Committee for inquiry and report:

'a 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;

b. the impact this has on the targets of revenge porn, and in the Australian community more broadly;

c. potential policy responses to this emerging problem, including civil and criminal remedies;

d. the response to revenge porn taken by Parliaments in other Australian jurisdictions and comparable overseas jurisdictions; and

e. any other related matters.' [3]

In February this year the Australian Senate's Legal and Constitutional Affairs References Committee released its report called 'Phenomenon Colloquially Referred to as "Revenge Porn"'.[4] The government has not yet released a response.

The Committee noted at the outset that a more acceptable term (and a term I will use in this paper) is 'the non-consensual sharing of intimate images'.[5]

Many submissions to the Committee also noted the connection between this behaviour and violence against women in domestic contexts. This social scourge is a matter of heightened publicity and

[1] Deputy Director of Public Prosecution, Commonwealth DPP Australia. The views expressed in this paper do not represent the views of the Director or the Australian government.
[2] Professor Zelman Cowen, 'The Private Man', ABC Boyer Lectures, Australian Broadcasting Commission, Sydney, 1969.
[3] Australia, Senate, Legal and Constitutional Affairs References Committee, 'Phenomenon Colloquially Referred to as "Revenge Porn"', Canberra, February 2016, p.1.
[4] Ibid.
[5] Ibid.

awareness in Australia following some well publicised instances. This has led to much public discussion, a prominent public campaign and some official enquires into this social problem.

The committee noted that there had been a rise in this phenomenon of non-consensual sharing of intimate images coinciding with the rise and pervasiveness of the internet and social media.[6]

There is certainly a lot of attention being given to this social phenomenon. The outlawing of the conduct was the subject of a Bill in the last Parliament that was drafted but never enacted.

Part of the Committee's report was to look at recently enacted legislation criminalising the non-consensual sharing of intimate images. A plethora of legislation has recently been enacted in many jurisdictions. In this paper I refer to some of that legislation. Part of the Committee's report was to look at existing legislation at Commonwealth government level in Australia and some of the new legislation that had recently been enacted elsewhere.

Australian federal law

In Australia there is an existing offence at Commonwealth government level and part of the Committee's approach was to examine the adequacy of this law. The law predates the legislation recently enacted elsewhere and criminalises use of a telecommunications service in a menacing, harassing or offensive manner (whether by the method of use or the content of a communication, or both).[7]

One issue with the law is that, in contrast to the recently enacted laws in other places, it does not specifically target the conduct of the non-consensual sharing of images of a certain sort. It focuses rather on the objective offensiveness of the use of the telecommunications service. In that way it may achieve coverage of the conduct but it does so by regulating the distribution. It regulates the misuse of the system. It relies on being able to show that the use of the telecommunications system is menacing, harassing or offensive.

Laws elsewhere

The Australian federal law may be contrasted with the newer legislation recently enacted elsewhere in the world including in Australia at State level. This more recent legislation more specifically focuses on the nature of the images. Almost all the newer legislation has the common feature of sharing images of a particular sort coupled with an absence of consent. Almost all of the new legislation has the feature that the images it is directed at are more clearly defined. The way they are described specifically refers to what is depicted in the unlawfully shared image. Basically the way the images are defined requires they contain nudity or sexual activity. Some of them also describe the material by reference to the circumstances in which the images were taken. An example of this is the recently enacted Canadian law.[8] It requires that the images have those features but also that they were taken in a reasonable expectation they would remain private.

So the legislation, with few exceptions, requires the 'publication', 'distribution' or 'disclosure' of the image in some way without consent. The two common broad features are:

[6] Ibid, pp.3-5.
[7] Criminal Code (C'th), s 474.17.
[8] Criminal Code (Can), s 162.1

- Images of a certain type – nudity or sexual activity. Different phrases have been used to describe these images including 'intimate image', 'private sexual photograph or film', 'invasive image', 'sexually explicit image'.
- Non consent to distribution.

Legislation of this type has been enacted at State level in Australia in South Australia[9] and also internationally in Canada[10], England and Wales[11], Scotland[12] and 26 US States (as at December 2015)[13] including California[14], Illinois[15], Florida[16] and Oregon[17].

The Canadian law is typical of this and prohibits:

> Publication, distribution, transmission, sale, making available or advertising an intimate image of a person without consent or reckless as to whether person gave consent

Some of the offences in those jurisdictions I've mentioned have additional requirements.

For instance as far as the images themselves are concerned, there is a sometimes a requirement that the images were brought into existence in the expectation wouldn't be shared. Invariably there is a requirement that the person causing distribution knows or there is no consent. However some have the alterative that the person was reckless as to whether there was consent.

The levels of intention required also vary. Inevitably the distribution or publication or disclosure needs to be willed. There is sometimes also a requirement for an intention to cause harm and the Acts in England and Wales and Scotland are examples of this.

Some also require not only an intention to do harm but also harm to be actually caused. California is an example of this.

By contrast some laws do not require either an intention to cause harm or actual harm to be caused. They typically just require an absence of consent but not harm to be actually caused to an individual. The laws in Canada and Illinois are examples of this.

Some of the variants not only prohibit the distribution but also have a threatened distribution component.

Other approaches to prohibition

There are two other types of offence I've noticed in my limited review. One is the type that does not attempt to define the image and the circumstances in which it was distributed. This type of law

[9] Summary Offences Act 1953 (SA), s 26C.
[10] Criminal Code (Can), s 162.1.
[11] Criminal Justice and Courts Act 2015 (Eng & Wales), s 33.
[12] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (Scot), s 2.
[13] Attorney General's Department, Submission, Senate Legal and Constitutional Affairs References Committee, 15 January 2016, pp.14-15.
[14] California Penal Code, ss 647(j)(4)(A) and 647(j)(4)(B).
[15] Illinois Criminal Code of 2012, 720 ILCS 5/ s 5/11-23.5 (2014), Non-consensual dissemination of private sexual images.
[16] Florida Statutes, Title XLVI, Chapter 784, Section 049, Sexual cyberharassment.
[17] Oregon Revised Statutes, s 163.472, Unlawful dissemination of an intimate image.

focuses on the acceptability of the conduct in distributing it by reference to community standards. Victorian legislation is an example of this.[18] It is closest in nature to the federal law in Australia in that it focuses on the unacceptability of the distribution. It provides a contrast to what has been enacted in some other parts of the world and notably the neighbouring Australian State of South Australia. South Australia has chosen to enact a law with more commonality with other international jurisdictions discussed above – it focuses on distribution of invasive image of another person, without consent. The Victorian law by contrast doesn't have a non-consent element in the offence itself. It does define the images it covers. It simply prohibits the intentional distribution of an intimate image contrary to community standards of acceptable conduct. There is nothing in the offence directly requiring proof of lack of consent, although the law is certainly wide enough to capture that. Indeed the distribution of an image without consent of the persons depicted is cited as an example in the legislation of an unacceptable distribution. The example is expressed as:

> A person (A) posts a photograph of another person (B) on a social media website without B's express or implied consent and the photograph depicts B engaged in sexual activity.[19]

The other contrasting law that was examined in the Committee's report was the Harmful Digital Communications Act 2015 (NZ) ('HDCA'). That law potentially targets much more activity than the non-consensual sharing of intimate images. It could also apply to cyberbullying and other objectionable online behaviour. It was accompanied by some controversy when enacted.[20] The HDCA criminalises 'causing harm by posting digital communication':

(1) A person commits an offence if—
  (a) the person posts a digital communication with the intention that it cause harm to a victim; and
  (b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and
  (c) posting the communication causes harm to the victim.

(2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—
  (a) the extremity of the language used:
  (b) the age and characteristics of the victim:
  (c) whether the digital communication was anonymous:
  (d) whether the digital communication was repeated:
  (e) the extent of circulation of the digital communication:
  (f) whether the digital communication is true or false:

[18] Summary Offences Act 1966 (Vic), s 41DA.
[19] Summary Offences Act 1966 (Vic), s 41DA(1).
[20] N Jones, 'Controversial Cyberbullying Law Passes', NZ Herald, 30 January 2015, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11473545

(g) the context in which the digital communication appeared. [21]

Given its wide application to any digital communications it is potentially much broader than non-consensual distribution of intimate images. It can cover any communication and cyber bullying type conduct. The second significant difference with legislation enacted elsewhere is its focus primarily on the intent of the defendant. It does not attempt to confine the application of the legislation to particular sorts of images at all but the intention of the defendant in posting the digital communication. Notably it does not require an absence of consent at all. To fall within the ambit of the law the post must have 2 other features. It must do actual harm to the victim and it must be of a nature that 'would cause harm to an ordinary reasonable person in the position of the victim'. This provides a significant contrast to what has been enacted elsewhere.

Committee's discussion

With this legislative background in mind, the Committee discussed a number of features of a potentially more targeted federal law.

- Consent

  The Committee noted that many submissions it received emphasised the importance of lack of consent and that this should be the 'primary focus' of any new legislation. The committee recommended that lack of consent should be the 'central tenet' and of any legislative response.[22]

- Threats

  The Committee noted that a number of public submissions especially from community and victim support groups noting that threats to carryout publication of intimate images were a feature of abusive relationships and could be a subject matter of offence creating legislation.[23]

- Intent

  Committee received submissions that had a range of views about necessity for intent. Some said intent of the perpetrator should be included as an element. Others were adamant that this was not necessary.[24]

- Recklessness

  The Committee discussed whether the recklessness as to whether consent had been given was appropriate.[25]

- Anonymity of victims

[21] Harmful Digital Communications Act 2015 (NZ), s 22.
[22] Australia, Senate, Legal and Constitutional Affairs References Committee, 'Phenomenon Colloquially Referred to as "Revenge Porn"', Canberra, February 2016, pp.18, 50 and 51.
[23] Ibid, pp.18-20 and 33-34.
[24] Ibid, pp.34-35.
[25] Ibid, p.35.

> The Committee noted that a mechanism whereby victims could have their anonymity assured would be beneficial. This would require a legislative anonymity.[26]

'Take down' laws

The deleterious effects of the conduct don't cease on detection, apprehension or charge. The harmful material stays online. So for a victim the existence of a comprehensive criminal law that will effectively cover the conduct they are a victim of is only the beginning. Some form of law that prevents the continued proliferation of the offending is also an important feature of a victim based response to this crime type.

A feature of the New Zealand legislation is a comprehensive regime for court application for an order that material be taken down. It is an offence if material is not removed. The Committee also noted the Canadian approach, where offenders can be required to pay the costs associated with the removal of images, is worthy of consideration.[27]

Australia's Office of the Children's e safety Commissioner[28]

This is an innovative Australian government initiative. The Office has been in existence for less than a year. It was established by the Enhancing Online Safety for Children Act 2015 (C'th).

As described in the Act the role of the Office is:

> ... to administer a complaints system for cyber‑bullying material targeted at an Australian child.

- The complaints system includes the following components:

  (a) a 2‑tiered scheme for the rapid removal from social media services of cyber‑bullying material targeted at an Australian child;

  (b) a tier 1 social media service may be requested to remove from the service cyber‑bullying material targeted at an Australian child;

  (c) a tier 2 social media service may be given a notice (a social media service notice) requiring the removal from the service of cyber‑bullying material targeted at an Australian child;

  (d) a person who posts cyber‑bullying material targeted at an Australian child may be given a notice (an end‑user notice) requiring the person to remove the material, refrain from posting cyber‑bullying material or apologise for posting the material.

- The functions of the Commissioner also include:

  (a) promoting online safety for children; and

[26] Ibid, p36.
[27] ibid, p.53.
[28] www.esafety.gov.au.

(b) coordinating activities of Commonwealth Departments, authorities and agencies relating to online safety for children; and

(c) administering the online content scheme that was previously administered by the ACMA [Australian Communications and Media Authority].'[29]

As noted in the Act, the office has a takedown power so that cyber bullying type content involving young people can be removed. At the Senate Committee hearing the former Commissioner Alistair MacGibbon described their work as follows:

> 'As an office what we deal with is taking down the harmful material and often d addressing the matter that has led to an issue coming to the fore in the first place. We are for pragmatic options to facilitate quick removal of the material…
>
> 'We have legislation that was passed by the Australian parliament last year that gives us a tiered scheme to enrol social media services into our legislation. We have nine such social media services enrolled with us. They are Google+, YouTube, Twitter, ASKfm, Facebook, Instagram, Yahoo Answers, Yahoo Groups and Flickr. That gives us coverage of the vast bulk of services that are used by Australians—not all of them but certainly a large percentage of the communications that are being carried out by young Australians online. When we receive a complaint, we assess for its serious nature, because we only deal with serious cyberbullying. … Once we assess it as being serious, we will communicate that to the social media service. The complainant first has to have gone to the social media service to have taken down. If they refuse, they come to us and the social media service will then take action. We have not yet, in over eight months that we have been operating, had to use a formal notice to take down material. They have always cooperated with us as an office. That means that we can take material down and it is now within less than eight hours that the material is brought down.'[30]

In its report the Committee advocated something similar to enable the take down of intimate images distributed without consent:

> 'The committee believes that there is value in a Commonwealth agency being authorised to issue take down notices outside of a court process, similar to the OCeSC [Office of the Child eSafety Commissioner] currently. While the committee has not reached a conclusive view about whether this is something that the OCeSC should be empowered to do or whether it would be more appropriately done by another agency…'[31]

Committee's recommendations

It recommended that Australia have legislative change at both federal and State level. It said there was 'overwhelming support from submitters and witnesses for legislative change, including at the Commonwealth level. It further concluded:

[29] Enhancing Online Safety for Children Act 2015 (C'th), s 3.
[30] Australia. Senate, Legal and Constitutional Affairs References Committee, Hearing transcript, 18 February 2016, p.10.
[31] Australia, Senate, Legal and Constitutional Affairs References Committee, 'Phenomenon Colloquially Referred to as "Revenge Porn"', Canberra, February 2016, p.52.

> 'The committee is persuaded by the arguments for consent to be the central tenet of any non-consensual sharing of intimate images offences. The committee is similarly convinced that non-consensual sharing of intimate images offences should not include 'an intent to cause harm' or 'proof of harm' elements: the perpetrator's intentions and whether or not the victim is harmed are not pertinent; the acts of non-consensually taking and/or sharing intimate images should be sufficient for an offence to have been committed... the committee believes that a recklessness element should be included in non-consensual sharing of intimate images offences.'[32]

It recommended offences of:

- knowingly or recklessly recording an intimate image without consent;
- knowingly or recklessly sharing intimate images without consent; and
- threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.

It also urged Australian State and Territory legislatures to enact legislation[33].

In terms of remedy in addition to criminal sanction the Committee agreed 'that take down notices often offer a more expeditious remedy in the first instance for removing intimate images and affording victims some protection.'[34]

The Committee recommended that:

> '… the Commonwealth government consider empowering a Commonwealth agency to issue take down notices for non-consensually shared intimate images.'[35]

The Committee also recommended that the Australian government re-examine introducing a statutory cause of action for serious invasion of privacy and that there be further community education initiatives and that there be further professional training in this crime type for Australian police.[36]

Conclusion

The laws developed to tackle the phenomenon of non-consensual sharing of intimate images vary in content and form. It remains to be seen how effective the new laws are in practice. In the meantime it has been recommended to Australia's Parliaments that new laws be enacted in Australian jurisdictions at both federal and State level.

[32] Ibid, p.51.
[33] Ibid, pp.51-52.
[34] Ibid, p.52.
[35] ibid, p.53.
[36] Ibid, p.55.