

HENRY RESPONDS TO DICKSON: ‘REVENGE PORN’: A VICTIM FOCUSED RESPONSE

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This comment responds to Alyse Dickson’s article in this volume titled ‘Revenge Porn: A Victim Focused Response’. It summarises the difficulty that Australian law has encountered in keeping up with evolving behaviours with emergent digital technologies and provides recommendations for achieving the ‘victim focused response’ that Dickson argues for in her article. The comment begins in Part I by highlighting the problems caused by the term ‘revenge pornography’. Part II explores possible directions for future research and stresses the need for an interdisciplinary approach for any strategy to be truly effective. The comment concludes by arguing that a formal legal response in the form of criminal legislation in all jurisdictions should be implemented.

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I am very pleased to provide a response to Alyse Dickson’s excellent paper.¹ I thank both Alyse and the *University of South Australia Student Law Review* for giving me this opportunity. Dickson argues that Australian law should adopt a ‘victim focused response’ to the problem of ‘revenge pornography’, in particular, one that restores a sense of control to the victims. She suggests that this can be achieved through the implementation of innovative criminal or civil regimes to ensure, as far as practically possible, the removal of non-consensual imagery from the internet. In my response below, I provide a discussion of the terminology and the legislative frameworks for providing justice to victims of

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¹ Alyse Dickson, ‘“Revenge Porn”: A Victim Focused Response’ (2016) 2 *University of South Australia Student Law Review* 42.

image-based harms. I end my review by reflecting on the opportunities for future research in this area.

I 'REVENGE PORNOGRAPHY': TERMINOLOGY AND PHRASES

As Dickson points out, 'revenge pornography' is a media-generated term that is used to describe the non-consensual distribution of nude, sexual or sexually explicit images in the digital era.² The term, however, is problematic for three key reasons. First, the term (and the discourses surrounding it) focuses almost exclusively on embittered ex-partners who are motivated by feelings of revenge. While this certainly appears to be a common scenario, perpetrators may also be family members, friends, acquaintances or complete strangers who have diverse motivations beyond that of revenge. For instance, perpetrators may distribute non-consensual images as a form of blackmail and coercion, or in order to seek social notoriety, sexual gratification or monetary gain.³

Second, the term 'revenge pornography' implies that non-consensual imagery is a form of pornography that can be consumed and used for sexual gratification purposes. However, in many instances, the content is not 'pornographic' per se and/or the distributor is not disseminating the image for the purposes of pornography. Moreover, the label of 'pornography' may have the effect of positioning victims as complicit in the production of pornography, particularly as the term is often used to describe situations where the victim has taken the image of their own body or has shared the image with an intimate partner.

It is interesting to note an analogous shift in language in studies on child exploitation material. For instance, many researchers and practitioners now prefer the terms 'child abuse material' or 'child exploitation material' to that of 'child pornography'. This change in language recognises that although some people may use images of children for sexual gratification reasons (thus fulfilling the primary aim of pornography), we should be naming these

² Ibid 45.

³ See generally Danielle K Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345; Nicola Henry and Anastasia Powell, 'Beyond the "Sext": Technology-Facilitated Sexual Violence and Harassment against Adult Women' (2015) 48 *Australian & New Zealand Journal of Criminology* 104.

practices for what they are — a form of abuse and exploitation.⁴ Likewise, the term ‘revenge pornography’ *misrecognises* the nature of the harm, especially as many images are not simply shared or viewed, but also are visual representations of abuse and violence enacted on victims of domestic and/or sexual violence. We should therefore be labelling these acts as a form of abuse, not as a form of pornography.

Finally, the term ‘revenge pornography’ is often understood exclusively in terms of the *distribution* of intimate images, yet such practices also encompass the *creation* of images without consent (eg, the covert filming, recording or photographing of another person), as well as the *threats to distribute* nude, sexual or sexually explicit images.

A starting point for any discussion on responses to the problem of non-consensual imagery must be on the power of language and the ways in which language has both empowering and disempowering effects. Language is important in terms of the ways in which broader societal discourses shape our understanding of the behaviours, their impacts and how we respond to them. While ‘revenge pornography’ is ‘catchy’ and has generated the debate that was needed to bring attention to this issue,⁵ it is important to frame these acts for what they are; that is, as a form of ‘image-based sexual abuse’. In the research that I am conducting with my colleagues Anastasia Powell and Asher Flynn, we initially adopted the term ‘image-based sexual exploitation’, but after much deliberation, we have changed our preferred term to ‘image-based sexual abuse’, as adopted by UK law professors, Clare McGlynn and Erika Rackley.⁶

We believe that the broader term ‘abuse’ encompasses an array of behaviours which include the following sub-categories: (1) relationship retribution (where revenge is a motivation within the context of an intimate relationship); (2) sextortion (where the perpetrator seeks to obtain further images, money or unwanted sexual acts using existing images, or the threat of images, regardless of whether not they exist); (3) sexual voyeurism (where perpetrators are seeking to create or distribute images as a form of sexual gratification,

⁴ Marg Liddell and Anastasia Powell, ‘What’s in a Name? Online Child Abuse Material is not “Pornography”’, *The Conversation* (online), 13 August 2015 <theconversation.com/whats-in-a-name-online-child-abuse-material-is-not-pornography-45840>.

⁵ Clare McGlynn and Erika Rackley, ‘Not “Revenge Porn”, but Abuse: Let’s Call it Image-Based Sexual Abuse’, *Inherently Human* (online), 15 February 2016, <<https://inherentlyhuman.wordpress.com/2016/02/15/not-revenge-porn-but-abuse-lets-call-it-image-based-sexual-abuse/>>.

⁶ *Ibid.*

including, but not limited to, ‘upskirting’ and ‘down-blousing’); (4) sexploitation (where the primary goal is to obtain monetary benefits through the trade of non-consensual imagery); and (5) sexual assault (where perpetrators and/or bystanders record sexual assaults and rapes on mobile phones or other devices and then distribute those images).⁷ Images may be ‘selfies’ taken by the victim, images taken by another person, stolen images, or images that are manipulated in order to depict the victim’s face or body in a sexual way. Images may be distributed originally by the victim, or by another person, or the victim may have no knowledge that images of them are being shared.

A critical understanding of the terminology, as well as the nature, scope and impacts of these diverse behaviours, enables a much richer understanding of the phenomenon as a whole, leading to better legal and non-legal responses to addressing these harms. Dickson, in her excellent paper, has conveyed this appropriate and nuanced level of understanding. She provides a thoughtful and reasoned analysis of the scope of Australian civil and criminal laws. The strength of her paper lies in her examination of the role of law from the perspective of the victim. As she emphasises, one of the key harms lies in the difficulties that many victims face in having images removed from the internet and digital devices. She argues that any response, legal or non-legal, or quasi-legal, must prioritise this justice need:

Once the images have been distributed, they are, for the most part, irretrievable. Even if the original intimate image is removed, it is almost impossible to ensure it is gone forever. ... Given the effect revenge porn can have on victims, the reduction of harm in conjunction with, or in addition to, deterring perpetrators with criminal sanction and compensating victims with civil remedies should be a priority.⁸

Dickson points to both the strengths and weaknesses of different laws in different jurisdictions, not simply in the Australian context, but also internationally as well. In particular, she notes that criminal investigations ‘can often be a traumatic experience for victims’⁹ owing to the possibility that police, legal personnel, victim advocates and members of the public may have access to these images when they are presented as evidence during the pre-trial, trial and post-trial stages. She also notes that the criminal law, in many

⁷ Anastasia Powell and Nicola Henry, *Sexual Violence in a Digital Age* (Palgrave Macmillan, forthcoming 2017).

⁸ Dickson, above n 1, 47.

⁹ Ibid 51.

jurisdictions, does not ‘provide victims with an efficient and accessible means for obtaining the removal of revenge porn from the internet’.¹⁰ Yet she notes that despite these obstacles, the criminal law is an important part of the solution to this problem.

Overall, Dickson provides a detailed and comprehensive summary of the laws relating to image-based sexual abuse, which will serve as a useful resource to lawyers and non-lawyers alike. She argues that while both civil and criminal laws are needed to respond to this problem, a key goal of law or policy reforms or practice should be to enable the ‘fast removal of the images from the internet’.¹¹ She recommends that Australia adopt an efficient system to deal with complaints and ensuring content removal of online abuse, similar to the assistance provided to children through the *Enhancing Online Safety for Children Act 2015* (Cth) and the New Zealand *Harmful Digital Communications Act 2015*.

II DIRECTIONS FOR FUTURE RESEARCH

Image-based sexual abuse has been increasingly identified as a significant and serious problem, warranting substantial legislative reform and non-legal remedies in order to both respond to, and ultimately prevent, such harms. Owing to the rapid developments of digital technologies over the last decade, particularly over the past five years, we are witnessing new ways in which motivated perpetrators are using technology as a tool of abuse and harassment. To understand the phenomenon of image-based sexual abuse (as one of many forms of ‘technology-facilitated sexual violence’),¹² there are several key directions for future research and practice. The first step is to understand the nature and impacts of such harms. This must involve a recognition that the terminology itself is inherently problematic, and that we should be naming these behaviours as a form of abuse. The second step is to investigate the prevalence of image-based sexual abuse. In our 2015 Australian survey on online abuse and harassment ($n = 2,956$), we found that 1 in 10 Australians (aged 18–54 years) had a nude or semi-nude image of them distributed online or sent onto others without their permission.¹³ However, as our study was more

¹⁰ Ibid 52.

¹¹ Ibid 69.

¹² Anastasia Powell and Nicola Henry, above n 7.

¹³ Anastasia Powell and Nicola Henry, ‘Technology-Facilitated Sexual Violence Victimization: Results from an Online Survey’ (2016 forthcoming) *Journal of Interpersonal Violence*.

broadly on digital abuse and harassment, we did not explore in further detail the experiences of victims and perpetrators (although this is the subject of our current research). Other international surveys have likewise not yet investigated this issue adequately.¹⁴ Further qualitative and quantitative studies that investigate prevalence, as well as victim and perpetrator experiences of image-based offences, will help to guide the development of future interventions and responses.

Third, further investigations into the scope and adequacy of existing and new laws, both civil and criminal, is vital. This should involve an analysis of terminology for new specific offences, including the nature of the images themselves (eg, 'intimate images', 'private sexual images', or 'invasive images'), and other key terms such as 'consent' and 'distribution'. Investigation of the fault elements, defences and penalties, as well as the scope of new criminal offences (eg, whether the creation, distribution, and threat of distribution should all be covered), is also important. Moreover, law reform is necessary in Australian jurisdictions that continue to criminalise the behaviour of young people who consensually take and share images of themselves, and who may be subject to child pornography or child exploitation/abuse material offences in those jurisdictions.

While it is crucial to ensure that laws keep pace with the rapidly changing nature of technology, the law should not be seen as the only response to the problem of image-based sexual abuse. Non-legal measures should focus on addressing the key causes of such behaviours. This will involve understanding the motivations of perpetrators and the socio-cultural support for gender inequality and violence against women. Prevention measures should focus on changing social norms, beliefs and attitudes towards masculinity, femininity, sexuality and violence. Such measures should target perpetrators, potential perpetrators, and 'bystanders' who explicitly or implicitly provide support for such attitudes and behaviours. This should involve sustained efforts in educational programs in schools, universities and the community more generally with a focus on digital ethics and respectful relationships.

¹⁴ Some international studies investigating the prevalence of image-based abuse (among other behaviours involving technology) include: Manuel Gámez-Guadix, Carmen Almendros, Erika Borrajo and Esther Calvete, 'Prevalence and Association of Sexting and Online Sexual Victimization among Spanish Adults' (2015) 12(2) *Sexuality Research and Social Policy* 145; Kim Eichorn, *Lovers Beware: Scorned Exes May Share Intimate Data and Images Online* (4 February, 2013) McAfee Labs <<http://www.mcafee.com/au/about/news/2013/q1/20130204-01.aspx>>.

In addition, there is much more to be done collaboratively among researchers, practitioners, corporations and organisations, including internet, website, social media and other service providers, as well as government, educational and community advocates. A victim-focused approach, in addition to the one outlined through legal redress in Dickson's paper, should also encompass police training, information resources, helplines and public awareness campaigns. Responsibility for these behaviours must foremost be directed to the perpetrators of image-based sexual abuse, and the bystanders who provide implicit or explicit support to them.

Above all, any future research should be interdisciplinary and collaborative. Understanding the prevalence, nature, scope and responses to image-based sexual abuse should be undertaken by lawyers, criminologists, cyber experts, educationalists and others. Alyse Dickson's article, although predominantly providing an analysis of legal forms of redress, importantly recognises the importance of understanding this growing problem from these diverse perspectives.

III CONCLUSION

Australian law has not kept pace with evolving behaviours involving digital technologies. While legal redress is not the only way to address technology-facilitated abuse, it is an important part of the solution. In particular, criminal legislation should be introduced in all Australian jurisdictions to specifically capture the harms related to the non-consensual creation, distribution, and threat of distribution, of intimate images. A formal legal response should be implemented in conjunction with a range of other legal and non-legal remedies and support services at educational, community, law enforcement and policy levels. Lawmakers should ensure that such laws are broad enough to cover a range of different behaviours beyond the paradigmatic 'revenge pornography' example (eg, ex-lovers using sexually explicit images as a way to get revenge), but not so broad that they criminalise behaviours that lack specific, malicious intent. I am grateful to Alyse Dickson for providing a comprehensive and detailed review of current Australian laws, and for pressing the need for a victim-focused approach to addressing the harms of image-based sexual abuse, also known problematically as 'revenge pornography'.