

**THE LIMITS OF CRIMINAL LAW AND JUSTICE:
'REVENGE PORN' CRIMINALISATION, HYBRID
RESPONSES, AND THE IDEAL VICTIM**

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This comment is a response to Alyse Dickson's article in this volume entitled 'Revenge Porn: A Victim Focused Response'. Part I considers the challenges that 'revenge pornography' raises and considers the difficulties of controlling aberrant sexualised conduct in circumstances where modern technology provides an almost limitless capacity to capture and distribute private images. Part II looks at the wider socio-cultural context, the gendered and sexualised assumptions of hetero-normativity and warns of the risks of overlooking 'hidden' individuals or groups that do not align with normative discourses of the ideal victim.

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I THE CHALLENGE OF CRIMINALISING 'REVENGE PORN'

The criminalisation of 'revenge porn', the sharing of intimate images without the consent of the person depicted, presents a challenge for traditional institutions of law and justice. This problem is exacerbated because (together with the social and cultural contexts of what may be considered to be intimate, private or indeed sexual, in addition to the functionality of the new 'smart' technologies that exist to capture and distribute images), the nature of non-consensual distribution faces all the traditional complexities of consent in the law of sexual assault. The immediate and widespread distribution of non-consensual images over a difficult to control internet is also part of the problem. Criminalising 'revenge porn' is therefore vexed with all the difficulties of controlling aberrant sexualised conduct combined with the

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limitless capacity of the new technologies to capture private moments and distribute them at large.

These challenges place the response to ‘revenge porn’ offending outside the appreciable scope of most criminal justice systems. Instead, novel remedies must be considered to effect a satisfactory outcome for victims of such offences — namely, removal of the offending images from the offender’s electronic devices, or more difficult still, from social media or the internet itself. While this is not to suggest that very serious cases of non-consensual dissemination may be harmful and ought to be criminalised, the threshold at which we judge such conduct as warranting criminal sanctions carries consequences for all who disseminate private, intimate images over the internet. Given the modern preference for social media as a main mode of communication, criminalisation potentially captures a large section of the community. Alyse Dickson traces this complexity in her article “‘Revenge Porn’: A Victim Focused Response”,¹ setting out law reform initiatives and the corresponding inter-jurisdictional responses to ‘revenge porn’ offences.

Arguably, the seamless crossing of personal boundaries that leaves victims vulnerable to ‘revenge porn’ offences can be juxtaposed to the uneasy legal response found across all Australian jurisdictions. Many Australian and international lawmakers continue to grapple with the need to criminalise truly harmful and offensive conduct on the one hand, while delineating the everyday use of the new technologies to limit criminalisation of the innocent, on the other. The real possibility that traditional avenues of criminal justice may not be adequate to respond to this kind of technology-assisted offending behaviour also raises the argument that criminal law and justice may no longer be the avenue for adequate intervention and correction of aberrant conduct. This necessarily leads us to question the authority of criminal law and our traditional recourse to criminalisation.

The literature that informs our inquiry necessarily focuses on sociological and legal perspectives that reflect not only on the normative gendered and sexualised context of ‘sexting’ as an activity between consenting adults, but also on the risks of this activity for younger persons or children, and the extension of this activity where images are then distributed beyond the remit of any previous agreement.² There is also the need to consider whether it is

¹ (2016) 2 *University of South Australia Student Law Review* 42.

² Murray Lee and Thomas Crofts, ‘Gender, Pressure, Coercion and Pleasure: Untangling Motivations for Sexting between Young People’ (2015) 55 *British Journal of Criminology* 454–73.

ever appropriate to consider the risks to children in this discussion, given that distributing sexualised images of children will always be prohibited. The starting point for adults is different, and indeed ‘sexting’ between adults can be seen as a way of adding to a relationship by allowing consenting partners to capture images that meaningfully enhance their sexual relationship. There are applications available through smart technology, mainly smart phones, that enable the capture and distribution of images to identified networks, further enhancing the notion that private consensual distribution can add to a person’s intimate life and relationships. Dickson addresses this issue by examining the response to the cyberbullying of children and, recognising the differences between the use of new technologies by adults and children, advocates the extension of executive functions to assist ‘take downs’ of offending images.³ The New Zealand experience is further explored in this regard.⁴

The extent to which non-consensual distribution of intimate images occurs inadvertently, negligently, recklessly or with the intent of causing real harm to the victim, lies at the face of any debate over criminalisation. Implicit in this debate is the acknowledgement that criminalisation on its own will be unlikely to bring justice to those suffering harm as a result of non-consensual distribution. Furthermore, criminalising at the lower levels of intent or *mens rea* (for example, recklessness, negligence or inadvertent distribution), can risk including conduct between adults that parliament may never have intended to criminalise.⁵ How the police will go about pursuing these new offences, given that new offences necessarily extend police powers of investigation, is also unknown. Further still, whether police will use the threat of new distribution-based offences to induce guilty pleas for other more common offences, offensive conduct, distribution of an indecent article, or harassment, intimidation or stalking for instance,⁶ is even less predictable.

³ See *Enhancing Online Safety for Children Act 2015* (Cth).

⁴ See *Harmful Digital Communications Act 2015* (NZ).

⁵ As to the level of intent to be attributed to the non-consensual distribution of an intimate image, see Standing Committee on Law and Justice, New South Wales Legislative Council, *Remedies for the Serious Invasion of Privacy in New South Wales* (2016), 60–3; see also Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *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* (2016), 5.18.

⁶ See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13 ‘Stalking or intimidation with intent to cause fear of physical or mental harm’.

Parliaments across Australia are grappling with the problem of ‘revenge porn’ but none has advanced a coherent solution to the problem. Dickson aptly identifies this lack of any singular reform option as both the weakness and the strength of any solution to the problem. The New Zealand reforms create a hybrid response by blending appropriate criminalisation, civil remedies and other actions including those formerly available through equity, as well as administrative responses based in the executive, as the means to respond to ‘revenge porn’. The state based response of Australian criminal justice with only weak links to a federal response may substantially inhibit the forming of an appropriate hybrid response in Australia.⁷ An assessment of the Victorian and South Australian provisions, together with what has been proposed by the Commonwealth, New South Wales, and the Northern Territory, suggests that while there are clear points of connection, substantial differences remain.

II THE WIDER SOCIO-CULTURAL CONTEXT AND THE ‘IDEAL VICTIM’

The issues of ‘revenge porn’ criminalisation extend far beyond the legal and multi-jurisdictional solutions to this novel and pressing problem.⁸ The socio-cultural, technological, gendered and sexualised context of disseminating intimate images also places at risk certain individuals and groups who are more

⁷ On 23 November 2016, Prime Minister Malcolm Turnbull announced that the Office of Children’s eSafety Commissioner was being reformulated to the Office of eSafety Commissioner, to accommodate the needs of adult victims of ‘revenge porn’ distribution. This change was announced following the Commonwealth inquiry (see above, n 5) into ‘revenge porn’ offences and seeks to build upon the hybrid response developed for at risk children. The decision to develop the office to include adult victims was predicated on the basis that adult women are particularly vulnerable to such offending, and self-help services have been developed in order to assist such victims navigate their options where a complaint is made. In a joint Press Release, Mitch Fifield, Minister For Communications together with Michaelia Cash, Minister For Women, stated ‘As part of a comprehensive range of measures to combat the non-consensual sharing of intimate images, the Office of the eSafety Commissioner will develop a new online reporting tool which will allow victims to report incidents as well as access immediate and tangible support. “This is about empowering women to take control online. The expanded role for the eSafety Commissioner will help women manage technology risks and abuse, and give women the tools they need to be confident when online,” said the Minister for Women Senator the Hon Michaelia Cash.’. Minister for Communications and Minister for Women, ‘New eSafety Commissioner Appointed in Expanded Role to Combat Non-Consensual Sharing of Intimate Images’ (Media Release, 23 November 2016).

⁸ Multi-jurisdictional responses have garnered attention lately regarding the seeking of solutions to problems that evade traditional approaches to policing and prosecution under criminal law. Precedents have been set here, particularly regarding non-traditional modes of intervention and investigation. See, eg, Anne-Marie McAlinden, and Bronwyn Naylor, ‘Reframing Public Inquiries as “Procedural Justice” for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice’, (2016) 38 *Sydney Law Review* 277–309.

readily inclined to share intimate images. Younger people, those dating or seeking a relationship, individuals (whether in a recognised relationship or not) who take images to enhance a sexual encounter, or established couples who take images to ‘spice up’ their existing relationship, may also be unduly exposed as potential victims *and* offenders.

Layered here are the gendered and sexualised assumptions of heteronormativity,⁹ where women are always seen as the victims of non-consensual distribution while men are always cast as the offenders¹⁰ who disseminate intimate images to gain further control of their vulnerable partners as they try to escape an abusive relationship. The Victorian reforms were predicated upon concern for vulnerable victims in ongoing, abusive relationships, particularly with regard to threats to distribute.¹¹ While some victims are women who are indeed exposed to control by a male partner out of ‘revenge’ dissemination or threats of dissemination,¹² the use of smart technologies by most individuals and groups means that ‘revenge porn’ offences must necessarily have a social and cultural context beyond the gendered and sexualised norms that currently locate ‘revenge porn’ offences within a heterosexual community of domestic and intimate partner violence. The point is not to diminish the significance of domestic or intimate partner violence and the finding of an appropriate legal and policy response to it. However, we must look carefully at all sections of the community before we criminalise distribution, because our identification of an ‘at risk’ community can blinker us from identifying other victims, and

⁹ Clare Cannon, Katie Lauve-Moon and Fred Buttell, ‘Re-Theorizing Intimate Partner Violence through Post-Structural Feminism, Queer Theory, and the Sociology of Gender’, (2015) 4 *Social Sciences* 668–687; Don Dutton and Katherine White, ‘Male Victims of Domestic Violence’ (2013) 2 *New Male Studies* 5–17; John Archer, ‘Sex Differences in Aggression in Real-World Settings: A Meta-Analytic Review’, (2004) 8 *Review of General Psychology* 291–322.

¹⁰ John Blosnich and Robert Bossarte, ‘Comparisons of Intimate Partner Violence among Partners in Same-Sex and Opposite-Sex Relationships in the United States’ (2009) 99 *American Journal of Public Health* 2182–4.

¹¹ *Summary Offences Act 1966* (Vic) ss 41DA, 41DB. See also *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); Explanatory Memorandum, Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 (Vic) 39–40.

¹² Media attention has focused almost exclusively on the female victim of intimate partner violence. See *Summary Offences Act 1966* (Vic) s 41DB as to threats to distribute. The focus on female victims has also resulted in some women being blamed for allowing intimate images to be taken in the first instance. However, reports are emerging of female offenders: George Sandeman, ‘Revenge Porn Case Sees First Woman Convicted for Victimising Male Partner’, *The Sun* (online) 9 April 2016 <<https://www.thesun.co.uk/archives/news/1121275/revenge-porn-case-sees-first-woman-convicted-for-victimising-male-partner/>>.

risks missing other ‘hidden’ individuals or groups that do not align with normative discourses of the ideal victim.¹³ Most people use the new technologies — and some use it inappropriately — but further ethnographic research is needed.

Alyse Dickson’s article provides much needed analysis of the legal context of ‘revenge porn’ criminalisation, advancing the case for the movement to multi-jurisdictional responses beyond the criminal law. This piece makes an important contribution to a literature lacking detailed analysis of the case for criminalisation with an exploration of viable alternatives beyond the criminal law. The vexed problem of ‘revenge porn’, its sociological and gendered context, and its problematic interconnection with the new technologies, suggests that more work needs to be done before a fair, adequate and workable solution is found. Recourse to criminalisation as a first and perhaps singular response to a complex social and technological problem must be assessed critically with a view to alternative pathways, and in this regard, Dickson’s article shows the vital importance of beginning with sound legal analysis.

¹³ Nils Christie, ‘The Ideal Victim’ in Ezzat Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (St. Martin’s Press, 1986) 17–30.