

**Criminal Code Amendment (Private
Sexual Material) Bill 2015**

Exposure Draft

DISCUSSION PAPER

September 2015

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National action to address “revenge porn”

The Australian Labor Party intends to amend the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to criminalise “revenge porn” under federal law by introducing the Criminal Code Amendment (Private Sexual Material) Bill 2015.

The proposed amendment bill is intended to target individuals who share, or threaten to share, private sexual images or film recordings of others without consent and with the intention of, or where there is the risk of, causing that person harm or distress, as well as those who operate “revenge porn” websites. These offences should capture sharing via all forms of telecommunications including SMS, email, websites and social media.

A copy of the exposure draft is available to view and download from the Australian Labor Party website at www.alp.org.au/endrevengeporn

The enclosed discussion paper invites comments on specific aspects of the exposure draft. It is not claimed that this paper has canvassed every possible issue in relation to its subject matter. Submissions that do not respond to the specific questions posed, but raise other issues, are welcomed.

Comments should be submitted to the Australian Labor Party via the feedback submission portal at www.alp.org.au/endrevengeporn or via email to Tim.Watts.MP@aph.gov.au by Friday **2 October 2015**.

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Federal Member for Griffith**

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Overview

The purpose of this paper is to invite discussion about if, and if so, how, the criminal law should respond to the emerging issue of “revenge porn” and other non-consensual distribution of what would otherwise be very private images and recordings.

Non-consensual sharing of private sexual images and recordings

The emergence of the internet, in particular social media, and the proliferation of mobile devices with sophisticated photographic and film recording capabilities, have given rise to a new form of sexual victimisation, colloquially referred to as “revenge porn”. This involves sharing private sexual images or film recordings via SMS, email, websites and social media platforms, without the subject’s consent. This can cause harm and distress – usually, the sharer’s intention.

In many cases, the subject of the intimate material originally shares it with the offending party voluntarily: for example, a person sharing a photograph of their naked body with another person, with whom they are in a relationship, via SMS, email or a social media platform like Snapchat (“sexting”).

Later, after that relationship breaks down, the offending party widely disseminates the naked photograph without the consent of the subject, or threatens to do so. This can occur via SMS, dedicated “revenge porn” websites or social media. This conduct may be designed to shame and humiliate the subject or punish them for discontinuing the relationship. In other cases the unauthorised sharing of intimate material, or the threat to do so, is intended to harass the subject or coerce them to engage in conduct against their will. For example, someone may threaten to send private sexual images to their partner’s family to pressure that person to continue their relationship.

Private sexual images or film recordings are not always obtained from the subject with consent. In some cases this material is obtained through “hacking”, from the subject’s computer, Facebook page, or cloud storage, or by other illegitimate means. The private material can be shared for the perverse thrill of harming a stranger, or to drive traffic to a website. Although this paper uses the colloquial term “revenge porn” (because that is the commonly used term), it should be understood that sometimes material is distributed not for revenge but for other reasons.

“Revenge porn” can have a devastating impact on its victims including severe psychological distress and damage to relationships, community standing and career prospects. Many “revenge porn” websites include victims’ contact information, leading to further online harassment and fears for physical safety.

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According to a McAfee survey reported by the American Psychological Association, one in ten ex-partners has threatened to expose intimate images of their ex-partner online, and sixty percent of those who threatened to expose intimate photos followed through on their threats.

Existing legal response

In October 2014 the Victorian Parliament became the first Australian jurisdiction to enact criminal offences to deal with “revenge porn”. The Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 inserted Sections 41DA and 41DB into the *Summary Offences Act 1966* (Vic) to make it an offence to distribute, or threaten to distribute, an intimate image of another person, where that distribution would be contrary to community standards of acceptable conduct. These offences are punishable by up to 2 years imprisonment.

As “revenge porn” grows as a global phenomenon, lawmakers around the world are increasingly enacting laws to criminalise this behaviour. Legislation targeting “revenge porn” has been introduced in the UK, several states in the US, Canada, Israel, Brazil and the Philippines: see for example Section 33 of the *Criminal Justice and Courts Act 2015* (UK).

There is no federal offence specifically targeting “revenge porn” in Australia. However, Division 474 of the Criminal Code criminalises a range of conduct in relation to the use of telecommunications services. For example:

- Section 474.17 – using a carriage service to menace, harass or cause offence;
- Section 474.19 – using a carriage service for child pornography material; and
- Section 474.27A - using a carriage service to transmit indecent communication to a person under 16 years of age.

“Carriage service” is defined in the Dictionary to the Criminal Code to have the same meaning as that in the *Telecommunications Act 1997* (Cth), which defines “carriage service” as “a service for carrying communications by means of guided and/or unguided electromagnetic energy”. This definition captures transmission of images or film recordings via SMS or email, and uploading and sharing them via the internet and social media.

Division 474 of the Criminal Code relies on the Commonwealth Parliament’s power to make laws with respect to “postal, telegraphic, telephonic, and other like services” under Section 51(5) of the *Australian Constitution* and the incidental power under section 51(39).

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Absent the protection of the criminal law, Australians are forced to rely on private law remedies to respond to “revenge porn”. These may include seeking an injunction or damages for the equitable wrong of breach of confidence, claiming breach of copyright, where the victim owns the copyright of the offending material, or pursuing defamation proceedings. None of these remedies is ideal or entirely fit for purpose.

In addition, there has been some very limited judicial recognition of a tort of invasion of privacy. This tort is far from established in Australia, though there have previously been calls for the creation, by statute, of a civil wrong in relation to serious invasions of privacy. As recently as last year the Australian Law Reform Commission made recommendations in relation to the design of such a cause of action. These issues are beyond the scope of this paper which focusses on the possibility of a criminal law amendment. It does not deal, in detail, with suggestions for improving the availability of private law remedies.

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Issues for consideration

1. Threats to share private sexual material

The threat to share private sexual images can be as abusive towards victims as actually sharing the material. Threats can be used as a mechanism for exercising power and control over another individual, and can have a significant impact on a person's mental health.

The proposed amendment bill would make it a criminal offence to threaten another person that private sexual images or recordings of that person will be shared. It will also make it an offence to threaten to share a private sexual image of a third person. For example, it would be an offence for a person to threaten a mother that they will share a private sexual image of her daughter.

- 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)?

2. The meaning of “private sexual material”

The term “revenge porn” can be used to describe a range of behaviours that involve the sharing of sexual images or recordings of a person without their consent. These behaviours may be done to exercise power or control over a person, to humiliate or shame a person, or for the perverse thrill of knowing that the subject of an image did not consent to it being shared.

“Revenge porn” can be understood as an extreme example of a broader range of behaviours that can be referred to as “technologically-facilitated sexual violence”. The act of sharing private images without consent is arguably a form of sexual violence; regardless of whether the images are per se “sexually graphic”.

The proposed amendment bill responds to the harm that is, or can be, caused to victims as a result of the non-consensual sharing of private images, and does not unduly focus on the sexual nature of the images being shared. The meaning of private sexual material therefore covers not only the sharing of images that are necessarily “sexual” but also the kinds of images that a reasonable person would not expect to be made public having regard to the circumstances in which the image or recording was taken, and any other relevant circumstances (such as the subject's cultural or religious background).

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- 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?

3. Intention of perpetrators

The consequences for victims of “revenge porn” can be severe, including humiliation, online harassment, damage to future relationships and careers, and damage to mental health. There have been victims of “revenge porn” who have committed suicide.

As stated above, sharing private sexual 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.

The proposed amendment bill focuses on the effect of “revenge porn” on victims, as opposed to the intention or motivation of the perpetrator. The offence would apply where the behaviour is engaged in with the intention of causing harm or distress, or where there is a risk that the behaviour would cause harm or distress.

- 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?

4. Operating a “revenge porn” website

There have been a number of high-profile incidents of “revenge porn” globally that have involved people creating and operating websites that feature, promote and earn money from the non-consensual sharing of private sexual images. “Revenge porn” is also circulated via online forums and groups to a wide audience. The proposed amendment bill criminalises this kind of behaviour and applies a harsher penalty due to its large-scale nature and its serious effect on victims.

- 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?

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5. Protections for the media

It is important that the media is able to freely disseminate information that is in the public interest. The proposed amendment bill includes a defence for people that share private sexual images without consent by the media where this is in the public interest.

However, 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.

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

6. The meaning of “consent”

The lack of consent to the sharing of private sexual images is what makes “revenge porn” a sexual violation that should be criminalised.

There are circumstances in which images or recordings that might fall into the scope of the term “private sexual material” may be distributed with consent. That includes consensual public sharing – such as pornography consensually made (putting aside philosophical questions that may arise in that regard). It might also include anatomical depictions for use for medical or other similar purposes. Similarly, a person might consent to a particular image being shared with specific people but not the public at large.

The proposed amendment bill defines “consent” to include both general consent to the sharing of images and consent to particular instances of sharing that may be given either expressly or by necessary implication.

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