More than Revenge: Addressing the Harms of Revenge Pornography

Report of the More than Revenge Roundtable

Hosted by Monash University, La Trobe University and RMIT University

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2. Introduction

The non-consensual distribution of intimate images, also known as ‘revenge pornography’ has been increasingly identified as a significant and serious problem, warranting substantial legislative reform and non-legal remedies. Yet little information is available to date on these types of behaviours, or the extent of harms caused to victims. What is clear is that this form of image-based sexual exploitation is occurring globally, and research is needed to assist in the development of: concise laws, training for criminal justice authorities, social workers and victim advocates, and education and prevention campaigns, in order to respond effectively to the victims and perpetrators of these harms.

“Whatever solutions we come up with, they must deter. At the moment we are trying to limit the damage once it has already been done. The point of legislation is to be expressive and communicate to society that this is something you should not do – so don’t do it. People must understand how serious this is and that it will ruin someone’s life ... Social attitudes don’t change merely because of the law. However, the more the law explicitly recognises that this is a social problem, the more we may address some of the harms. It is the bigger social attitude problem that we have to fix”

(Professor Mary Anne Franks).

‘Revenge pornography’ is a media-generated term used to describe the distribution of sexually explicit or intimate images of another person without their consent. The term is a misnomer (Franks 2015), since not all perpetrators are motivated by feelings of revenge, and not all content constitutes or serves the purpose of ‘pornography’. Indeed, labelling such images pornographic may be highly offensive to victims. Some scholars have alternatively labelled the behaviour as ‘non-consensual pornography’ (Citron & Franks 2014; Franks 2015), ‘involuntary porn’ (Burns 2015), or ‘non-consensual sexting’ (see Henry & Powell 2015a). However these alternate terms are also problematic, in part because they tend to focus on the behaviour of the victim (e.g. the voluntariness of the creation and/or distribution of the image) rather than on either the abusive impacts of the behaviour or the perpetrator’s actions as a form of sexual violation and exploitation. Consequently, we prefer to name these harmful behaviours as they are – a form of image-based sexual exploitation (Henry, Flynn & Powell 2015). We contend that this term better captures the diverse range of harmful behaviours increasingly reported by victims and allows for clearer distinctions between child sexual exploitation material and adult victims of image-based sexual exploitation, which are not distinct in current terminology. However recognising that such a term does not currently carry significance in broader public understanding and debates on this issue, the term ‘revenge pornography’ is used throughout this report.

“While we can deal with it solely through law, the attitudes will remain and women will continue to suffer in a myriad ways. There is an expressive value of the law, but what do we do for women after the fact? We need to take the discussions a step further”

(Professor Walter DeKeseredy).

Leaving aside definitional issues, it is important to note that revenge pornography includes a wide range of behaviours and motivations. It includes images originally produced or obtained with and without the consent of the victim, and may involve: images obtained (consensually or otherwise) in an intimate relationship; photographs or videos of sexual assault/s; images obtained from the use of hidden devices to record another person; stolen images from a person’s computer or other device; and pornographic or sexually explicit images that have been photo-shopped, showing the victim’s face.
While these wrongs can be perpetrated by jilted lovers who distribute or threaten to distribute images to get ‘revenge’ on their partner or ex-partner, revenge pornography can also involve acquaintances or strangers who distribute images in order to coerce, blackmail, humiliate or embarrass another person, or those who distribute images for sexual gratification, fun, social notoriety or financial gain.

The methods of distribution are likewise diverse, including text message or email to family, friends, colleagues, employers and/or strangers; uploading images to pornography websites, including mainstream pornography sites, or specifically designed revenge pornography or ‘ex-girlfriend pornography’ websites; uploading images onto social media, thread or imageboard websites; or more traditional means of distributing images in public places, such as through the post, letterboxes or public spaces.

While the non-consensual distribution of intimate images may cause minimal harms to some, for others there may be profound, adverse and long-lasting impacts. For example, victims may be at risk of stalking if their personal details are revealed next to their images online (known as ‘doxing’), or if information underneath their images incites others to make sexual demands of them in person. Images may be shared or distributed to children, intimate partners, family members, friends, colleagues and strangers, resulting in feelings of shame and humiliation to both the victim and their significant others. This may substantially affect relationships with others, including leading to a loss of employment or future employment prospects and relationship breakdown. Images are also being distributed (or threats are being used to distribute images) in domestic violence contexts, meaning that victims may be forced to engage in non-consensual acts, stay in a relationship, or refrain from pursuing criminal charges or an intervention (apprehended violence) order. This adds a significant burden on victims who may already find it difficult to leave their violent partners (Henry & Powell 2015a). Like sexual violence generally, victims may be blamed for engaging in certain behaviours, including those who consent to having their photograph or video taken by another person, or those victims who took the image themselves. Victim-blaming is likely to exacerbate the diverse social, financial and psychological impacts of this harmful behaviour.

“Women online receive certain types of abuse that men do not. It can take the form of revenge pornography but not always. Revenge pornography is one of the worst forms and one of the hardest to ‘undo’. There are impacts on careers and educational opportunities and the enduring threat of disclosure. There is a strong disciplinary effect on other women (it could happen to you). It is quickly becoming an option for people to shut women up; a virulent form of online misogyny. Revenge pornography is a particularly disturbing type of conduct”

(Professor Mary Anne Franks).

Overall, victims may feel unsafe in their own homes and may suffer significant emotional distress. They may retreat from engaging in both offline and online social activities. They may suffer anxiety, depression and a host of other psychological problems as a result of knowing that their images are out in cyberspace and that they have little control over who possesses these images, or whether those images are being continually distributed thereafter (Flynn et al 2015). To add to these concerns, the effect of revenge pornography in society more generally is to consolidate the idea that the bodies of women and girls, as well as other sexual minorities, are available for objectification and consumption (Henry & Powell 2015b).

In Australia, there is no federal law pertaining to revenge pornography. Instead, wide-ranging offences, including the use of a carriage service to menace, harass or cause offence, exist under the Criminal Code Act 1995 (Cth) s 474.17. However this telecommunications offence is too broad in scope to capture the types of harms caused when intimate or sexually explicit images are distributed or disseminated without consent. To our knowledge, this charge has only been used once in relation to ‘revenge pornography’ related behaviours (see R v Daniel McDonald and Dylan Deblaquiere [2013] ACTSC 122). While some have argued that the breadth of the telecommunications law is its strength (Australian Law Reform Commission 2014), and that this offence is perfectly adequate in terms of capturing a wide range of behaviours –
including revenge pornography – others maintain that the law is not widely known or actively enforced. As the Commonwealth Director of Public Prosecutions has warned, ‘[existing] federal laws are not properly protecting women from so called “revenge porn” attacks by aggrieved ex-lovers’ (cited in Wilson 2016).

In addition to an absence of legislation at the federal level, most Australian state/territory jurisdictions do not have specific revenge pornography laws. Instead, they seek to capture these behaviours under stalking, blackmail, voyeurism or indecency laws. To date, just two Australian jurisdictions have introduced revenge pornography offences. In 2013, South Australia made distributing an ‘invasive image’ without consent a criminal offence. Under its Summary Offences Act 1953 (SA), perpetrators face a maximum of two years’ imprisonment if it can be proven that the distributor knew or should have known that the victim did not consent. ‘Invasive image’ is defined as a ‘moving or still image of a person – (a) engaged in private act; or (b) in a state of undress such that the person’s bare genital or anal region is visible’. In 2014, Victoria introduced more specific revenge pornography legislation, making it a criminal offence to maliciously distribute, or threaten to distribute, ‘intimate’ images without consent under the Summary Offences Act 1966 (Vic). The maximum penalty is two years’ imprisonment for distribution and 1 year imprisonment for threat of distribution. Available data indicate that 102 offences have been recorded by Victoria Police in the first 12 months of operation, with the majority of alleged offenders being male (86 percent) and the majority of victims being female (84 percent). Adolescents (10 to 17 years) and young people (18 to 29) are also overrepresented among both victims and alleged perpetrators (Data provided by Crime Statistics Agency, Department of Justice and Regulation, State Government of Victoria, 31 March 2016). Clearly, there is a need for further research to monitor the uptake and impacts of these and other newly introduced offences.

Internationally, Canada, Israel, Japan, New Zealand, the Philippines, the UK and 26 states in the US have introduced varying forms of revenge pornography legislation. In New Zealand, the Harmful Digital Communications Act 2015 (NZ) criminalises the non-consensual distribution of sexually explicit and/or intimate imagery (revenge pornography) and a number of extra-judicial mechanisms have been put in place to ensure harmful content is removed. England and Wales introduced specific revenge pornography legislation in April 2015 through the Criminal Justice and Courts Act 2015, and in October 2015, the Scottish Government introduced the Abusive Behaviour and Sexual Harm (Scotland) Bill 2015, which proposes a new offence of sharing private intimate material. There is however, no consistency in criminal laws across jurisdictions and a near absence of empirical research into their effectiveness.

“In the US there is a strange obsession with sex and yet an unwillingness to talk about it at all. Consent is easy to teach. Children can be taught about consent as it undermines their agency. It is not hard to do and doesn’t have to be graphic. At five, they know not to steal toys. Children understand that you don’t force someone to do something that they don’t want to do. Children know the difference between borrowing and stealing. Education must start younger and must include basics – tell all boys ‘treat the girls you like the way you treat the boys you like, and you have rights to your body and space’. This isn’t complicated, but we refuse to have this conversation”

(Professor Mary Anne Franks).

In the absence of specific criminal legislation, the only other legal avenues for victims of revenge pornography can be found in the civil law. Unfortunately, existing civil laws are inherently limited in addressing revenge pornography for a number of reasons. First, these laws are ill-suited in their applicability and language to revenge pornography. Second, there are significant costs associated with civil litigation for ordinary Australians who may not have the financial means to bring civil action. And third, the civil laws arguably privatise the issue of revenge pornography and do not serve as an effective deterrent against future behaviours. Thus in the absence of legislation criminalising these wrongs, victims have limited access to formal justice processes.
It is these issues relating to revenge pornography that culminated in the *More than Revenge: Addressing the Harms of Revenge Pornography Roundtable* – an event organised by Dr Asher Flynn (Criminology, Monash University), Dr Nicola Henry (Crime, Justice and Legal Studies, La Trobe University) and Dr Anastasia Powell (Justice & Legal Studies, RMIT University). The roundtable brought together leading international scholars and legal experts to reflect on reforming responses to the serious legal and social problem of revenge pornography in Australia, the US and the UK.

The workshop provided a forum for a discussion about the ways in which practitioners, academics, advocates and stakeholders should or could respond to revenge pornography harms, within domestic, local, national and international contexts. A podcast of the roundtable is available at: [http://www.latrobe.edu.au/research/research-focus-areas/transforming-human-societies](http://www.latrobe.edu.au/research/research-focus-areas/transforming-human-societies).

The event formed part of a larger project, *Responding to Revenge Pornography: The Scope, Nature and Impact of Australian Criminal Laws*, funded by the Criminology Research Council (CRG08-16/17), a La Trobe University Transforming Human Societies (THS) Grant, and a Monash University Faculty of Arts Seed Research Project Grant. The project examines the non-consensual distribution of intimate or sexually explicit digital images of adults and represents the first Australian empirical study to investigate the phenomenon of revenge pornography, focusing on its nature, impacts and prevalence, as well as implications for Australian legal responses. Using a mixed-methods approach, the research aims to: (1) examine the scope and impacts of criminal legislation; (2) generate information on the prevalence of revenge pornography among Australian adults; and (3) investigate the impacts of these harms on adult victims.

> "People need to know that these provisions exist, for the law to have the expressive/communicative and symbolic function. The government needs to commit funds to take action to eliminate all forms of harms against women, instead of leave it to the voluntary charity organisations. The government should commit to ending violence against women”
> (Professor Clare McGlynn).

This report summarises the key themes and discussions emerging from the roundtable held at the Monash University Law Chambers on 22 February 2016. The report follows the structure of the event, providing a summary of themes and concerns identified in the two sessions: *Challenges and Experiences of Revenge Pornography: International Perspectives* and *Challenges and Experiences of Revenge Pornography: Australian Perspectives*. A brief discussion outlining the recommendations of the Australian Senate Legal and Constitutional Affairs Reference Committee Inquiry into the phenomenon colloquially referred to as ‘revenge porn’, released on 25 February 2016, then follows. The report ends with concluding comments and references.

The organisers would like to thank Rachael Burgin, Kate Burns and Madeleine Ulbrick who acted as rapporteurs on the day, and have contributed to the writing of this report.

> "We must try to get companies to think about this and the channels of distribution. It was a very big deal that Google committed to removing images, however all of it is after the fact – the victim must become aware and must navigate the system. We don’t want to wait for someone to be harmed before we act. Technology companies could use a pop-up to warn users when uploading an image to ensure consent is obtained; a speed bump to curtail impulsive behaviour. We can demand a lot more from companies in terms of being proactive”
> (Professor Mary Anne Franks).
3. Challenges and Experiences of Revenge Pornography: International Perspectives

Presenters
- Professor Walter DeKeseredy, Anna Deane Carlson Endowed Chair of Social Sciences, Director of the Research Centre on Violence, Professor of Sociology, West Virginia University (US)
- Professor Mary Anne Franks, Legislative & Tech Policy Director and Vice-President of the Cyber Civil Rights Initiative, Professor of Law, University of Miami (US)
- Professor Clare McGlynn, Professor of Law, Durham University (UK)

Key Topics
- Cultural Contexts and the Revenge Pornography Environment
- Fighting Revenge Pornography in the United States
- Revenge Pornography Reflections from the United Kingdom

Cultural Contexts and the Revenge Pornography Environment
Professor Walter DeKeseredy

Professor DeKeseredy identified revenge pornography as gaining significant attention in the US following the creation of the website, *Is Anyone Up?* This website was founded by Hunter Moore who was recently sentenced to two years and six months in prison, fined $2,000 and ordered to pay $145.70 restitution to one of the victims featured on the website (this was the value that Moore paid to obtain the photos of this particular victim). In discussing the harms of revenge pornography, Professor DeKeseredy noted the importance of meaningful dialogue about this problem, and the need for those researching and working in this field to continue to highlight the link between these harms and violence against women more generally, as these types of images can be used to coerce and control women as a continuation of sexual and physical violence. In what became a common theme of the day, Professor DeKeseredy acknowledged that the term ‘revenge pornography’ is itself problematic. Like the terms ‘intimate partner violence’ and ‘family violence’, he argued that ‘revenge pornography’ does not recognise the gendered nature of this form of sexual violence. In highlighting this point, Professor DeKeseredy drew on comparisons with family violence and stressed that how we name social and legal problems like revenge pornography has implications on how the public understand the phenomenon and how we respond to it. He explained that moving to gender-neutral terms allows certain groups (i.e. conservative groups, men’s rights groups) to falsely claim that women are as violent as men.

Professor DeKeseredy sought to highlight the concept of revenge pornography in its broader sociological context – as a sociological phenomenon. He said this was a social problem that requires responses that avoid individualising the harms experienced by victims; an outcome which has the potential to divert attention away from broader social forces and the critique of society that must be considered in any response or prevention of revenge pornography harms. In flagging these issues, Professor DeKeseredy noted the importance of not ignoring the profound rape myths inherent to revenge pornography and the related patriarchal sense of male ownership of the women in the images.

Drawing on Kurt Lewin, Professor DeKeseredy stated that there is ‘nothing so practical as good theory’, and that there is a demonstrable need for a sound, theoretical understanding of revenge pornography to be used as the basis to inform policy. As a starting point, Professor DeKeseredy presented his concept of male peer support as a potential contributing explanation for males engaging in revenge pornography harms. He defined male peer support as ‘attachments to male peers and the resources that those men provide which encourage and legitimate women abuse’. In his model, the male peer support group encourages and legitimises the abuse of women and one’s attachment to male peers (whether online or offline) then influences their behaviour.
DeKeseredy and his colleagues’ research on male peer support has been shown to be an indicator of violence against women, whereby violence is embedded within peer groups that engage in similar practices.

![Male Peer Support Model](image)

**Figure 1: Male Peer Support Model (DeKeseredy & Corsianos 2016)**

In the context of revenge pornography, men communicate and network online through revenge pornography websites, which enhances attachment of male peers and perpetuates and legitimises this problem. This subculture of violence is not restricted to any particular social group; however Professor DeKeseredy noted that men who are most likely to be abusive are part of a wider social network that encourages this. He explained that men’s rights’ groups have been shown to incite hatred against women and encourage other men to engage in this conduct/practice.

Connected to male peer support, Professor DeKeseredy argued, is the idea that patriarchy and masculinity provide a means for understanding revenge pornography, particularly in the context of ‘revenge’, on the basis that exiting relationships are a threat to masculine status, a threat to their dominance and a threat to the male sense of proprietary or ownership of ‘their’ women.

In another of the key themes of the day, Professor DeKeseredy acknowledged that while the law sends a powerful message to the community, there is a need for a comprehensive community based model to deal with violence against women and revenge pornography specifically. As such, he argued that the starting point for looking at revenge pornography should not be purely through a legalistic approach, but rather through a broader sociological lens that supports a comprehensive coordinated community based model (police, social workers, teachers, women’s advocates, sexual assault support workers), that targets the various aspects of society that contribute to this problem and a culture that permits the occurrence of revenge pornography harms.

**Fighting Revenge Pornography in the United States**

**Professor Mary Anne Franks**

Professor Franks’ presentation highlight the scale of the problem in the US (and globally), with her own research having identified around 3,000 sites specifically featuring revenge pornography images; a figure that does not include images that appear on mainstream pornography sites, social media, or blogs.
But the issue also expands beyond the image itself. As Professor Franks explained, it is not simply a matter of an individual releasing the photographs/videos, they also link these images to the victim’s social media accounts and provide personal information such as the victim’s name, email, home address and phone number, next to the image. In her experiences, the specific revenge pornography sites encourage submission of posts and ask for personal information to ensure the women in the images can be identified. In fact, some sites include a feature to allow users to search names and ‘find somebody that you know’.

In discussing terminology, Professor Franks argued that ‘non-consensual pornography’ was a more appropriate term than ‘revenge pornography’. While acknowledging some people’s concerns with using the term pornography, Professor Franks explained that the term captures the circumstances where a person is forced to become sexual entertainment for others without their consent; in this way, it is not a pornographic activity that the image exists, rather the act of making it entertainment is the pornographic element. The non-consensual element then captures that the disclosure of sexually graphic images, whether obtained without consent (e.g. hacked) or within the context of a private and confidential relationship, is non-consensual, and a form of violence.

Drawing on US experiences, Professor Franks stressed that these images constitute much more than revenge. Among many other reasons, they can be sent as a game or entertainment, and as a form of control and abuse. In the US, perpetrators have included, among others, police officers (confiscating phones, finding compromising images and sending to other officers), current partners, ex-partners, individuals sharing recorded sexual assaults, strangers, acquaintances and college fraternity members taking photos of naked, unconscious women and sharing the images on Facebook groups dedicated to this form of violence. In noting these various cases, Professor Franks highlighted the many different forms of this problematic behaviour and the many different types of parties involved. They range from the original discloser (confidante, stranger, abuser), to the distributor (primary, secondary) and the audience comprising the willing (those who seek out imagery), and the unwilling (those that didn’t choose to receive the image and are often victimised in the process, such as the victim’s family members).

According to Professor Franks’ research, 90 percent of revenge pornography victims are women. Drawing on the McAfee study she was involved in, Professor Franks noted that one in ten perpetrators had threatened to disclose an image and 60 percent of these followed through with the threat. Professor Franks also mentioned that approximately 20-30 victims each month contact the Cyber Civil Rights Initiative (CCRI) – a non-profit organisation dedicated to challenging online harassment and abuse. Professor Franks is the Legislative and Tech Policy Director and Vice-President of the CCRI.

In describing revenge pornography, Professor Franks noted that the harms can be categorised as sexual abuse, intimate partner violence, harassment, harms against women, discrimination and an invasion of privacy. However, the only harm that has gained traction in the US in a legal policy context has been the privacy invasion caused by such images. While acknowledging this as a real and problematic outcome of revenge pornography, Professor Franks stressed the importance of recognising these behaviours as violence against women – as conduct that seeks to silence and harm women, and drive them out of important spaces (such as online, employment, education). In this regard, it is important to speak less about these behaviours as harms that are generalisable to all members of the community, and instead, discuss them as a problem that affects predominantly women.

Professor Franks also identified the powerful role that technology can play in increasing the benefits of this industry of humiliation and form of abuse for perpetrators – for example, being affordable and easy, offering anonymity and social validation, the potential for social and monetary profit – while decreasing the costs of the abuse for perpetrators and simultaneously increasing the negative consequences for victims. For example, the amplification and permanence of the abuse leaves many victims feeling trapped and silenced for fear of identification or further exposure.
In the US, there have been some law reform efforts with 26 states and Washington DC implementing laws that can be applied to revenge pornography. A Federal Bill is also being introduced into Congress this year (2016). But one of the key challenges identified by Professor Franks has been negotiating freedom of expression versus privacy/safety/censorship, and the fundamental need to recognise women as equals. In this regard, there has been resistance to legislative intervention. The primary opponent has been the American Civil Liberties Union (ACLU). The ACLU have advocated for civil and criminal legislation regulating personal identifying information (e.g. medical records). However, they view revenge pornography as a constitutionally-protected expression. As Professor Franks explained, the ACLU will fight any federal legislation regulating revenge pornography. The ACLU was involved, for instance, in a lawsuit against the state of Arizona in relation to its revenge pornography laws.

Another challenge has been in the drafting of appropriate laws, where there has been a focus on including an ‘intent to cause harm’ requirement, limiting the sharing of images to internet/online only, and some states only prosecute if the perpetrator is an intimate partner. As a result, Professor Franks notes that some forms of offending have failed to be captured by the laws. For example, a ‘satirical group’ on a closed Facebook forum encouraged users to upload pictures of unconscious women at parties (without the knowledge or consent of the women). Despite this clearly falling into most definitions of revenge pornography, a case could not be made that a law was broken, because there was no express intent to cause distress to the victims, as this was a Facebook group accessible to members only.

Professor Franks also reflected on the Australian Senate Legal and Constitutional Affairs Reference Committee Inquiry into the phenomenon colloquially referred to as ‘revenge porn’, specifically, the comments of the Australian Federal Police Assistant Commissioner, Shane Connelley, who stated that ‘people have to grow up in terms of what they are taking and loading onto a computer because the risk is high … If you go out in the snow without clothes on you will catch a cold. If you go on the computer without your clothes on you catch a virus’ (Mr Connelley, Committee Hansard, 18 February 2016: 45). In responding to these comments, Professor Franks not only noted that ‘this is literally not how a cold works’, but also highlighted the problematic nature of such conceptualisations of revenge pornography as it removes accountability from the perpetrator and shifts blame onto the victim. She argued that revenge pornography is not a virus (computer or otherwise); and it is not something that just ‘happens’: someone is choosing to share images without consent and that is where the focus should be.

Revenge Pornography Reflections from the United Kingdom
Professor Clare McGlynn

Professor McGlynn’s presentation provided a thorough overview of the benefits and limitations of the laws recently introduced in England and Wales, and those proposed in Scotland. In doing so, she demonstrated that despite being introduced as a way to ‘help women’, the laws and proposed law do not adequately take into consideration women’s (victims’) experiences. A clear example of this was the failure of the English and Welsh laws to recognise revenge pornography as a form of sexual violence, thus it is not situated within the law’s broader response to sexual offending. In this regard, revenge pornography laws do not have the same anonymity provisions normally extended to victims of sexual violence.

Like Professors DeKeseredy and Franks, Professor McGlynn explained that these harms require far more depth than simply being referred to as revenge pornography. Instead, she referred to the phenomenon as ‘image-based sexual abuse’. She argued that using a term like image-based sexual abuse conveys the seriousness of the harms and better captures the breadth of images including those involving sexual assaults, voyeurism, up-skirting, revenge pornography, domestic abuse and hacked images.

Professor McGlynn noted that there is a failure to fully recognise the harm caused by image-based sexual abuse including harms relating to: health, well-being, physical safety, rights to privacy, dignity, and sexual expression; and this lack of acknowledgement result in the normalisation of non-consensual sexual activity and the minimising and trivialising of this form of sexual violence.
She argued that this lack of understanding and appreciation exists across all different levels of society, and this in turn impacts on the sorts of laws and policies that are adopted. The failure to recognise harm was exemplified in the example Professor McGlynn gave of a male perpetrator in England who after being found guilty and sentenced to a period of imprisonment for posting a video of his ex-girlfriend on a pornography website without her consent said, ‘I wish I was going to jail for something worthwhile’. However, Professor McGlynn noted that the failure to understand the harms of revenge pornography is not just common to perpetrators; there is also a widespread lack of understanding in parliament among the lawmakers. For example, in Scotland, the proposed legislation excludes the non-consensual sharing of up-skirting images. While there are laws that prohibit the taking of such images, the proposed revenge pornography laws do not include the disclosure and sharing of these types of images. When highlighting this glaring omission to those involved in drafting the Scottish laws, Professor McGlynn said the members of parliament were surprisingly unaware that the sharing of such images was a major issue, and instead decided that if they do implement a revenge pornography law, they will wait to see whether up-skirting becomes a major issue, before considering changing the proposed laws.

Professor McGlynn also outlined a number of limitations in the new and proposed laws. In England and Wales, there was a rush to legislate, which impacted on the breadth and strength of the laws introduced. In this way, there was a problematic focus on perpetrators (i.e. intent to cause distress) and a lack of attention to the harms of the victim. Professor McGlynn forewarned that any new laws in Australia should not require a focus on the victim showing harm or distress, in order for the offence to have occurred. Additionally, the English and Welsh law is unlikely to cover hacked images or secondary distribution (i.e. on social media), and does not include faked or photo-shopped images. Professor McGlynn thus stressed that Australian legislators should consider the flaws of the English, Welsh and proposed Scottish laws.

In discussing the educative role of the law, Professor McGlynn noted that the expressive and symbolic value of the new criminal laws in England and Wales should not be underestimated, however, she stressed the importance of teaming legislation with widespread educational programs. This occurred in England and Wales, where there was a large education campaign discussing the new laws and what constitutes revenge pornography. There was subsequently a large increase in reports to police and the ‘Revenge Porn’ helpline that was introduced dealt with over 1,800 calls in 6 months. Accordingly, Professor McGlynn suggested that any changes in Australian jurisdictions should be combined with an information and awareness campaign, as this is vital in ensuring awareness of the law.

4. Challenges and Experiences of Revenge Pornography: Australian Perspectives

**Presenters**
- Fiona Mort, Office for Women, Department for Communities and Social Inclusion, South Australia
- Sergeant Mark Higginbotham, Victoria Police, Melbourne Prosecutions Unit
- Alex Davis, Domestic Violence Unit, Legal Aid New South Wales
- Professor Barbara McDonald, Sydney Law School, New South Wales

**Key Topics**
- Gender Inequality and Challenges in the Law
- Challenges in Policing, Prosecuting and Preventing Revenge Pornography Offending
- Victim-Blaming and The Absence of Appropriate Responses
- Moving Beyond the Criminal Law

**Gender Inequality and Challenges in the Law**
In discussing revenge pornography, Fiona Mort identified one of the key challenges as being the absence of Australian research to date, and because it is a developing area, we have yet to determine which discourse we should place our discussion of these harms within. In terms of deficiencies in the law, Ms Mort flagged the difficulties in the law trying to keep up with constantly evolving technologies. As she noted, ‘older
people use Facebook, younger people use Snapchat because they think it disappears, but we now know there is technology to retain those images’. Drawing from the experiences in South Australia, Ms Mort discussed a recent case where consensual photographs of a woman taken by her partner were hacked by a third party in another country and distributed online, but there was little recourse for the victim or for the police to act. While recognising the difficulties of legislating for all types of offending (such as this case), she argued that the law needs to respond to these harms and be really clear that perpetration of these acts is within a context of violence against women.

Ms Mort stressed that any responses to revenge pornography needed to be situated within a gender inequality and gendered violence context. She argued that ‘the whole notion has arisen because we don’t have gender equality. It is shaming women, controlling them and silencing them. The threat to rape, harass and demean women is because we don’t like what they have to say’. In this regard, she highlighted the problematic victim-blaming attitudes that advocates have tried to shift in relation to sexual assault, now being seen in relation to revenge pornography – ‘it’s your fault for taking/having the images’.

Ms Mort also identified the following key challenges:
- Technology ensures mass impact of the harms;
- Large companies are struggling to respond appropriately;
- Transnational prosecutions are difficult and costly; and
- Popular culture is increasingly normalising sexual violence and gender inequality.

Ultimately, Ms Mort stressed the need for a change in the language society uses when discussing sexual abuse, including in the context of revenge pornography harms.

**Challenges in Policing, Prosecuting and Preventing Revenge Pornography Offending**

Drawing from his 20 years’ experience investigating and prosecuting sexual violence offences, Sergeant Mark Higginbotham identified a common, problematic attitude emerging in Victoria (Australia) among males, particularly young males, towards women. He described various examples of perpetrators who trawl Facebook and social media sites for women they can target – often those with low self-esteem, who are trusting and the perpetrator believes is unlikely to complain. He described the pages and pages of transcripts he had read of the interactions instigated by these men, all of which read as if the same person wrote the comments, because the same dialogue appears containing expressions of entitlement, claims of obligation because ‘he did something for her’, and then the abuse and controlling behaviour moves to threats of disclosure, shaming and victim-blaming.

Sergeant Higginbotham noted there are approximately 700 sex cases listed in the Melbourne Magistrates’ Court each financial year, and while the police and police prosecutors are trying to manage the experience for victims in a better way, sex cases are not generally resolved by guilty pleas, and the police must offer substantive evidence to prove the charges. On average, Sergeant Higginbotham suggested that just one in 20 complainants in sexual violence cases receive a positive outcome in court – an outcome he described as very poor.

A key challenge identified by Sergeant Higginbotham for the police is resourcing and an absence of power within the laws. The Victorian legislation covers revenge pornography as a summary offence, which means the police have no arrest powers. There is nothing they can do if someone contacts them to say, ‘this man is threatening to distribute images’. Likewise there is a 12 month statutory limit on any offence charged. This is important because there is around a 12 month lag for the analysis of a hard drive. Bearing in mind that the detectives tasked with investigating these offences have around 30 cases on the go at any one time, the delay in this evidence can result in these cases being given a low priority and further to this, the delay can result in many cases being permanently stayed, as the matters drag on for too long and there is a ‘justice delayed is justice denied’ requirement in place to protect alleged perpetrators from drawn-out proceedings. Sergeant Higginbotham also said that in his experience, it was very rare for the revenge pornography offence to be charged in isolation from other offences. Instead, it was being used to
supplement other forms of offending behaviour such as stalking, which may reduce the effectiveness of the offence in its own right.

While acknowledging that victims are being listened to and generally treated better by police, Sergeant Higginbotham noted there are still fundamental issues for victims in obtaining justice under the current laws and much more needs to be done.

**Victim-Blaming and The Absence of Appropriate Responses**

Alex Davis has been working in field of women’s rights for many years. Over this time, she noted there has been a significant increase in the number of women reporting issues of technology-facilitated abuse, including those experiencing revenge pornography. In her experience, Ms Davis has found that this type of behaviour is used in tandem within a broader context of violence and is often used as a tool to prevent women from leaving a violent relationship, or to punish them if they do leave.

Ms Davis noted one of the biggest challenges in responding or preventing revenge pornography is the failure of society to see that the problem is about consent to share the images, not consent to make the images. Likewise, she identified victim-blaming as one of the biggest challenges and the need to target education campaigns to tackle gender inequality and victim-blaming in society. She noted that there is also a need for more police training, as clients are going to police wanting to report instances of revenge pornography and online harassment, and police are saying there is nothing that can be done. In highlighting this problematic outcome for women, Ms Davis supported Sergeant Higginbotham’s resource claims, noting that this absence of police action is closely linked to a lack of police funding and the fact police do not have the resources to investigate these harms efficiently or effectively.

In describing the situation in NSW, Ms Davis said that the absence of specific laws has meant lawyers such as herself are having to use existing laws very creatively. However, the laws relating to stalking and voyeurism are ill-equipped to deal with revenge pornography harms. In addition to flagging specific legislative reform, Ms Davis also noted the importance of having takedown orders that operate in tandem with education and further research.

**Moving Beyond the Criminal Law**

Professor Barbara McDonald was tasked with preparing the Australian Law Commission’s recommendations in relation to invasions of privacy in the digital era (2014). In doing so, she was involved in looking at invasions of privacy in all sorts of contexts, including reading submissions from domestic violence advocates, to drone enthusiasts and large corporations concerned about information being transferred overseas. During the course of the inquiry, Professor McDonald said it became very clear that revenge pornography was one of the most serious invasions of privacy in the digital era.

In considering laws to respond to revenge pornography, Professor McDonald noted that the key ingredients should include invasion either by intrusion into seclusion (e.g. a person in the shower, a covert camera in the roof) or by misuse of information (e.g. distributing images without consent), which, she argued, revenge pornography clearly fits into. In this scenario, intent or recklessness does not have to be directed at victim distress; it can be directed towards the invasion of privacy, and this is an objective test. In other words, the invasion of privacy – the sharing/misuse of the image – is the wrong, as this is the breach of privacy. The only question is whether the breach was intentional or reckless.

Professor McDonald stressed that there is a role for the civil law in relation to revenge pornography, because the police cannot do everything and people cannot always rely on the criminal law for justice. In making this point, Professor McDonald explained that this is why tort law developed, and there is certainly scope in Australia to provide a mechanism for people to bring an action forward in relation to an invasion of privacy breach.
5. The Australian Senate Legal and Constitutional Affairs Reference Committee Inquiry Recommendations

Key Recommendations from the Australian Senate Legal and Constitutional Affairs Reference Committee’s Report
- Australian governments should use the phrase ‘non-consensual sharing of intimate images’ or similar when referring to revenge pornography in legislation and formal documentation.
- The Commonwealth government should legislate against 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 the image/s exist.
- State and Territory governments should introduce legislation to capture revenge pornography offending that is the same or substantially similar to the recommended Commonwealth legislation.
- The Commonwealth government should empower a Commonwealth agency to issue takedown notices for revenge pornography images.
- The Commonwealth government should establish a formal mechanism for Commonwealth agencies and internet and social media providers to regularly engage on issues relevant to revenge pornography.
- The Commonwealth government should give further consideration to the Australian Law Reform Commission’s (2014) recommendations regarding a statutory cause of action for serious invasion of privacy.
- The Commonwealth government should implement a public education and awareness campaign about revenge pornography for adults.
- All Australian police should undertake training in relation to revenge pornography.

In November 2015, the Australian Senate’s Legal and Constitutional Affairs References Committee was tasked with investigating and reporting on the phenomenon colloquially referred to as ‘revenge porn’, which they defined as ‘sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm’. The Committee was asked to consider the impacts of revenge pornography on victims and the community more generally; examine the types of responses that have been introduced in other jurisdictions; and identify potential federal policy responses both criminal and civil.

The Committee received 32 submissions and heard evidence from 20 witnesses. The majority of the submissions supported the criminalisation of revenge pornography. As the Law Council of Australia explained, a federal criminal offence would offer a ‘uniform approach’ across Australian states and territories, which is important ‘in the digital age, where images can be distributed and accessed instantly in any jurisdiction’ (Legal and Constitutional Affairs References Committee 2016b). The NSW Office of the Department of Public Prosecutions also supported ‘a specifically targeted criminal offence [that] would fill a gap within the existing law and go some way towards addressing what is a growing – and highly damaging – phenomenon’ (Legal and Constitutional Affairs References Committee 2016b). Women’s legal and support services from across Australia similarly described a federal criminal offence as ‘an important and much needed lever in the Commonwealth government’s response to preventing violence against women’ (Legal and Constitutional Affairs References Committee 2016b). In short, a new federal criminal offence was considered a viable way to send a clear message to the community and potential perpetrators that these abusive behaviours are unacceptable and will not go unpunished.

The Committee released their report containing the abovementioned eight recommendations, three days after the More than Revenge Roundtable (Legal and Constitutional Affairs References Committee 2016b). The report identified a need for governments to introduce both Commonwealth and state/territory laws to specifically criminalise acts of revenge pornography, but further to this, highlighted the importance of adopting a comprehensive response that includes: a mix of civil remedies; professional training for police; a public education and awareness campaign on the harms of revenge pornography and any new laws
implemented; and the development of a body (or empowerment of an existing body) to issue takedown notices.

Much like the findings of the Roundtable, a key focus of the report was the need to move away from using the problematic term ‘revenge pornography’ in any new laws and in public debates, with the aim of addressing community perceptions and victim-blaming stereotypes – such as the views expressed by the Australian Federal Police Assistant Commissioner Steven Connelley discussed by Professor Franks at the roundtable. The Federal Government has yet to provide an official response.

6. Conclusion

Key Findings of the Roundtable

- ‘Revenge pornography’ should be replaced with a new term that captures the wide range of motivations and behaviours that relate to the non-consensual distribution of intimate images.
- Image-based sexual exploitation should be considered within a gendered context, taking into consideration also other factors such as race, religion, sexuality and socio-economic status.
- Any responses/laws implemented must take into account the sociological contexts, critiques and cultures in which they are being introduced.
- Problematic victim-blaming attitudes in society must be addressed and targeted by focusing discussions, campaigns and laws firmly on the perpetrator’s actions in disclosing the images without consent, not on the victim.
- A comprehensive public education campaign aimed at adults, and also children, must accompany any changes in the law.
- Civil law alternatives should be strengthened and work alongside the criminal law.
- The limitations in laws introduced elsewhere should be considered in any legislation introduced to avoid mirrored issues arising in the Australian context.
- Victims’ experiences must be at the heart of any laws introduced.
- Police resourcing and training must be improved to better reflect technological advancements.
- More research in this field is vital in order to provide an evidence-base for any policy reforms.

At the conclusion of the Roundtable, it became clear that Australian law has not kept pace with evolving behaviours where technology is used in some way to perpetrate violence or harassment. While legal redress is not the only way to address revenge pornography, there was a general consensus and indeed strong support for criminal legislation that specifically captures the harms related to the non-consensual distribution of intimate images. The Roundtable also demonstrated the importance of ensuring any laws implemented are broad enough to cover a range of different behaviours beyond the paradigmatic revenge pornography example (e.g. ex-lovers using sexually explicit images as a way to get revenge), but not so broad that they undermine the intentions and useability of the legislation.

Much like the Senate Inquiry’s report, a key finding of the Roundtable was the need for any formal legal responses to 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. As we argue elsewhere (Flynn, Henry & Powell 2016), while specific federal legislation criminalising revenge pornography is overdue, any new law should not be relied upon as the only mechanism for addressing these harmful behaviours. Instead, it will take a combination of legal and non-legal measures such as corporate and organisational service agreements and community codes of conduct that include clear statements on the unacceptability of revenge pornography; support and advocacy for victims of image-based abuse; training resources for police and service providers; and awareness-raising and prevention in the community, to create the cultural change needed to support victims, hold perpetrators accountable, and ultimately prevent these harms before they occur.
Another clear message arising from the Roundtable is the need to challenge the blame and stigma too often directed at victims, and communicate that it is the perpetrators who knowingly or recklessly distribute these images whose actions must be condemned. And finally, it is vital that additional research in this area is undertaken to better understand the scope, nature and prevalence of revenge pornography to ensure any responses have a sound theoretical and evidence-based from which to better address and prevent these harms.

7. References


**Legislation**

- Abusive Behaviour and Sexual Harm (Scotland) Bill 2015
- *Criminal Code Act 1995* (Cth)
- *Criminal Justice and Courts Act 2015* (Eng)
- *Harmful Digital Communications Act 2015* (NZ)
- *Summary Offences Act 1953* (SA)
- *Summary Offences Act 1966* (Vic)

**Cases**


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