

Responding to ‘revenge pornography’: Prevalence, nature and impacts

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List of acronyms

ABS	Australian Bureau of Statistics
ACORN	Australian Cybercrime Online Reporting Network
ACMA	Australian Media and Communication Authority
AFP	Australia Federal Police
ALRC	Australian Law Reform Commission
CALD	Culturally and Linguistically Diverse
CCRI	Cyber Civil Rights Initiative
HDCA	<i>Harmful Digital Communications Act 2015 (NZ)</i>
IBSA	Image-based sexual abuse
ICCPR	<i>International Covenant on Civil and Political Rights</i>
LGB	Lesbian, Gay and Bisexual
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer
LOTE	Language Other Than English
OeSC	Office of the eSafety Commissioner (formerly Office of the Children's eSafety Commissioner)
PTSD	Post-Traumatic Stress Disorder
SIAMA	Sexual Image-Based Abuse Myth Acceptance
VCSA	Victorian Crime Statistics Agency
VLRC	Victorian Law Reform Commission

Executive summary

Research aims and design

Image-based sexual abuse (IBSA) is a term used to describe a pattern of behaviours involving the non-consensual creation, distribution, or threats to distribute, nude or sexual images (photographs or videos). Also known as 'revenge pornography' or 'non-consensual pornography', IBSA affects a significant proportion of the population and has wide-ranging and significant impacts.

This report provides an empirical account of IBSA in Australia, including documenting the prevalence, nature and impacts of victimisation and perpetration, and analysing the effects of existing and proposed laws governing IBSA in Australia. The study addresses three key questions:

1. What is the nature and prevalence of IBSA in Australia, and what are the impacts on victims?
2. What are the merits and limitations of existing Australian and comparative legislative models for responding to IBSA?
3. What are the perceptions of key legal, policy and support stakeholders regarding the effectiveness of existing legislation and the need for new legislative models for responding to IBSA in Australia?

The study involved a mixed quantitative and qualitative methodology comprising the first-ever national online survey of IBSA victimisation and perpetration; legislative analysis of criminal offences in Australia and internationally; stakeholder engagement; and 44 in-depth interviews conducted with 52 key stakeholders across three states (New South Wales, South Australia and Victoria).

Key findings: National survey

Prevalence: Victimisation

The study found that 1 in 5 survey respondents (23%) reported being a victim of at least one form of IBSA. Most common among respondents were nude or sexual images taken of them without their consent, with 1 in 5 (20%) reporting these experiences. Also common were nude or sexual images being sent onto others or distributed without consent, with 1 in 10 (or 11%) reporting such experiences; a finding since replicated in a representative population-based national study commissioned by the Australian Office of the eSafety Commissioner (OeSC 2017). Nine per cent of survey respondents had experienced threats that a nude or sexual image would be sent onto others or distributed without their consent. The survey also found that 1 in 10 women reported someone taking an image of their cleavage without their permission ('downblousing') and 1 in 20 women reported someone taking an image up their skirt ('upskirting') without their permission.

Overall, the study found that women and men reported similar *rates* of victimisation, however there were differences in the *nature* of IBSA between women and men. Significantly, the survey found that some members of the Australian community were more likely than others to report being a victim of IBSA. This included: 1 in 2 Aboriginal and Torres

Strait Islander people; 1 in 2 Australians with a disability; 1 in 3 Lesbian, Gay and Bisexual people; 1 in 3 young people aged 16 to 19 years; and 1 in 4 people aged 20 to 29 years. The study found that victims of IBSA were almost twice as likely as non-victims to report experiencing high levels of psychological distress. These impacts were highest for victims who had experienced threats to distribute an image, of whom 80% reported high levels of psychological distress, consistent with a diagnosis of moderate to severe depression and/or anxiety disorder.

Prevalence: Perpetration

In terms of self-disclosed perpetration, the survey found that 1 in 10 (10.1%) respondents reported engaging in at least one IBSA behaviour. Almost 9% said that they had taken a nude or sexual image of another person without that person's permission, and nearly 7% said that they had distributed a nude or sexual image without permission. One in 20 (5.4%) also reported making threats to another person that they would distribute their nude or sexual images.

For all individual IBSA behaviours, the survey found that men were significantly more likely to report engaging in perpetration than women. Overall, 13.7% of men and 7.4% of women reported engaging in any IBSA perpetration. Perpetration was highest for males in the 20-29 (18.2%) and 30-39 (15.6%) age groups. For women, perpetration was highest at the 20-29 (9.3%) and 16-19 (9.1%) age groups, suggesting a younger cohort of women are engaging in IBSA perpetration as compared with men.

The study also reported on the characteristics of IBSA perpetration. Most respondents said the victim was a partner/former partner (23.7%), a family member (19.7%) or a friend (17.2%). In keeping with the victimisation findings, perpetrators reported similar numbers of males as female victims (males 34.8%; females 37%).

The study found a disturbing level of victim-blaming and harm minimisation attitudes among respondents. Overall, 1 in 2 men (50%) and 1 in 3 women (30%) held attitudes that either minimised the harms or blamed the victims. Despite widely-held victim-blaming attitudes among survey respondents, 4 in 5 Australian respondents (81%) agreed with the statement 'It should be a crime for someone else to share a nude or sexual image of another person without that person's permission'. These findings demonstrate the importance of education to address problematic and inconsistent community attitudes on IBSA.

A particularly pertinent finding was that 4 in 5 (81%) respondents agreed with the statement: 'It should be a crime for someone to share a nude or sexual image of another person without that person's permission'. Females (84%) were significantly more likely than males (77%) to endorse the criminalisation of IBSA. Both victims (81%) and non-victims (81%) of IBSA were just as likely to agree that it should be a crime. Perpetrators (77%) were somewhat less likely to agree that IBSA should be a crime than non-perpetrators (81%), though the margin of difference was not statistically significant. These findings indicate that there is broad support within the Australian community regarding the need for legal

consequences in response to IBSA, regardless of whether someone has experienced it personally as either a victim or perpetrator.

Key findings: Stakeholder interviews

Importance of specific criminal offences

Like the survey respondents, stakeholder participants indicated overwhelming support for the introduction of consistent federal and state/territory laws that criminalise IBSA. In particular, the study found majority support for federal leadership in creating a national approach to criminalising IBSA, which would then be mirrored across all states and territories. Participants stated that criminal laws send a clear message to the community that these behaviours will not be tolerated, recognising the significant harms associated with IBSA and providing scope for law enforcement to treat such behaviours more seriously.

Definitions

Participants expressed concerns about the most appropriate definitions to include in legislation to capture the varying contexts in which IBSA occurs. This was specifically mentioned in relation to defining 'distribution' and what constitutes an 'intimate image'. For most participants, it was important that: the definition of distribution includes 'showing' not just 'sending' or 'posting online'; an offence occurs regardless of whether the image was distributed to one or more people; and the offence is not premised on the distribution occurring through a telecommunications style carriage service. There was more conjecture around the definition of intimate images, but ultimately consensus emerged in relation to capturing nude, semi-nude and images of a sexual nature, in instances where one would have a reasonable expectation of privacy.

Requirement of intent and proof of harm

In keeping with current Australian legislative provisions (but differing from some international laws), participants overwhelmingly agreed that IBSA laws should not require the prosecutor to prove either that the perpetrator intended to cause harm or distress, or that the victim did in fact experience harm or serious emotional distress.

'Morph porn'

All but three of the 52 stakeholder participants expressed support for the inclusion of digitally manipulated images (otherwise known as 'morph porn' or 'deepfakes') in IBSA legislation. Those that did not support this requirement (which is captured in the New South Wales and Australian Capital Territory laws introduced in 2017) argued that the harm caused to victims was not as significant, therefore it did not require legislative intervention.

Non-sexual forms

While expressing concern regarding the cultural harms experienced by victims through the creation, distribution, or threat of distribution, of an intimate but not sexual image, the majority of participants rejected calls to include cultural standards (e.g. the non-consensual distribution of an image showing a Muslim woman without her hijab) in IBSA legislation at the current time.

Barriers to victim-reporting

Participants identified a range of challenges that hindered victims from reporting to police. Prominent on this list was a victim-blaming and harm minimisation mentality among law enforcement personnel. In addition to supporting better training for law enforcement in responding to victims, there was also majority support for introducing victim anonymity protections similar to those in place for other sexual offences to safeguard the privacy of victims and encourage increased levels of reporting.

Penalties

Participants supported a range of penalties for those found guilty of IBSA offences that included imprisonment, on the provision that this was not the first resort for young people. There was also support expressed for greater penalties for website hosts and organisations involved in profiting from IBSA.

Law enforcement challenges

There were a number of law enforcement challenges that were identified by stakeholders. These included: blurred jurisdictional boundaries; procuring sufficient evidence to mount a case; resource restrictions; a lack of technical knowledge; and/or awareness of applicable legislation. The challenges of implementing effective IBSA law are further reflected in low prosecution rates in Australia. In Victoria, for example, police data reveals that between 1 January 2015 and 18 July 2017, there have been 53 cases (28 arrests) of intentionally observing another person's genital or anal region (*Summary Offences Act 1966 (Vic) s41A*); 415 cases (62 arrests) of the non-consensual distribution of an intimate image (*Summary Offences Act 1966 (Vic) 41DA*); and 144 cases (52 arrests) of threatening to distribute an intimate image (*Summary Offences Act 1966 (Vic) 41DB*).

These low reporting figures are in contrast to the survey finding that 1 in 5 Australian respondents have experienced IBSA victimisation, suggestive of a level of ineffectiveness in the existing Victorian legislation – which is likely connected to challenges in policing.

Recommendations

This report makes key recommendation concerning strengthened legal options, working collaboratively with key stakeholders (such as law enforcement, companies, website moderators and support services), knowledge sharing, extending victim support services, developing primary prevention education directed at perpetrators, and further research.

Introduction

In 2014, hundreds of private, intimate images of well-known celebrities were posted onto a US-based website in exchange for bitcoins, the digital currency used to facilitate online transactions. The images had been stolen via a breach of Apple's iCloud (an online platform for backing up photos from Mac devices) and were later disseminated by traders and sellers through other social media sites, including Twitter, Tumblr and Reddit. Likewise, in June 2015, over 400 nude images of South Australian women and girls were published on a US-based noticeboard site and made available for download without the consent of the individuals appearing in the images. Stolen by hackers, as well as partners and ex-partners, the images were uploaded onto the site for trading and downloading.

Perpetrators who non-consensually create, distribute or threaten to distribute nude or sexual images include intimate partners, family members, friends, acquaintances and persons unknown to the victim. Their motivations are diverse and include retribution, social notoriety, monetary gain, voyeurism and sexual gratification. The images themselves may be self-created by the victim as a 'selfie' or produced consensually in the context of an intimate relationship. Alternately, images may have been altered, taken surreptitiously, created coercively, or may be taken of a sexual assault or rape. While prior to the Internet, perpetrators used more conventional means of maliciously distributing intimate images (such as via street posters and letterboxes), image-based sexual abuse (IBSA) represents a new and growing phenomenon that has significant long-term psychological, physical and social implications.

This introduction starts with a discussion of the terminology used in this report, before then presenting an overview of the relevant literature, and an outline of the research aims. The introduction ends with a brief overview of the report structure. The term 'victim' is used throughout the report to refer to those who are the subject of different forms of IBSA, however, the authors recognise the problems associated with this term, and that not all people identify with this label.

From 'revenge porn' to 'image-based sexual abuse'

'Revenge pornography' is a media-generated term typically used to describe the online distribution of nude or sexual images (photographs or videos) by a jilted ex-lover without the consent of the person depicted in the image. However, this term has been the subject of much critique on a number of intersecting bases. First, the term itself is a misnomer since not all perpetrators are motivated by revenge when they share nude or sexual images without consent (Franks 2016). Second, the focus is often narrowly on the distribution or sharing of images by jilted ex-lovers seeking revenge against a former partner, and as such, it does not adequately capture diverse forms of image-based violations, such as the non-consensual taking of nude or sexual images (e.g. 'upskirting', 'downblousing' or surreptitious filming in public or private places), or the threats of distribution (also known as 'sextortion') (see McGlynn & Rackley 2017; McGlynn, Rackley & Houghton 2017; Powell & Henry 2017). Third, the terminology likens non-consensual images to the production of commercial pornography, yet many images that are shared without consent have very little in common

with mainstream porn. Fourth, it minimises the harms done to victims by failing to acknowledge that the creation, dissemination or threat of dissemination of non-consensual nude or sexual images is a form of abuse, resulting in often quite significant impacts to those who experience it. Fifth, the term arguably has victim-blaming connotations because it implies the victim has done something to provoke the wrath of the offender. Finally, and perhaps most importantly, the term focuses attention on the content of the image, rather than on the abusive actions of perpetrators who engage in IBSA (Rackley & McGlynn, 2014).

The framing of language is powerful, and can not only be a deterrent to victims coming forward to report their experiences, but it may also shape problematic attitudes and beliefs within the community that blames victims for their actions. It may also lead to an absence or delay in changes to the law, or the development of narrowly framed laws, policies and educational programs. For example, in many international jurisdictions (e.g. New Zealand, the United Kingdom and the United States), the prosecution must prove that the perpetrator intended to cause distress to the victim (discussed in more detail below). This means that some laws do not catch persons who lack the specific intent to cause distress. Thus if a person is trading in the distribution of non-consensual images not to publicly humiliate the victim, but for other reasons, such as to impress their peers or to obtain sexual gratification, these individuals will not be captured under the existing laws in these jurisdictions. This is arguably the outcome of problematic terminology that frames image-based violations as being fundamentally premised on revenge.

In responding to the problems with the 'revenge porn' terminology, some scholars have labelled the behaviour 'non-consensual pornography' (Citron & Franks 2014; Franks 2016), 'involuntary porn' (Burns 2015), or 'non-consensual sexting' (see Henry & Powell 2015a). In line with leading legal scholars in this field (McGlynn & Rackley 2017; McGlynn, Rackley & Houghton 2017), this report uses the term 'image-based sexual abuse' because it not only captures a much broader array of behaviours and motivations, but it also moves the focus to the abusive actions of those who misuse intimate imagery.

IBSA includes three main behaviours:

1. the non-consensual recording, taking or creation of nude or sexual images;
2. the non-consensual distribution, sharing, posting or dissemination of nude or sexual images; and/or
3. making threats to share nude or sexual images.

IBSA may be perpetrated by persons who: distribute or threaten to distribute images to get 'revenge' on their partner or ex-partner; threaten to distribute images to coerce, blackmail, humiliate or embarrass another person; or distribute or threaten to distribute images for sexual gratification, fun, social notoriety and/or financial gain. Given the range of contexts in which IBSA occurs, and the diversity of perpetrator motivations, it is useful to draw on a typology that more clearly identifies the scope of behaviours involved. IBSA encompasses the following four types (see Powell & Henry 2017):

1. Relationship retribution, where revenge is a motivation within the context of a current or past relationship.

2. Sextortion, where the perpetrator threatens to share intimate images with others (regardless of whether or not the image exists) in order to obtain further images, money, sexual acts, or to coerce the victim into another act, or prevent them from doing something.
3. Voyeurism, where perpetrators create or distribute images as a form of sexual gratification, or where perpetrators take or share images to seek power, enjoyment or entertainment in observing someone engaged in a private act (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 nude or sexual imagery.

Images may include any of the following: images obtained (consensually or otherwise) in an intimate relationship; images digitally altered showing a victim's face superimposed or 'stitched' on a pornographic image (also known as 'morph porn' or 'deepfakes'); images of sexual assault; images obtained from the use of hidden devices to record another person; and images stolen from a person's computer or other device. The extent and context of the nudity or sexual nature contained in an image may also have a bearing on the harm experienced by a victim. These circumstances can include images where the victim was: (1) partially clothed or semi-nude; (2) showering, bathing, or toileting; (3) completely nude; (4) with their genitals visible; (5) engaged in a consensual sex act; (6) experiencing an unwanted or non-consensual sex act; (7) with breasts exposed and nipples visible; (8) 'downbloused'; and/or (9) 'upskirted'.

Finally, the methods of distribution may include: 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 porn' or 'ex-girlfriend porn' websites; and/or uploading images onto social media, thread or imageboard websites.

Literature review

Legal research

In response to a growing appreciation of the significant impacts of IBSA on victims, a number of jurisdictions have introduced specific legislation to criminalise the non-consensual creation or distribution of intimate images (sometimes including threats to distribute). This includes: the Philippines (2009); Israel (2014); Japan (2014); New Zealand (2015); the UK (England, Wales (2015)); Scotland (2016)); and Canada (2015). Thirty-nine states in the United States have also introduced specific offences, however, to date there is no federal offence for IBSA in the United States. South Australia and Victoria were the first Australian jurisdictions to introduce IBSA laws. New South Wales and the Australian Capital Territory also introduced specific IBSA laws in August 2017. At the federal level, a broader offence that might capture IBSA behaviours exists under the *Criminal Code Act 1995* (Cth) (the use of a carriage service to menace, harass or cause offence), however this provision does not adequately capture the harms or varying types of IBSA offences.

To date, the vast majority of attention within the academic literature on IBSA or ‘revenge pornography’ has been on the range of applicable civil and criminal laws for addressing this issue. This literature is heavily US-based (see e.g. Citron 2014; Citron & Franks 2014), although there have been some analyses in other jurisdictions (see e.g. Henry & Powell 2015a, 2016; Matsui 2015; Salter & Crofts 2015; Suzor, Seignor & Singleton 2017; Svantesson 2010). While some legal scholars argue that existing laws are sufficient to capture IBSA behaviours (see e.g. Patton 2015; Stokes 2014), others advocate for the specific criminalisation of IBSA. Legal scholars Citron and Franks (2014), for example, argue that current civil law remedies in the United States do not adequately address IBSA, or provide an effective deterrent against such behaviours, because even if civil litigation is successful, it cannot stop the spread of the image once it has been distributed. Additionally, victims often lack the resources to sue under privacy, tort or copyright laws. Citron and Franks (2014: 349) argue that although existing criminal laws can be used to prosecute perpetrators, it is important to craft specific legislation on IBSA ‘to convey the proper level of social condemnation for this behavior’. They, among others, support a federal criminal statute on IBSA in the United States (see also Burris 2014; Kitchen 2015; Lipton 2011; Mathen 2014). Also in the United States context, other legal scholars argue that civil laws can be used to address IBSA. Levendowski (2014), for instance, argues that victims can use copyright laws in order to have the images removed and in some cases, receive monetary compensation – as long as they were the original creator of the image. Others have advocated amendments to copyright legislation so that the owner is understood to be the person depicted in the image (Bambauer 2014; Folderauer 2014; see also Tushnet 2013), while some propose amendments to the *Communications Decency Act 1996* (US) which regulates indecency and obscenity on the Internet, so that immunity is not given to websites that host IBSA images. This, it is claimed, will halt ‘the cycle of online tortious activity that affects the lives of so many’ (Cecil 2014: 2556; see also Franklin 2014).

Non-legal remedies are also advocated as a mechanism to respond to the harms of IBSA, such as ‘host-site shutdowns, changing trends, changes to search engines, payment blocking for removal sites, and organized attacks and doxing by hacker groups’ (Scheller 2015: 590). Some recent examples of Internet intermediary action include companies such as Google, Microsoft, Twitter, Reddit, Tumblr, Pornhub, SnapChat, Instagram and Flickr (among others) introducing reporting and content removal mechanisms, as well as policies prohibiting the distribution of non-consensual nude or sexual imagery.

In summary, there is growing scholarly attention to IBSA, with a particular emphasis on the applicability of existing criminal and civil laws, particularly in the United States. However, there has been little analysis of the effect and impact of new laws criminalising IBSA, or the use of existing civil or criminal laws. Moreover, little is yet known about how police are charging accused persons, or how such offences are being prosecuted, particularly in the Australian context. Most strikingly, there continues to be a lack of empirical data on this phenomenon internationally in terms of victim, perpetrator or bystander experiences. These are major gaps that this project seeks to in part address.

Empirical research: Quantitative studies

Sexting research

The majority of empirical research to date in the broader literature on technology and intimate relationships has been on 'sexting' among children and adolescents (see e.g. Crofts, Lee, McGovern & Miliivojevic 2015; Mitchell, Finkelhor, Jones & Wolak 2012; Patrick, Heywood, Pitts & Mitchell 2015; Stanley et al. 2016; Villacampa 2017; Yeung, Horyniak, Vella, Hellard & Lim 2014). 'Sexting' can be defined as the sending and/or receiving of nude or sexual images or texts. These studies on sexting have yielded disparate findings on prevalence, depending on the participant sample, sampling techniques, instruments, as well as the different definitions of sexting used. The establishment of prevalence rates on consensual sexting among young people is therefore made somewhat challenging (Klettke, Hallford & Mellor 2014; Lounsbury, Mitchell & Finkelhor 2011). However, generally these studies tend to concur that sexting is relatively common among young people (although see conflicting findings of a recent study by UK Safer Internet Centre, Netsafe and the Office of the eSafety Commissioner (2017)).

While most of this empirical research on youth and adolescent sexting has focused on consensual forms, some studies have also sought to investigate the prevalence of non-consensual sexting; that is, where images are taken or shared without consent (or IBSA). For example, Patrick, Heywood, Pitts and Mitchell (2015) found that 1 in 10 school students had sent 'a sexually explicit nude or nearly nude photo or video of someone else'. Crofts, Lee, McGovern and Miliivojevic (2015) found that 20% of young people showed another person an image without the person's consent, and 6% of respondents reported sending an image to another person without their consent. In a 2014 survey with undergraduate psychology students (n=228), 11% reported that a sext had been sent on without their consent while they were deemed to be a minor (i.e. under the age of 18) (Strohmaier, Murphy & DeMatteo 2014).

Some studies have explored 'coercive sexting' (see e.g. Englander 2015; Mitchell, Finkelhor, Jones & Wolak 2012), where a person is pressured or coerced into sending nude or sexual images. For instance, in an American study, Drouin, Ross and Tobin (2015) found that one fifth of their sample (undergraduate students (n=480) were coerced into taking explicit images in the context of an intimate partner relationship. In another study, Wood, Barter, Stanley, Aghtaie and Larkins (2015) found that over a quarter of girls in England who had sent a sexual image had been pressured by a partner to do so, and almost half had sent the image to prove their commitment. These studies did not focus on IBSA behaviours beyond pressure or coercion to send a nude or sexual image.

Moreover, few studies have explored non-consensual behaviours among adult populations. This is despite some research (Borrajó & Gámez-Guadix 2015) indicating that technology-based abuse between partners occurs more often between young adults, rather than adolescents or pre-adolescents. Of the research that does examine prevalence among adult populations, the majority of these studies have sought to examine either consensual sexting behaviours among adults and/or a much broader range of abusive online behaviours (see

e.g. Baumgartner, Valkenburg & Peter 2010; Gámez-Guadix, Almendros, Borrajo & Calvete 2015; Staude-Müller, Hansen & Voss 2012). Overall, there have been very few studies specifically and exclusively focused on IBSA. Studies that have included at least one item in their survey instrument relating to IBSA behaviours are discussed below.

Perpetrator and bystander studies

To date there has been little empirical research investigating perpetration rates among either young people or adults, and no studies exclusively on IBSA (with the exception of the authors' study as discussed in this report). While it is difficult to synthesise the findings given the different sample sizes, definitions and instruments used, studies indicate an approximate range between 12-30% of respondents who report sharing nude or sexual images without the consent of the person depicted in the video or photograph. In an Australian study by Crofts, Lee, McGovern and Miliivojevic (2015) on 'sexting', they found that among participants aged over 19 years (n=422), 16% had shown a sexual image to another person who was not meant to see it, 4% had shared the image online, and 4% had forwarded the image via MMS or email. While the authors differentiated between different forms of 'sharing', in other studies it is unclear what 'sharing' means. For instance, in an Italian study on sexting and dating violence among 13-30-year olds (n=1,334), the authors found that 12.6% of respondents had shared a sexual image without another person's consent at least once (Morelli, Bianchi, Baiocco, Pezzuti & Chirumbolo 2016). In a study on 'technology-based coercion' (n=795), Thompson and Morrison (2013) found that 16.3% of men had shared a sexually suggestive message or picture of someone without their consent (n=795). And in a sexting study of American adults aged between 21 and 75 years (n=5,805), Garcia et al. (2016) found that more than one in five participants (22.9%) reported sharing a 'sexy' photo with someone else without consent. It is important to note that the Garcia et al. study focused on sharing photos, whereas the Thompson and Morrison study did not differentiate between sexual images (videos and/or pictures) or text.

These existing studies do not report on gender, age, race or sexuality differences in relation to self-disclosed perpetration items with the exception of the Garcia et al. (2016) study which found that more men (25.3%) than women (19.6%) had 'shared a received sexy photo with someone else'. Their study also found that gay men were twice as likely as lesbian women to share such images.

There has also been limited investigation into bystanders and IBSA. A decade ago, the National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com's study (2008) of American young adults aged between 20 and 26 years (n=627) found that 24% of women and 40% of men said that a nude or semi-nude image had been shared with them when intended for someone else. In another American study (n=3,447), it was found that 40% of men (compared with 24% of women) reported receiving second-hand 'sext content' (Gordon-Messer, Bauermeister, Grodzinski & Zimmerman 2013). Finally, in a 2017 Australian national survey (OeSC 2017), it was found that almost one-fifth of Australian respondents (n=4,122) had been bystanders to IBSA because they received a nude or sexual image from someone else that knew the person depicted in the image had not consented to

it, or were not sure if they had consented to it. The study also found that few bystanders take action when they witness IBSA, with 44% of respondents saying they did not do or say anything in relation to the behaviour.

Research has also explored responses to hypothetical scenarios of IBSA and sexting to explore bystander's perceptions of the perceived seriousness of the incident, and the potential inclination of participants to seek revenge through the non-consensual distribution of intimate images (Scott & Gavin 2017). For instance, participants in this study, when confronted with two hypothetical scenarios (one in which the perpetrator was a man and the victim a woman, and the other in which the perpetrator was a woman and the victim a man) perceived IBSA to be more serious when the perpetrator was a man.

Victimisation studies

There have been few studies examining the prevalence and impacts of IBSA victimisation. Most studies use small sample sizes and/or convenient samples (e.g. typically American college students). Nearly all of these studies have been more broadly on intimate relationships and technology use or technology-facilitated abuse, and only three specifically on IBSA (CCRI 2014; Lenhart, Ybarra & Price-Feeney 2016; OeSC 2017). Although it is difficult to compare results across studies, owing to different methods, definitions and sample sizes, the studies identified here indicate prevalence relating to the non-consensual sharing of nude or sexual images among adults to be anywhere between 1-12%. 'Sharing' can include showing and/or distributing online and/or via mobile phone and other means. The review below reports on overall prevalence rates and any differences according to gender, age, sexuality and race/ethnicity.

Some studies found equal rates of IBSA victimisation for men and women, whereas others found that more men or more women reported being victimisation. For instance, in their study of Spanish adults (n=873), Gámez-Guadix, Almendros, Borrajo and Calvete (2015) found that 1.1% said that someone had disseminated or uploaded onto the Internet photos or videos with erotic or sexual content of them without their consent, which was fairly equal for both men and women. In a nationally representative survey of US residents aged 15 years and over (n=3,002), Lenhart, Ybarra and Price-Feeney (2016) found that 3% of women and 2% of men said someone had posted a photo of them online without their permission. However, they found that young adults aged between 18-29 years were more likely than older adults to have had someone post an intimate image of them without their consent (5% - male and female alike). In this study, Lesbian, Gay and Bisexual (LGB) respondents (15%) were also more likely than heterosexuals (7%) to have experienced someone sharing a nude or nearly nude image of them without their consent.

Other studies have found higher prevalence rates. For instance, in an Australian study on technology-facilitated sexual violence, using a non-probability sample (n=2,956) of Australian men and women aged between 18 and 54 years, Powell and Henry (2017) found that 1 in 10 (10%) reported that a nude or semi-nude image of them had been distributed without their permission. They found that men (11%) were somewhat more likely to report

experiencing these behaviours than women (7.4%) although notably the effect sizes for these differences were very low (see also Reed, Toman & Ward 2016 who found that more men (5.9%) than women (2.7%) had a sexually suggestive image shared of them without their permission (n=365)).

In another Australian study, specifically on IBSA, and conducted in 2017 by the authors alongside the Social Research Centre for the Office of the eSafety Commissioner (n=4,122), 11% of respondents said they had a nude or sexual photo or video posted online or sent on without their consent (OeSC 2017). In contrast to the other studies mentioned here, this study found that women (15%) over the age of 18 years were twice as likely as men over 18 (7%) to have experienced someone sharing nude or sexual images of them without their consent. Like the Lenhart et al. study (mentioned above), this study found that age and gender were a significant predictor of prevalence, with 24% of women and 16% of men aged between 18-24 years having experienced someone sharing a nude or sexual image of them without their consent. In addition to gender and age, this study found that Aboriginal and Torres Strait Islander Australians (25%) were twice as likely to have experienced this form of IBSA in comparison with non-Indigenous Australians (11%). Finally, 19% of lesbian, gay or bisexual participants said that someone had shared a nude or sexual image of them without their consent, compared to 11% of heterosexual participants. Prevalence was also high for those who speak a language other than English at home (19% compared to 11%).

These studies yield different findings based on whether participants were asked about whether someone had shared a photograph and/or video, who the perpetrator was, and whether the image had been shared via the Internet and/or other means. The rates also vary depending on the sample. For instance, in three different non-representative studies, respondents were predominantly female (see Branch Hilinski-Rosick, Johnson & Solano 2017; Dir & Cyders 2015; Marganski & Melander 2015). However, what these studies collectively indicate is that IBSA is common among various populations, especially marginalised populations, including LGBTI, Indigenous, female, young and CALD groups.

In addition to the findings on the non-consensual distribution of nude or sexual images, a small number of studies have more specifically focused on threats to share nude or sexual images, also known as 'sextortion'. Although not measuring prevalence, an in-depth study on sextortion was conducted by Thorn and the Crimes Against Children Research Centre of the University of New Hampshire (Wolak & Finkelhor 2016). In their online survey of 18-25-year-olds (n=1,631), they found that 'perpetrators carried out threats or otherwise harmed respondents in about 45% of cases, more frequently in the face-to-face relationship group than in the online encounter group, and disseminated sexual images in about 30% of cases' (Wolak & Finkelhor 2016: 27). Such findings suggest that investigating threats to distribute nude and/or sexual images without consent, alongside the non-consensual creation or distribution of such images, is important to understanding how these behaviours correlate and overlap.

As stated above, it is difficult to compare prevalence rates across different studies on sextortion behaviours, yet the findings suggest that anywhere between 1-15% of people have reported someone making threats to share intimate images of them. For instance, in an American study, 1.6% of women and 1.5% of men had experienced someone threatening to share embarrassing or sexually suggestive images, although it is worth noting that the sample size was small (n=365) (Reed, Tolman & Ward 2016). In the Gámez-Guadix, Almendros, Borrajo and Calvete study (2015) (n=873), the authors found that 1.9% said someone had threatened or coerced them into sending photos, images or videos with erotic or sexual content, and 2.1% said they had been threatened or coerced into performing a sexual act on the Internet. Lenhart, Ybarra, and Price-Feeney (2016) similarly found comparatively low rates of sextortion victimisation across their representative sample (n=3,002), with 4% of women and 2% of men reporting that someone had threatened to post nude or nearly nude photos or videos of them to hurt or embarrass them. However, they found that young people aged between 15-29 were most likely to report being threatened with the sharing of nude or nearly nude images, with 7% under the age of 30 reporting this experience. They also found that young women under the age of 30 were more likely to have received such threats (10%), and that LGB participants were more likely than heterosexual participants to have experienced sextortion, with 15% of LGB participants reporting these experiences (Lenhart, Ybarra & Price-Feeney 2016).

Higher prevalence rates were reported in other studies. For instance, 9.6% of all Australian respondents (n=2,956) in Powell and Henry's (2017) non-probability survey said that someone had threatened to distribute or share a nude or semi-nude image of them, with no significant differences reported by gender. The McAfee (2013) Love, Relationships, and Technology Survey of American adults aged 18-54 (n=1,182) similarly found that 1 in 10 people said an ex-partner had threatened to post sexually explicit images of them online (with 60% having carried out the threat).

It is important that quantitative research not only establish prevalence rates in relation to IBSA behaviours, but also measure the impacts on victims. Few studies to date have investigated these impacts because there have been very few studies investigating IBSA specifically. One exception is the Cyber Civil Rights Initiative's (CCRI) (2014) Effects of Revenge Porn Survey (n=864), which found that 49% of respondents had experienced harassment or stalking online by users who had seen the images, and 93% said they had experienced significant emotional distress as a result of their images being distributed online. In the representative Australian study mentioned above (n=4,122), the authors found that victims of the non-consensual sharing of nude or sexual images said they felt annoyed (65%), angry (64%), humiliated (55%), depressed (40%) and afraid for their safety (32%) (OeSC 2017). Furthermore, 42% said their most recent experience of IBSA affected their self-esteem and 41% said it affected their mental health.

Drawing on feminist theoretical literature on gender and sexuality to further analyse the gendered nature of IBSA is a crucial supplement to these emerging empirical studies. Scholars have explored the phenomenon of 'slut shaming', a term that is used to describe

the social condemnation of those who transgress deeply embedded, puritanical societal beliefs and values about sexuality, particularly female sexuality. Women, in particular, are held up against a double standard that applies unequally to them, and are often derided as 'sluts' (Ringrose & Renold 2012). Burns (2015), for instance, explores the ways in which notions of 'choice' are utilised to blame victims for the original production of a sexual image. She claims that 'involuntary porn' serves a dual purpose of providing sexual gratification, as well as serving to condemn and degrade women who choose to take explicit self-images of themselves.

While feminist criminologies may be foremost concerned with women's victimisation, it is important that research into emerging forms of technology-facilitated abuse seek to capture the experiences of a diversity of victims and perpetrators that focuses on the intersections between gender, age, race, sexuality, disability and socio-economic status. An approach that considers the intersections of disadvantage, discrimination and oppression (Crenshaw 1991) will contribute to a deeper understanding of the diverse and complex forms of IBSA victimisation, and to a much richer analysis of how gender intersects with other forms of identity. Qualitative research has the capacity to explore these intersections and complexities in much more nuanced manner as compared with survey research alone. The next sub-section examines the small body of qualitative research on IBSA.

Empirical research: Qualitative studies

Only two studies to date have undertaken qualitative research on IBSA perpetration. In one study, Hall and Hearn (2018) examined the online comments that accompanied the postings of non-consensual nude or sexual images. In the second study, Uhl, Rhyner, Terrance and Lugo (2018) undertook content analysis of 134 non-consensual photographs contained on 7 different websites. No researchers to date have undertaken qualitative research with perpetrators themselves.

Some IBSA literature has sought to focus on the experiences of victims, with scholars primarily drawing on anecdotal accounts from media sources to explore the significant impacts of IBSA (see e.g. Citron & Franks 2014; Harika 2014). Other scholars have utilised established theoretical frameworks for understanding the harms of IBSA, such as Liz Kelly's (1988) 'continuum of sexual violence' (see e.g. Henry & Powell 2015b; McGlynn & Rackley 2017; Powell & Henry 2017).

Qualitative research indicates that increasingly women are seeking assistance from domestic violence, sexual assault, and community legal services for advice, support, and legal options, in response to IBSA (Bates 2017; Burkett 2015; Henry & Powell 2015; Powell & Henry, 2016). Attention has been paid to the significant emotional distress that victims experience when non-consensual images are created, distributed, or threatened to be distributed. For instance, victims may retreat from engaging in both offline and online social activities and they may suffer anxiety, depression and a range of other social, economic, and psychological problems. Many victims have been forced to adopt drastic measures, including changing their name, quitting their job and/or moving address, because of threats

to their physical safety, and/or professional and reputational damage (Citron & Franks 2014; Henry & Powell 2015a; Wolak & Finkelhor 2016). IBSA may thus lead to a loss of employment, or a loss of employment prospects, as well as relationship disintegration with intimate partners, children, family members, friends, and work colleagues.

Once images are distributed, the victim has little control over those images, and indeed it may be impossible to ensure that the images are ever completely removed from personal devices or the Internet. Victims may also be at risk of stalking if their personal details are revealed next to their images online or if information attached to their images incites others to make sexual or other demands of them in person. The distribution of the images, and the threat of distribution may also occur in the context of domestic violence and/or sexual violence contexts (Henry & Powell 2015a; Powell & Henry 2017), thus further extending the perpetrator's capacity to extend control, cause fear, and enact significant emotional distress.

In relation to sexting literature, Burkett (2015: 849) notes that female victims were more inclined to draw upon broader socio-cultural narratives of their role/responsibility in their own victimisation, and blame themselves for their perceived 'silly' choices. Burkett (2015: 853) also found that young women 'perceived sexting to be more serious and risky with the likelihood of adverse outcomes than did male participants'. This perception of sexting was also demonstrated in Renfrow and Rollo's (2014: 909) online, open-ended survey, in which 'most' of the 85 survey respondents deemed sexting to be a 'risky behaviour'.

Gendered victim-blaming was also (unsurprisingly) noted in a number of studies. Walker, Sancu and Temple-Smith (2013), for instance, found victim-blaming attitudes in their interviews with 33 young people. Both female and male participants noted that girls who sent sexts are 'viewed as responsible for the potential fallout that proceeds, even though boys may have coerced the girl to send the image' (Walker, Sancu & Temple-Smith 2013: 699). They noted that boys who sent sexts were not subjected to these same attitudes, observing that '[f]or males, participation in the behavior was often of positive significance and sometimes viewed as a means to status' (2013: 699). These attitudes are not restricted to western nations, with Arora and Scheiber (2017) finding that their interview participants in Brazil held similar views. However, Arora and Scheiber (2017: 416) also observed that their female interviewees from India were more likely to be sympathetic towards the victims of IBSA, where there was 'a shared feeling of camaraderie towards these women [from other Indian women]'.

Yeung, Horyniak, Vella, Hellard and Lim 2014 (2014: 335) note that although their survey (n=1,372) and focus group participants (n=39) widely considered the non-consensual distribution of sexts to be 'problematic', this form of sharing was believed to be more common among men. Focus groups participants also believed that the non-consensual sharing of sexually explicit images was being used by men as "'trophies" that could be shared in order to demonstrate... [the man's] sexual success' (Yeung, Horyniak, Vella, Hellard & Lim 2014: 335).

In the only qualitative study with IBSA victims conducted to date, Bates (2016) conducted 18 in-depth semi-structured interviews with Canadian and American adult 'revenge porn' victims who had self-identified as victims or survivors. She noted that her research participants described having experienced post-traumatic stress disorder (PTSD), anxiety, depression, and a loss of self-esteem. According to Bates (2016: 17), these experiences are best characterised as 'a horrendous invasion of sexual privacy and personal space, and in most cases [was done] at the hands of someone they loved and trusted'. She argues that 'revenge porn' should be classified as a sexual offence, since victim experiences are very similar in nature to the experiences of rape survivors.

In summary, there is an emerging body of literature on IBSA. Most of the literature to date has been focused on applicability of new or existing criminal offences, and the possibilities of remedies under civil or criminal law in mostly (although not exclusively) American jurisdictions. While empirical research remains under-developed, including both quantitative and qualitative studies, there is a growing body of research that captures the prevalence of victimisation and perpetration of IBSA. However, much more research is needed. Studies which focus exclusively on IBSA will have a greater chance of achieving this goal, however, care is needed to ensure that survey items capture the broader scope of IBSA behaviours and impacts, and qualitative research should investigate IBSA experiences in the context of other experiences of sexual violence, family violence and sexual harassment.

Research aims

This project sought to break new ground by gathering much-needed empirical data about the nature, prevalence and impacts of IBSA, as well as the effects of existing and proposed legislative reform in Australia and across other international jurisdictions. It addresses a significant gap in an under-researched area of criminal justice policy on an emerging social and legal issue that is of growing importance both nationally and internationally. Currently, it remains unclear whether any benefits have arisen from the various approaches to criminalising and/or responding to IBSA in Australian jurisdictions. This research provides insight into the effectiveness of IBSA laws and an evidence-base from which future legal reform can draw. Significantly, this is the first-ever Australian study to empirically examine the extent of adult IBSA victimisation and perpetration.

The study documents current practices in relation to IBSA laws and victimisation in Australia. It is the first study to present a comprehensive analysis of IBSA victimisation through a national online survey of Australians aged 16-49. The study is also informed by the experiences and perspectives of legal, policy and support stakeholders including police, legal services, women's information services, domestic violence services, community legal centres, youth legal and information services, disability services, sexual assault services, representatives of the LGBTIQ community and Culturally and Linguistically Diverse (CALD) services. The qualitative research was conducted in three jurisdictions (New South Wales, South Australia and Victoria) obtained through semi-structured interviews, group discussions and consultation (see methodology).

The study addresses three key research questions:

1. What is the nature and prevalence of IBSA in Australia, and what are the impacts on victims?
2. What are the merits and limitations of existing Australian and comparative legislative models for responding to IBSA?
3. What are the perceptions of key legal, policy and support stakeholders regarding the effectiveness of existing legislation and the need for new legislative models for responding to IBSA in Australia?

The research seeks to not only inform law reform in Australia (and internationally), but also to guide a range of other legal and non-legal measures to both prevent and address IBSA.

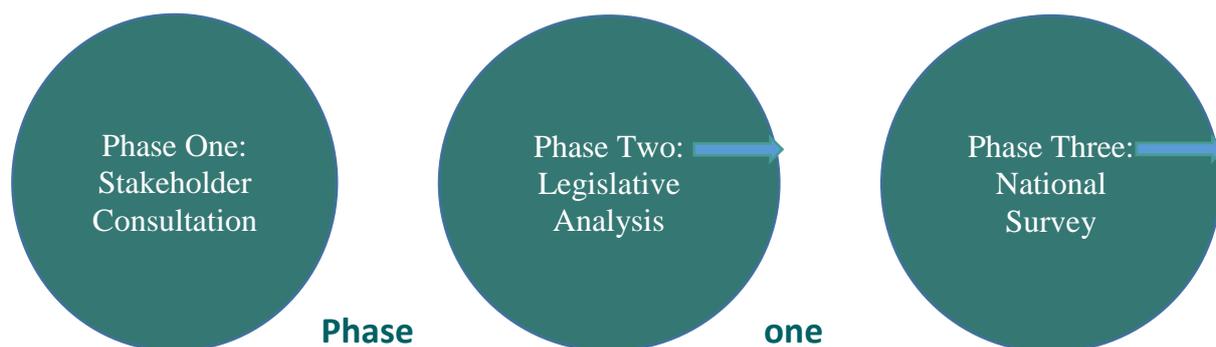
Structure of the report

This report contains six sections. The first section (presented above) provided an overview of the existing literature in this field and the aims of the current study. The second section presents an overview of the three-phase multifaceted research design. The third section presents the findings from the national survey with Australians aged 16 to 49 years, responding to the first research question. The fourth section identifies the key legislative models for responding to IBSA in Australia and in comparative jurisdictions, responding to the second research question. The fifth section discusses the findings from the qualitative interviews (Phase one), responding to the third research question. The report concludes with a sixth section summarising the study's key findings and observations, and making recommendations for policy, law and education initiatives.

Methodology

Introduction

This project builds on the small body of research on IBSA globally, with the key aims of shedding light on the prevalence of victimisation in Australia and examining the role of existing legislative responses to this social and legal problem. The project was informed by a mixed qualitative and quantitative methodology over three research phases which are described in detail below.



A central element of the research design was consultation and engagement with those involved in policy and legal reform (state government policy units), criminal justice system responses (police, prosecution and defence legal services, members of the judiciary) and support for victims (women’s information and sexual assault/domestic violence services). The stakeholder consultation phase of this research project comprised two components: (1) a National ‘Revenge Pornography’ Law Reform Roundtable held in Melbourne in February 2016; and (2) semi-structured interviews with stakeholders identified across these key groups.

National ‘Revenge Porn’ Roundtable

The National ‘Revenge Porn’ Roundtable involved presentations by invited IBSA law reform experts from England (Professor Clare McGlynn), Canada (Professor Walter DeKeseredy) and the United States (Professor Mary Anne Franks), followed by workshop discussions with the stakeholder audience, led by the research team. This included 10-minute snapshot presentations from representatives of the Department for Communities and Social Inclusion (South Australia), Legal Aid New South Wales, Victoria Police and the Australian Law Reform Commission. All presentations were video-recorded and made available as a vodcast via the La Trobe University Transforming Human Societies website (see also Flynn, Henry & Powell 2016).

The Roundtable was attended by approximately 70 invited personnel representing key stakeholder groups from across Australia, including: federal, state and territory government policy units; human rights representative bodies; police and prosecution units; the judiciary; legal services; women’s information services; and sexual assault services. The Roundtable captured key Australian stakeholder perspectives on IBSA. It also provided the most

advantageous way to learn from the law reform experience of relevant international jurisdictions.

The key themes, challenges and recommendations arising from the Roundtable discussions then informed the second component of this phase; the stakeholder interviews.

Semi-structured stakeholder interviews

Semi-structured interviews were conducted with key stakeholder groups in three 'case study' Australian jurisdictions: New South Wales, South Australia and Victoria. South Australia and Victoria were selected because at the time of commencing the research, they represented the only jurisdictions with legislation addressing the non-consensual distribution of 'intimate' or 'invasive' imagery. New South Wales was selected as the third case study jurisdiction because at the time of commencing this research, New South Wales did not have specific legislation on IBSA, yet in July 2015, New South Wales began conducting an inquiry into the adequacy of their existing laws. As discussed in more detail below, in August 2017, New South Wales introduced new criminal offences for IBSA. The New South Wales interviews, however, were conducted before this law came into effect.

The stakeholder interviews aimed to capture participant experiences and perspectives of IBSA, including: the nature of the problem (terminology, examples, prevalence, harms); criminal justice responses (existing/proposed law, policing responses, legal requirements, penalties); and other legal and non-legal responses (civil law, educational programs, corporate social responsibility).

Key Australian stakeholder agencies were identified from a combination of the researchers' existing professional contacts, publicly available information, and recommendations from those who were interviewed. The following agencies or organisations were represented: police; legal organisations; women's legal services; government; domestic and sexual violence services; youth sector agencies; CALD communities; LGBTIQ groups; sex worker advocates; technology industry representatives; disability services; and academia. After receiving institutional human ethics and policy agency research approvals to undertake the research, participants were contacted via telephone or email to garner initial interest, and were provided with the Participant Information Statement in advance via email.

In total, 44 stakeholder interviews with 52 participants were conducted in Victoria (n=30), New South Wales (n=12) and South Australia (n=10) between April 2016 and October 2017. There were in total 39 female, 1 transgender and 12 male participants. All interviews were conducted in-person at the participant's workplace by one or two of the project researchers. In some cases, two participants from the same organisation were interviewed together. The interviews lasted between 40 and 90 minutes. Participants included: 7 police (detectives, detective sergeants and senior sergeants within specialist sexual offences and cybercrime units); 19 domestic violence and sexual assault service stakeholders; 14

legal/policy experts; 4 academics; 3 youth sector representatives; 2 LGBTIQ representatives; 2 industry representatives; and 1 disability service stakeholder.

Participants were assigned pseudonyms (e.g. 'Dean', 'Jacqui') and placed into one of seven stakeholder categories: Legal Expert (includes law enforcement personnel); Disability Support; Victim Support Advocate; Industry Representative; LGBTIQ Representative; Academic; and CALD Representative. Some participants from the 'Legal Expert' category requested that their comments be paraphrased and assigned to an 'Anonymous' pseudonym, hence they are referred to as 'Anonymous, Legal Expert'.

The interviews focused on the participants' experiences in responding to IBSA victimisation. The interviews were broken into categories, exploring five key areas:

1. the backgrounds to the existing laws;
2. the specific contexts in which the laws are intended to apply;
3. potential or known challenges/obstacles to prosecution and/or conviction;
4. how legal requirements such as 'intention', 'consent' and the 'reasonable person' are interpreted and/or applied;
5. the extent and circumstances under which third-parties might be criminally liable for the distribution of nude or sexual imagery without consent.

The interviews were audio-recorded (with permission) and transcribed verbatim. The transcripts were verified and deidentified. The transcripts were then coded using NVivo software for qualitative data analysis according to 16 key themes

1. terminology;
2. prevalence and patterns;
3. nature and scope of behaviour;
4. victim harms and challenges;
5. perpetrator practices;
6. IBSA as a gendered phenomenon;
7. community attitudes and perceptions;
8. law and shifting cultural norms;
9. criminal justice and policing;
10. scope of the criminal law;
11. civil law and civil penalties;
12. takedown orders;
13. corporate social responsibility;
14. constraints on services;
15. education and awareness-raising;
16. victim support services.

Phase two

Comparative legislative and crime statistics analysis

An in-depth legislative analysis was conducted that focused on the three Australian case study states (New South Wales, South Australia and Victoria), as well as four international jurisdictions: Canada, New Zealand, the United Kingdom, and the United States. In addition to the rationale described above for the selection of the Australian jurisdictions, the international case study sites were chosen because they represent some of the earliest legislative reforms on IBSA and/or they have a similar (common law) legal system to Australia. The legislative analysis focused on identifying the scope, conceptual parameters, and merits and/or limitations that arise from existing Australian and comparative legislative models in responding to IBSA.

The legislative analysis was further nuanced in the Australian case study jurisdictions through consideration of the uptake and reach of applicable offences based on analysis of the reportable crime statistics. Data was obtained from the Victorian Crime Statistics Agency (VCSA) that identified the IBSA offences that had been reported to Victoria Police between 1 January 2015 – 30 June 2017. This captured s41A (observation of genital or anal region), s41DA (distribution of intimate image) and s41DB (threat to distribute intimate image) of the *Summary Offences Act 1966* (Vic). The data was broken down by gender, age, investigation status and outcome. This data was used to inform patterns of victimisation and perpetration of IBSA in Victoria, and supplement the findings of Phase three.

Phase three

National survey of IBSA victims

The final element of the research design involved conducting a national survey to examine the extent and impacts of adult experiences of IBSA victimisation and perpetration, with respondents broadly representing the Australian population across key demographics. To this end, the survey sample comprised 4,274 Australian respondents, aged 16 to 49 years with quota sampling across gender, age and sexuality to approximate the demographics representative of the Australian population (as per the Australian Bureau of Statistics (ABS) Census data). This age range was selected because it represents both the adult age range at highest risk for sexual- and family-related violence (ABS 2012), as well as the majority of mobile and Internet technology users (ACMA 2011). Respondents were recruited through a social research panel provider, and were invited to take part in the survey. This was a non-probability sample with controls to reduce bias and better approximate the population. There were three distinct advantages to this approach. First, Australian consumer data indicates that Internet-enabled mobile and smartphone use is particularly common among the target demographic, an increasing proportion of which does not have a fixed landline phone (ACMA 2011), thus impacting on the general representativeness of more traditional Computer Assisted Telephone (CATI) survey methods (Webster et al., 2014).

Second, online panel surveys distribute participation requests to a large database of potential respondents who have given permission to be contacted for the purposes of

survey research, thus improving timeliness of responses, as well as completion rates, and helping produce high-quality datasets. Third, in contrast to the combined costs of advertising, technical equipment and the time and expertise required to sustain telephone, mail-out or a broad online recruitment campaign, online panel recruitment is an extremely cost-effective and efficient method for conducting online survey research.

Respondents and procedures

The study sample consisted of 4,274 adult respondents (females: $n=2,406$, 56.3%; males: $n=1,868$, 43.7%) recruited via Research Now, an online panel provider. Respondents ranged in age from 16 to 49 (M age = 34.54 years, SD = 8.96). In addition, 3,764 (88%) respondents identified as heterosexual and 510 (12%) identified as lesbian, gay, or bisexual (LGB). Of those identifying as LGB, 244 identified as female (47.8%), and 266 (52.2%) identified as male. All respondents were informed that the purpose of the study was to examine attitudes and experiences of sex, technology and relationships.

Measures

The survey comprised a range of items, including those on the topic of IBSA as well as general technology use, online dating, and sexual selfie items, and demographic items. The measures analysed for the purposes of this study are further described below.

Technology use items. Three questions about respondents' use of the Internet and communications technologies were adapted from the Australian Media and Communication Authority (ACMA) national surveys on Australia's Internet and mobile market (ACMA 2012). One question asked respondents about the device they use most often to access the Internet. A second question asked how often they access the Internet (1 = More than once a day, 2 = Once a day, 3 = A few times a week, 4 = A few times a month, 5 = Less often); while a third question asked how frequently they used different electronic communications platforms (e.g. instant messaging, email, chat rooms, social networking sites, blogs, text messaging, voice calls over Internet, online forums, and in-game chat). Responses to these latter two questions were summed to create a Technology Use Score, with mean scores indicating more frequent Internet and/or digital communications use.

Kessler Psychological Distress Scale (K10). This 10-Item scale asked respondents how they have been feeling over the past 30 days with example items including: 'About how often did you feel tired out for no good reason?', and 'About how often did you feel depressed?' (Kessler et al. 2002). The K10 has also been validated in the Australian population against clinical diagnoses of depressive episode and generalised anxiety disorder (Andrews & Slade 2001). The response frame is a Likert scale where 1 = None of the time, and 5 = All of the time. K10 scores can thus range from experiencing anxiety and depression none of the time (10 points) to all of the time (50 points), with scores of 10 to 21 indicating 'low' or 'moderate' levels of psychological distress and scores of 22 or more indicating 'high' and 'very high' levels of psychological distress (Andrews & Slade 2001). Previous studies have reported very strong internal consistency (e.g. $\alpha = .93$ in Fassaert et al. 2009). The

Cronbach's alpha for this sample was .95, indicating likewise very strong internal consistency.

Online dating and sexual self-image behaviour items. Respondents self-reported whether they had ever experienced a range of online dating and sexual self-image behaviours. Behaviours were rated on a 5-point Likert scale where 0 = Never, and 5 = Frequently. Example items for online dating include: 'used a dating or hook-up app on your mobile phone'; for consensual sexual self-images: 'sent a nude or sexual photo or video of yourself to a current sexual partner'; and for non-consensual sexual self-images: 'sent someone a nude or sexual photo or video when you didn't really want to'. Selected items were summed to create an Online Dating Score, Consensual Sexual Self-Images Score, and Pressured/Unwanted Sexual Self-Images Score, with higher mean scores on each indicating a greater frequency and range of behaviours experienced.

Sexual Image-Based Abuse Myth Acceptance (SIAMA) Scale. An 18-Item scale which had previously been developed (Powell, Henry & Flynn forthcoming) and modelled on rape myth acceptance, tested respondents' attitudes towards minimising the harms and blaming victims of IBSA. Example items include: 'Women tend to exaggerate how much it affects them if a nude or sexual image of them gets out online', and 'People should know better than to take nude selfies in the first place, even if they never send them to anyone'. The SIAMA scale was found to have very strong internal consistency ($\alpha = .93$), with Cronbach's alphas for the two subscales 'Minimise' and 'Blame' of .95 and .86 respectively. Higher mean scores indicate greater endorsement of minimising and blaming attitudes in relation to IBSA. Mean scores can also be categorised as low endorsement (equal or less than 54), moderate endorsement (55 to 90) and high endorsement (91 to 126).

IBSA victimisation items. Respondents self-reported whether they had ever experienced (since the age of 16) a photograph or video being taken, distributed, or sent onto others, or threats made to distribute, without their permission and in a range of circumstances, including: where they were completely nude; where their genitals and/or breasts were visible; where they were engaged in a sex act; where they were engaged in a private act (such as showering, bathing, or toileting); as well as 'upskirt' and 'downblouse' shots. Responses on individual items were summed to produce an IBSA Score, with higher mean scores indicating experience of multiple forms of IBSA victimisation.

Nature and impacts items. Of those respondents who did disclose experiencing at least one form of IBSA, additional items asked about the nature and impacts of their most recent experience. These included: the gender of the perpetrator; any relationship to the perpetrator; whether the image-based violation was a one-off behaviour (or part of a pattern of harassing and/or abusive behaviour from the same perpetrator); sites of distribution and whether identifying information was also shared (where applicable); emotional impacts (e.g. whether they felt it was funny [reverse scored], okay [reverse scored], annoying, humiliating, depressing, frustrating, or if they feared for their safety); personal impacts (e.g. on intimate, family, social, and professional relationships); and any

actions taken as a result of the experience. Individual responses on six emotional impact items were summed to create an Emotional Impacts Score, while the same was done for personal impacts items to create a Personal Impacts Score, where higher mean scores indicate a greater severity of multiple impacts.

Demographic items. These included: gender, age, sexuality, relationship status, languages other than English (LOTE), nativity, level of education, income and disability items. The survey was tested through both cognitive interviews and an initial pilot survey sample to ensure that the adapted survey measures remain valid and reliable in the Australian context. Descriptive and inferential statistical analyses were conducted using quantitative analysis software (e.g. SPSS).

Conclusion

The methods for this project were designed to address significant gaps in the literature on IBSA regarding the prevalence and nature of IBSA. The remaining sections of this report discuss the key findings in relation to: the quantitative national survey with over 4,000 Australian adults; the legislative analysis of IBSA civil and criminal laws in a national and international context; and the qualitative semi-structured interviews with 52 Australian stakeholders.

The nature, prevalence and impacts of IBSA: Quantitative findings

Introduction

An overarching aim of this research has been to examine both the nature and extent of IBSA experienced within the Australian community. In this section of the report, the key findings from the survey phase are reported. First, some of the high-level findings on the extent of IBSA victimisation are explored, before then moving onto key findings regarding perpetration behaviours. In the later sub-sections, survey data are discussed on witnessing and bystander responses to IBSA, as well as community attitudes that minimise the harms of IBSA, blame the victims of IBSA, and/or excuse the perpetrators of IBSA.

Digital dating and sexual self-images

After some general questions about technology use and social media participation, respondents were asked about their own digital dating and sexual self-image ('selfie') behaviours. Overall, the data suggest that digital dating behaviours, such as using websites, hook up apps, texting or messaging to flirt, arrange dates, or to meet for sex, were the norm for respondents. In total, 78% had engaged in at least one of the digital dating behaviours asked about (see Table 1).

Sharing a nude or sexual self-image was also a relatively common experience for the sample with almost half of respondents (aged 16 to 49) doing so (see Table 1). Men were more likely than women to have engaged in online dating and sexual self-image taking and/or sending behaviours. For example, males (50%) were more likely than females (42%) to have ever voluntarily sent another person a sexual self-image. Men were more likely than women to send a sexual self-image to someone they only knew online (37% of men compared with 21% of women), and to someone they had just met (31% of men compared with 17% of women). Men (27%) were also more likely than women (18%) to say that they had sent a sexual self-image when they didn't really want to. However, two specific items asking about feeling pressured to send a sexual selfie, and receiving an image of someone's genitals that they had not requested, did not differ significantly by gender.

Table 1: Digital dating & sexual selfie behaviours - by gender

Digital dating behaviours	Females N (%)	Males N (%)	Total N (%)
Flirted with someone online	1282 (53.3)	1195 (64.0)*	2477 (58)
Asked someone out online for a first date	757 (31.5)	896 (48.0)*	1653 (38.7)
Asked someone out by sending them a text message or email	955 (39.7)	976 (52.2)*	1931 (45.2)
Used the internet or email to maintain a long-distance romantic	909 (37.8)	938 (50.2)*	1847 (43.2)

relationship			
Used an online dating website	864 (35.9)	954 (51.1)*	1818 (42.5)
Used a dating or hook-up app on your mobile phone	680 (28.3)	799 (42.8)*	1479 (34.6)
Asked someone you first met online to meet-up for sex	460 (19.1)	688 (36.8)*	1148 (26.9)
Went on a date with someone you met through an online dating website or app	817 (34.0)	884 (47.3)*	1701 (39.8)
Sent someone a flirty or sexy text or chat message	1301 (54.1)	1121 (60.0)*	2422 (56.7)
Asked someone to send you a nude or sexual photo or video	557 (23.2)	746 (39.9)*	1303 (30.5)
<i>ANY digital dating behaviours</i>	<i>1713 (71.2)</i>	<i>1458 (78.1)*</i>	<i>3171 (74.2)</i>
Voluntary sexual self-image behaviours			
Sent a nude or sexual photo or video of yourself to a current sexual partner	830 (34.5)	763 (40.8)*	1593 (37.3)
Sent a nude or sexual photo or video of yourself to a person you only knew online	504 (20.9)	689 (36.9)*	1193 (27.9)
Sent someone you just met a nude or sexual photo or video to flirt with them	411 (17.1)	586 (31.4)*	997 (23.3)
Let a sexual partner or date take a nude or sexual photo or video of you	653 (27.1)	626 (33.5)*	1279 (29.9)
Made a nude or sexy video with a sexual partner	530 (22.0)	634 (33.9)*	1164 (27.2)
<i>ANY voluntary sexual self-image behaviours</i>	<i>1021 (42.4)</i>	<i>927 (49.6)*</i>	<i>1948 (45.6)</i>
Pressured/unwanted sexual self-image behaviours			
Sent someone a nude or sexual photo or video when you didn't really want to	443 (18.4)	507 (27.1)*	950 (22.2)
Felt pressured to send a nude or sexual photo or video when you didn't really want to	632 (26.3)	530 (28.4)	1162 (27.2)
<i>ANY pressured/unwanted sexual self-image behaviours</i>	<i>654 (27.2)</i>	<i>578 (30.9)</i>	<i>1232 (28.8)</i>
Image-based harassing behaviours			
Received a nude or sexual photo or video of another person when you hadn't requested it (not including spam)	745 (31.0)	730 (39.1)*	1475 (34.5)
Received a photo or video of someone's genitals when you hadn't requested it (not including spam)	758 (31.5)	679 (36.3)	1437 (33.6)
Discovered that an image was drawn, digitally altered or	332 (13.8)	461 (24.7)*	793 (18.6)

manipulated to represent you in a sexual way

ANY image-based harassing behaviours 860 (35.7) 804 (43.0)* 1664 (38.9)

* denotes statistically significant differences between females and males at $p < .001$.

In comparing the four categories of digital dating and sexual selfie behaviours by age group, a clear pattern emerges (see Table 2). Overall, 20 to 29 year olds are most likely to engage both in digital dating behaviours and in voluntary sexual self-image behaviours; while those aged 40 to 49 are least likely to do so. There were no statistically significant differences in these categories for those aged 16 to 19, and 30 to 39. However, for pressured and unwanted sexual self-image behaviours, as well as image-based harassing behaviours, there was a trend towards younger people aged 16 to 19, and those aged 20 to 29, being more likely to experience these behaviours.

Table 2: Any digital dating & sexual selfie behaviours - by age

	16 to 19 N (%), a	20 to 29 N (%), b	30 to 39 N (%), c	40 to 49 N (%), d
Digital dating behaviours	191 (76.7) ^{b,d}	965 (85.0) ^{a,c,d}	1122 (77.3) ^{b,d}	893 (62.1) ^{a,b,c}
Voluntary sexual self-image behaviours	108 (43.4) ^{b,d}	647 (57.0) ^{a,c,d}	705 (48.6) ^{b,d}	488 (33.9) ^{a,b,c}
Pressured/unwanted sexual self-image behaviours	101 (40.6) ^{c,d}	444 (39.1) ^{c,d}	458 (31.6) ^{a,b,d}	229 (15.9) ^{a,b,c}
Image-based harassing behaviours	129 (51.8) ^{c,d}	556 (49.0) ^{c,d}	598 (41.2) ^{a,b,d}	381 (26.5) ^{a,b,c}

Note: Letters a,b,c,d denotes statistically significant difference between age categories (horizontal cells).

IBSA victimisation

In the survey, 1 in 5 respondents (23%) reported being a victim of at least one form of IBSA. This includes photos or videos where: a person was nude, where their breasts or genitals were visible, where they were engaged in a sex act, or where they were showering or bathing. It also includes ‘upskirting’ and ‘downblousing’ images. Most common were nude or sexual images being taken of them without their consent, with 1 in 5 (20%) reporting these experiences.

Also common was nude or sexual images being sent onto others or distributed without consent, with 1 in 10 (11%) surveyed reporting these experiences. It is important to note that these figures are likely to underestimate the prevalence of IBSA, as they only include data from those victims who have become aware that their images have been created and/or distributed without consent. Thus, the figure is likely to be much higher.

The study found a large cross-over between the non-consensual taking and distribution of images. Of those who had experienced a nude or sexual image of them being taken without their consent, 45% also said an image of them had been distributed without their consent. This again is likely to be an underestimate since many victims will never discover that their images have either been taken or distributed.

The most common sites or methods where victims reported their images had been distributed included: mobile phone messaging, email, Snapchat, Facebook, and other online sites (such as Reddit, Tumblr, and blogging sites), with 40% of victims saying their images were distributed across multiple devices and platforms. The finding that interpersonal communications sources, such as mobile phone, email and social media, were most commonly used is an important one but it also has a clear limitation. As noted above, the survey only captured those victims who had become aware that their images had been distributed. Interpersonal communication platforms and devices are therefore likely to be represented as a highly common mode, because these are the kinds of places where victims are most likely to be made aware of the misuse of their images. Interestingly, very few respondents said that their images were shared on ‘revenge pornography’, ‘ex-girlfriend’ or other online websites; yet it is possible that if those sites were used, victims would not know that their images were circulating there.

Nine per cent of survey respondents had experienced threats that a nude or sexual image would be sent onto others or distributed without their consent (see Table 3). Though threats were the least common form of IBSA in the study, these experiences are particularly harmful for victims.

Overall, the study found that women and men reported similar rates of victimisation of IBSA behaviours, however the findings demonstrate different gendered patterns in the nature of IBSA and its effects, as well as self-disclosed perpetration, which are discussed further below.

Table 3: Any IBSA victimisation - by gender

	Females N=2,406 (%)	Males N=1,868 (%)	Total N=4,274 (%)
Any sexual/nude images taken without consent	462 (19.2)	402 (21.5)	864 (20.2)
Any sexual/nude images distributed without consent	221 (9.2)	233 (12.5)	454 (10.6)
Any sexual/nude images threatened to distribute without consent	170 (7.1)	198 (10.6)	368 (8.6)
<i>Any IBSA victimisation</i>	<i>524 (21.8)</i>	<i>445 (23.8)</i>	<i>969 (22.7)</i>

The survey also asked female respondents about upskirting and downblousing images – where either images of their cleavage or up their skirt were taken, distributed or threatened to be distributed, without their permission. Of those surveyed, 1 in 10 women said that someone had taken an image of their cleavage without their permission and 1 in 20 said someone had taken an image up their skirt without their permission (data not shown). It is important to remember again, that these are only the prevalence rates where victims have become aware that someone was taking these images without their consent. The actual rate is likely to be higher since victims may not know that someone is taking images of them, or they may not know that someone is sharing images of them via mobile phone, email or Internet sites.

IBSA victimisation in vulnerable populations

Among the key findings on the extent of victimisation were that some groups within the Australian community were significantly more likely than others to report ever being a victim of IBSA. For example, 1 in 2 (50%) Aboriginal and Torres Strait Islander people, and 1 in 2 (56%) respondents disclosing a disability, reported ever experiencing at least one form of IBSA. Of LGB respondents, 1 in 3 (36%) experienced IBSA victimisation, as compared with 1 in 5 (21%) identifying as heterosexual. Meanwhile, IBSA victimisation was overall higher among those aged 16 to 19 (1 in 3, or 30.9%), and 20 to 29 (1 in 4, or 27%).

Of the respondents who said ‘yes’ to either ‘always’ or ‘sometimes’ needing assistance with their daily living activities, body movement activities and/or communication needs, more than half reported experiencing at least one form of IBSA (56.1%). This was significantly more than those respondents who did not disclose needing such assistance (17.6%). Of the different forms of IBSA, 53% of respondents with a disability reported experiencing the taking of a nude or sexual image without their permission; 42% reported that such an image had been distributed; and 41% said that they had experienced threats relating to the distribution of nude or sexual images.

Those who identified as having Aboriginal or Torres Strait Islander descent were twice as likely to be victimised (50%) than non-Indigenous respondents (22%). Victimisation was highest for the taking of nude or sexual images without permission, where 47% of Aboriginal or Torres Strait Islanders surveyed experienced this abuse, compared with 19% of non-Indigenous Australians. Thirty-seven per cent reported a nude or sexual image had been distributed of them without consent, as compared with 9% for non-Indigenous Australians; while 36% had been threatened with the distribution of a nude or sexual image, compared with 8% of non-Indigenous Australians.

Respondents who identified as LGB were significantly more likely (36%) than heterosexual-identifying respondents (21%) to report experiencing IBSA. Gay and bisexual males were slightly more likely (39%) than lesbian and bisexual females (33%) to report being victims. Gay and bisexual males were also the most likely of any group to report consensually taking and sending sexual self-images, with 79% reporting doing so, compared with 64% of lesbian and gay females, 48% of heterosexual males, and 41% of heterosexual females. Like the patterns of IBSA more generally, nude or sexual images being taken without consent was

the most common form of IBSA for LGB respondents, with 33% reporting experience of this abuse, as compared with 19% of heterosexual-identifying respondents. Of LGB respondents, 21% reported at least one experience of the non-consensual distribution of a nude or sexual image, compared with 9% of those identifying as heterosexual. Finally, 18% reported experiencing threats of distribution, as compared with 7% of heterosexual-identifying respondents.

The survey did not find any significant differences in victimisation by LOTE spoken at home, nativity (i.e. whether a participant was Australian- born or foreign-born), level of education, or income bracket.

Table 4: IBSA victimisation by key demographics					
		Images taken N (%)	Images distributed N (%)	Images threatened N (%)	Any IBSA N (%)
Gender	Males (n=1868)	402 (21.5)	233 (12.5)	198 (10.6)	445 (23.7)
	Females (n=2406)	462 (19.2)	221 (9.2)	170 (7.1)	524 (21.8)
Sexuality	Heterosexual (n=3764)	696 (18.5)	349 (9.3)	279 (7.4)	784 (20.8)
	LGB (n=510)	168 (32.9)*	105 (20.6)*	89 (17.5)*	185 (36.3)*
Age	16 – 19 (n=249)a	66 (26.5) c,d	33 (13.3)	28 (11.2)	77 (30.9)c,d
	20 – 29 (n=1135)b	264 (23.3) d	159 (14.0)	143 (12.6)	306 (27.0) c,d
	30 – 39 (n=1451)c	296 (20.4) a,b,d	185 (12.7)	152 (10.5)	325 (22.4) a,b,d
	40 – 49 (n=1439)d	238 (16.5) a,b,c	77 (5.4) a,b,c	45 (3.1) a,b,c	261 (18.1)a,b,c
Indigenous	Yes (n=133)	62 (46.6)*	49 (36.8)*	48 (36.1)*	67 (50.4)*
	No (n=4134)	799 (19.3)	404 (9.8)	320 (7.7)	899 (21.7)
Disability	Yes, always/Sometimes need assistance, n=561	298 (53.1)*	237 (42.0)*	230 (41.0)*	315 (56.1)*
	No, n=3679	559 (15.2)	214 (5.8)	136 (3.7)	646 (17.6)
Perpetration	Yes	271 (65.9)*	217 (52.8)*	209 (50.9)*	292 (71.0)*
	No	510 (14.0)	185 (5.1)	117 (3.2)	591 (16.2)
Voluntary sexual self-images	Yes	647 (33.2)*	387 (19.9)*	335 (17.2)*	731 (37.5)*

	No	217 (9.3)	67 (2.9)	33 (1.4)	238 (10.2)
Pressured/ unwanted sexual self- images	Yes	506 (41.1)*	349 (28.3)*	311 (25.2)*	574 (46.6)*
	No	358 (11.8)	105 (3.5)	57 (1.9)	395 (13.0)
Total IBSA		862 (20.2)	453 (10.6)	367 (8.6)	967 (22.7)

Note: * denotes statistically significant against demographic reference group (vertical cells), $p < .001$. Letters a, b, c, d denote statistically significant differences between age categories (vertical cells), $p < .001$.

The other pattern reflected in the victimisation rates is some differences in sexual self-image taking behaviours. The survey found that those who disclosed engaging in voluntary sexual selfie-taking behaviours were significantly more likely (37%) than those who had never sent a sexual selfie (10%) to have experienced at least one form of IBSA. Also, those who were pressured into sharing a sexual selfie were more likely (46%) to be victimised than by those who did not report unwanted experiences (13%).

However, even among those who say they have never consensually sent, or been pressured to send, someone else a sexual self-image, 1 in 10 were still victims of IBSA. This can be understood in light of the finding that many victims have experienced someone taking a nude or sexual photo or video of them without their permission; images which themselves might later be distributed, or threats made to distribute them. Therefore, while sending sexual selfies might increase the risk that those images are misused – not sending sexual selfies is by no means a guaranteed protection against victimisation.

IBSA perpetration

The majority (54%) of victims of IBSA reported that the perpetrator was male, with victims reporting 33% of perpetrators were female, and 13% were either unknown or a mixed group of both male and female perpetrators. These patterns differed only a little by the gender of the victim, with females (57%) slightly more likely than males (50%) to be victimised by a male perpetrator, and females (30%) slightly less likely than males (35%) to be victimised by a female perpetrator. What these findings suggest is that IBSA, while gendered in some ways, is not only a gender-specific form of abuse and harassment.

Self-disclosed perpetration of IBSA

Overall, 1 in 10 respondents self-disclosed engaging in at least one IBSA behaviour. Almost 9% said that they had taken a nude or sexual image of another person without that person's permission, while 6.7% said that they had distributed a nude or sexual image without permission. Finally, 1 in 20, or 5.4%, said that they had made threats to distribute nude or sexual images of another person without permission.

Table 5: Any IBSA self-disclosed perpetration - by gender

	Females N=2,406 (%)	Males N=1,868(%)	Total N=4,274 (%)
Any sexual/nude images taken without consent	153 (6.5)	220 (12.2)*	373 (8.9)
Any sexual/nude images distributed without consent	109 (4.6)	168 (9.3)*	227 (6.7)
Any sexual/nude images threatened to distribute without consent	80 (3.4)	129 (7.2)*	209 (5.0)
Any IBSA perpetration	171 (7.4)	240 (13.7)*	411 (10.1)

* denotes statistically significant difference at $p < .001$.

For all individual IBSA behaviours, men were significantly more likely to report engaging in perpetration than women. Overall, 13.7% of men, and 7.4% of women reported engaging in any IBSA perpetration (see Table 5). Perpetration was highest for males in the 20-29 (18.2%) and 30-39 (15.6%) age groups. For women, perpetration was highest among 20-29 (9.3%) and 16-19 (9.1%) year olds, suggesting a younger cohort of women engaging in IBSA perpetration as compared with men (see Table 6).

Table 6: Any IBSA self-disclosed perpetration - by age

	16 to 19 N (%), a	20 to 29 N (%), b	30 to 39 N (%), c	40 to 49 N (%), d
Any sexual/nude images taken without consent	21 (9.3)d	122 (11.0)d	150 (10.6)d	80 (5.6)a,b,c
Any sexual/nude images distributed without consent	14 (6.3)d	110 (9.9)d	116 (8.2)d	37 (2.6)a,b,c
Any sexual/nude images threatened to distribute with consent	11 (4.9)d	87 (7.9)d	95 (6.7)d	16 (1.1)a,b,c
Any IBSA perpetration	23 (10.5)d	133 (12.2)d	163 (11.8)d	92 (6.7)a,b,c

Letters a, b, c, d denote statistically significant differences between age categories (horizontal cells), $p < .001$.

The survey also asked perpetrators further questions about some of the characteristics of their behaviours. Most perpetrators said the victim was a partner/former partner, a family member or a friend. Perpetrators who distributed images without consent were similarly likely to say the image was of a male victim (34.8%) as a female victim (37%).

Nature and impacts of IBSA

Nature of relationship to perpetrator

Both men and women experienced the majority of IBSA from known people such as acquaintances, friends and/or family members (see Table 7). Women (39%) were more likely than men (30%) to be victimised by an intimate partner or ex-partner. In particular,

women’s experiences of threats to distribute a nude or sexual image were much more likely to come from a partner or ex-partner (38%). This was compared with men’s experiences of such threats from a partner or ex-partner (23%). The highest category for partner or ex-partner IBSA was women’s experiences of nude or sexual images being taken of them without permission: 45% of female victims said it was a partner or ex-partner who did this, compared with 39% of male victims. Female victims (12%) were also more likely than male victims (5%) to experience a stranger having ever taken a nude or sexual image of them without permission. This is likely to reflect gender differences in image-taking behaviours such as ‘upskirting’ and ‘downblousing’, as well as other voyeuristic or surreptitious images.

Table 7: Perpetrator characteristics by gender – as reported by victims

	Perpetrator sex N (%)			Relationship to victim N (%)		
	Male	Female	Mixed/ unknown	Partner/ ex- partner	Other known person	Strangers
Female victims						
Any sexual/nude images taken without consent (n=458)	298 (65.1)	110 (24.0)	50 (10.9)	206 (45.1)	197 (43.0)	54 (11.8)
Any sexual/nude images distributed without consent (n=220)	117 (53.2)	73 (33.2)	30 (13.6)	74 (33.6)	126 (57.3)	21 (10.0)
Any sexual/nude images threatened to distribute without consent (n=169)	91 (53.8)	54 (32.1)	24 (14.2)	64 (37.9)	95 (56.2)	9 (5.3)
Male victims						
Any sexual/nude images taken without consent (n=402)	207 (51.5)	144 (35.8)	51 (12.7)	158 (39.3)	220 (55.0)	20 (5.0)
Any sexual/nude images distributed without consent (n=231)	129 (55.8)	70 (30.3)	32 (13.9)	59 (25.5)	161 (69.7)	11 (5.0)
Any sexual/nude images threatened to distribute without consent (n=197)	81 (41.1)	79 (40.1)	37 (18.8)	45 (22.8)	136 (69.0)	16 (8.1)

Young people aged 16 to 19 and 20 to 29 were also more likely to experience IBSA from known people such as friends or family members, than from intimate partners or ex-partners. This was particularly true for the distribution of nude or sexual images without

consent where 30% of those aged 16 to 19 said it was a partner or ex-partner, while 64% said it was another known person. In comparison, 40% of respondents aged 40 to 49 years who had had a nude or sexual image distributed without consent said it was a partner or ex-partner who did this, while 49% said it was another known person.

Impacts of IBSA

The survey found that victims of IBSA were almost twice as likely as non-victims to report experiencing high levels of psychological distress. These impacts were highest for victims who had experienced threats to distribute an image ('sextortion'), of whom 80% reported high levels of psychological distress, consistent with a diagnosis of moderate to severe depression and/or anxiety disorder. Moderate to severe depression and/or anxiety affected 75% of victims whose images were distributed, and 67% of those whose images were taken without consent. These are very important findings as they demonstrate the serious nature of the harm that a majority of victims of IBSA experience.

Many victims also reported that they were 'very' or 'extremely' fearful for their safety as a result of experiencing IBSA. Feeling afraid for one's safety is an important indicator of potential stalking and/or domestic violence perpetration, with many legal definitions of stalking and abuse (such as for the purposes of an intervention or protection order) requiring that the victim fears for their safety. Of those experiencing threats of distribution, 46% of reported feeling highly fearful for their safety. Meanwhile, 39% of people whose images were distributed, and 28% of those whose images were taken without consent, felt highly fearful for their safety.

There were also important differences in fear experienced by women as compared with men. Women victims were more likely than men to report feeling afraid for their safety. For example, for images taken without consent, 32% of women victims reported fearing for their safety, as compared with 23% of men. For images distributed without consent, 40% of women and 36% of men said they felt afraid, while for images threatened to be distributed, 50% of women and 42% of men reported that they felt fearful for their safety. This is an important finding especially in light of the finding above that women are also more likely than men to experience IBSA from a male perpetrator, and from a partner or ex-partner. It suggests that some forms of IBSA may be associated with stalking and/or domestic violence victimisation – particularly for women victims.

Attitudes towards IBSA

As described in the methodology, the survey developed a set of attitudes items based on the extensive research that has previously been conducted on rape myths. Adapting items from the Illinois Rape Myth Acceptance scale (short-form), respondents were asked about the extent to which they agreed with statements endorsing either the minimisation of IBSA harms, victim-blaming, or excuses for perpetration. Overall, men (49%) were significantly more likely than women (32%) to hold attitudes that either minimised the harms, blamed the victims, or excused the perpetrators of IBSA. Given the finding that men are also more likely to be perpetrators of IBSA, and often against either a female partner or ex-partner or

other male peers, these findings suggest there is a need for prevention and education efforts on this issue.

On the complete SIAMA scale (see Table 8), mean scores of 54 indicate an average and neutral response of 3 on most items (where ‘strongly disagree’ = 1 and ‘strongly agree’ = 7, on the Likert scale). Therefore, only where mean SIAMA total scores were above 54 does it indicate that respondents’ attitudes were trending towards agreement with IBSA myths. The mean scores reported in the table below suggest not only that men’s and women’s attitudes significantly differed, but that women’s attitudes trended towards disagreement with IBSA myths, while men’s attitudes trended towards agreement. Moreover, this significant difference held for each of the three sub-scales of the SIAMA: Minimise the harms of IBSA, Blame the victims, Excuse the perpetrators.

Table 8: Sexual Image-Based Abuse Myth Acceptance (SIAMA) Scale - by gender			
	Females M (SD)	Males M (SD)	Total M (SD)
Minimise subscale			
Women should be flattered if a partner or ex-partner shows nude pics of her to some close friends (M)	1.72 (1.80)	2.42 (1.72)	2.12 (1.65)
A woman should share a nude image of herself with her partner, even if she doesn't really want to, for the good of the relationship (M)	1.72 (1.47)	2.29 (1.73)	1.97 (1.62)
A man shouldn't get upset if his partner sends nude pics of him to others (M)	1.94 (1.62)	2.50 (1.77)	2.19 (1.72)
Although most women wouldn't admit it, they generally find it a turn-on for a guy to share nude pics of her with his mates (M)	2.04 (1.66)	2.63 (1.73)	2.30 (1.72)
A woman shouldn't get upset if her partner sends nude pics of her to others (M)	1.77 (1.56)	2.28 (1.76)	1.99 (1.67)
Women tend to exaggerate how much it affects them if a or sexual image of them gets out online (M)	2.20 (1.76)	2.75 (1.80)	2.44 (1.80)
<i>TOTAL – Minimise Subscale</i>	<i>11.55 (8.14)</i>	<i>14.89 (9.03)*</i>	<i>13.01 (8.70)</i>
Excuse subscale			
If a guy shares a nude or sexual pic of his partner with his friends when he's drunk, he can't really be held responsible (E)	1.93 (1.59)	2.41 (1.73)	2.14 (1.67)
If a woman shows her friends a nude or sexual image of her partner, it just shows how proud she is of him (E)	2.11 (1.60)	2.69 (1.70)	2.36 (1.67)

It's only natural for a guy to brag to his mates by showing them a nude or sexual image of his partner (E)	2.18 (1.69)	2.62 (1.75)	2.37 (1.73)
If a woman is willing to send a nude or sexual image to a man she just met, then it's no big deal if he goes a little further by showing it to his mates (E)	2.13 (1.71)	2.60 (1.78)	2.34 (1.76)
A man's reputation is boosted among his mates if he shares nude pics of a sexual partner (E)	2.76 (1.89)	2.83 (1.79)	2.79 (1.85)
Men don't usually mean to pressure a partner into sending nude pics, but sometimes they get too sexually carried away (E)	2.91 (1.80)	3.37 (1.74)	3.11 (1.79)
<i>TOTAL – Excuse Subscale</i>	<i>14.01 (7.86)</i>	<i>16.53 (8.49)*</i>	<i>15.11 (8.23)</i>
Blame subscale			
If a person sends a nude or sexual image to someone else, then they are at least partly responsible if the image ends up online (B)	3.86 (2.19)	4.16 (2.00)	3.99 (2.11)
A woman who sends a nude or sexual image to her partner, should not be surprised if the image ends up online (B)	2.99 (2.15)	3.45 (2.11)	3.19 (2.14)
If a man sends a nude or sexual image to someone he just met, he should not be surprised if the image ends up online (B)	3.30 (2.19)	3.93 (2.10)	3.57 (2.17)
Celebrities and well-known media personalities who take sexy images of themselves should not expect that those images will remain private (B)	3.65 (2.27)	4.05 (2.10)	3.83 (2.20)
People should know better than to take nude selfies in the first place, even if they never send them to anyone (B)	4.57 (2.20)	4.52 (2.06)	4.55 (2.14)
If a man sends a nude or sexual image to a partner, he can't expect it will remain private (B)	2.90 (2.09)	3.61 (2.08)	3.21 (2.12)
<i>TOTAL – Blame Subscale</i>	<i>21.27 (10.03)</i>	<i>23.73 (9.62)*</i>	<i>22.35 (9.93)</i>
TOTAL SIAMA Scale	46.83 (22.27)	55.14 (23.01)*	50.47 (22.97)

* denotes statistically significant differences, tested at the scale and subscale levels, $p < .001$. (M) = Minimise, (B) = Blame, (E) = Excuse indicate conceptual sub-factors in a three-factor model. The item 'It should be a crime for someone to share a nude or sexual image of another person without that person's permission' though reported above, did not correlate satisfactorily within the SIAMA scale (after accounting for reverse scoring), and so is not shown in the table here.

Four in 5 (81%) Australians agreed with the statement: 'It should be a crime for someone to share a nude or sexual image of another person without that person's permission'. Females

(84%) were significantly ($p < .001$) more likely than males (77%) to endorse the criminalisation of IBSA. Both victims (81%) and non-victims (81%) of IBSA were just as likely to agree that it should be a crime, indicating that there is a broad agreement within the Australian community as to the seriousness of this issue, regardless of whether someone has experienced it personally. Perpetrators (77%) were somewhat less likely to agree that IBSA should be a crime than non-perpetrators (81%), although the margin of difference was not statistically significant.

Finally, the extent to which both victims and non-victims, as well as perpetrators and non-perpetrators of IBSA, endorsed the attitudinal myths of Minimise, Blame and Excuse on the SIAMA scale, was examined (see Tables 8 & 9).

Table 9: Any IBSA self-disclosed perpetration - by age

Construct variable	Victims M (SD)	Non-victims M (SD)	Perpetrators M (SD)	Non- perpetrators M (SD)
SIAMA Total	59.63 (27.43)*	47.78 (20.74)	67.95 (27.21)*	47.71 (20.85)
SIAMA Minimise	16.89 (10.80)*	11.87 (7.61)	20.07 (11.17)*	11.88 (7.67)
SIAMA Blame	23.79 (9.82)	21.92 (9.92)	25.79 (8.89)*	21.80 (9.95)
SIAMA Excuse	18.94 (9.69)*	13.99 (7.39)	22.09 (9.63)*	14.03 (7.38)

* denotes statistically significant differences, victims compared with non-victims, and perpetrators compared with non-perpetrations, at $p < .001$.

Respondents who had disclosed experience of IBSA victimisation reported significantly higher mean SIAMA scores than non-victims. Victims also reported significantly higher than non-victims on both the Minimise and Excuse subscales, but not the Blame subscale. Meanwhile, self-reported perpetrators of IBSA behaviours had significantly higher mean SIAMA scores than non-perpetrators; and this was also the case for each of the three subscales of Minimise, Blame and Excuse.

Table 10: SIAMA frequency agree – by key demographics

		Low endorsement (Strongly Disagree/Disagree) N (%)	Moderate to high endorsement (Moderate to Strongly Agree) N (%)
Gender	Males (n=1868)	947 (50.7)*	921 (49.3)*
	Females (n=2406)	1643 (68.3)	763 (31.7)

Sexuality	Heterosexual (n=3764)	2288 (60.8)	1476 (39.2)
	LGB (n=510)	302 (59.2)	208 (40.8)
Age	16 – 19 (n=249)a	145 (58.2)	104 (41.8)
	20 – 29 (n=1135)b	696 (61.3)	439 (38.7)
	30 – 39 (n=1451)c	840 (57.9)d	611 (42.1)d
	40 – 49 (n=1439)d	909 (63.2)c	530 (36.8)c
Indigenous	Yes (n=133)	50 (37.6)*	83 (62.4)*
	No (n=4134)	2534 (61.3)	1600 (38.7)
Disability	Yes, always/Sometimes need assistance, n=561	161 (28.7)*	400 (71.3)*
	No, n=3679	2409 (65.6)	1270 (34.5)
Perpetration	Yes	141 (34.3)*	270 (65.7)*
	No	2354 (64.6)	1288 (35.4)
Victimisation	Yes (n=969)	458 (47.3)*	511 (52.7)*
	No (n=3305)	2132 (64.5)	1173 (35.5)
Voluntary sexual self-images	Yes (n=1948)	997 (51.2)*	951 (48.8)*
	No (n=2326)	1593 (68.5)	733 (31.5)
Pressured/unwanted sexual self-images	Yes (n=1232)	475 (38.6)*	757 (61.4)*
	No (n=3042)	2115 (69.5)	927 (30.5)

* denotes statistically significant against demographic reference group (vertical cells), $p < .001$. Letters a, b, c, d denote statistically significant differences between age categories (vertical cells), $p < .001$.

Overall, the study found that perpetrators (65.7%) were significantly more likely – almost twice as likely in fact – as non-perpetrators (35.4%) to endorse victim-blaming and harm minimisation of IBSA. This was higher again when compared by gender with 71.3% of male perpetrators holding victim-blaming and minimising attitudes, as compared with 57.9% of female perpetrators. These findings have significant implications for education and awareness-raising towards the prevention of IBSA, as discussed further below.

Bystanders of IBSA

Respondents were asked whether someone had ever shown them, by displaying on a screen, a photo or video of another person (aged 16 years or over) where the person: was partially clothed or semi-nude (including 'upskirting' or 'downblousing' images); their breasts, including their nipples, were visible; was completely nude; their genitals were visible; was engaged in a sex act; or was showering, bathing or toileting. Respondents were also asked if someone had ever sent them (e.g. by picture message, email, social media or online) a photo or video of another person in those same circumstances.

In both cases, respondents were also asked whether they thought that the person in the image had given permission for the image to be shown or sent, however, approximately 70% of the sample did not answer this follow-up question. Given the completeness of data for all other lines of questioning, this is itself an indication either that the nature of the question was unclear, or that a majority of respondents were reluctant to think further about the consent of those people depicted in the nude/sexual images they are shown or sent. In light of the reality that many such images may cross-over into commercially produced pornography, it is difficult to say with certainty whether the images described here as shown to, or sent to, other people were in fact IBSA in relation to how the study used the concept. For this reason, the findings are not reported in detail here. Future research would benefit from better understanding the potential role that witnesses or bystanders can play in preventing and addressing IBSA.

Implications

Overall, the data sheds some much-needed light on the diversity and complexity of IBSA behaviours. The study found these harms to be relatively common, affecting 1 in 5 of those surveyed, and at rates similar to other sexually harassing behaviours in the community generally. Moreover, the study found that 1 in 10 of those surveyed had experienced the non-consensual distribution of a nude or sexual image; a finding which has since been replicated in a national population-based survey of Australians (OeSC 2017; see below). While a substantial portion of IBSA mirrors the dynamics of male-to-female partner abuse, the study found that this is far from just a gendered issue – with vulnerable and disadvantaged groups most likely to be victimised, and common dynamics of peer-to-peer sexual harassment and abuse being found to exist. Importantly, it was found that this issue affects young adults (20 to 29 years) at similar rates as younger people (16 to 19 years) – though of course younger people may be more vulnerable to the impacts of victimisation, and remain an important group to work with on prevention.

Despite the advances represented by the present study, there are some limitations that should be mentioned to help guide future research efforts. First, this study involved a non-generalisable community sample recruited via an online panel. While online panel providers make efforts at recruiting a diverse population, some research suggests that online panel samples may under-represent some subgroups compared with others (Baker et al. 2010). Future research should thus seek to validate these findings among a more representative

sample of the general population and further examine the experiences of different subpopulation groups.

The findings reported here suggest wider implications for research, policy, and practice in relation to responses and community understandings of IBSA. Given the extent and nature of IBSA, this research supports the need for consistent support services, as well as policy and legislative frameworks to respond to IBSA victimisation nationally. Furthermore, harm-minimising and victim-blaming attitudes constitute well-recognised barriers to help-seeking in response to other forms of sexual violence and abuse, whether held by victims themselves or by the professionals from whom they seek assistance and support. As such, it is important that government policy and programming direct effort to challenging such attitudes in relation to IBSA.

This research is the first Australian empirical study to shed light on the self-disclosed perpetration of IBSA. However, further qualitative research into the nature and dynamics of IBSA perpetration as well as peer support (or the role of witnesses and bystanders) represents an important direction for future research in the field. It is hoped that the findings will contribute to improved understandings of both IBSA victimisation and perpetration in Australia, and contribute to creative ways of both addressing and prevention IBSA.

In 2017, the researchers were commissioned by the Office of the eSafety Commissioner (hereinafter eSafety Commissioner) to conduct further national research into IBSA. In a joint project with the Social Research Centre Melbourne, the survey instrument was adapted and conducted with a representative (probability-based) sample of the Australian community aged 15 to 76 years (OeSC 2017). The research found the same overall prevalence for the non-consensual distribution of a nude or sexual image as present in the survey conducted for this Criminology Research Council project; that is, 1 in 10 Australians have experienced the non-consensual distribution of an intimate image. This commissioned research did not, however, include an additional set of behaviours relating to the taking of nude or sexual images without consent, nor threats being made to distribute a nude or sexual image. Nonetheless, the repeated finding with a representative survey sample provides further validation of the findings reported in this report.

It is important to note that the commissioned research also found similar trends in the nature of non-consensual distribution of intimate images, with certain vulnerable groups within the Australian community being more likely to be victimised, including young people, Indigenous Australians, and LGBTIQ individuals. However, there was one key difference in the nature of the findings between the survey research conducted for the eSafety Office and the research conducted for this report. In a representative sample of the Australian community, statistically significant differences were found by gender of respondents, such that women were more likely to experience the non-consensual distribution of an intimate image than were men (OeSC 2017). In fact, according to the study, adult women (15%) are twice as likely as adult men (7%) to have experienced this particular form of IBSA. This sheds light on the importance of funding population-based community surveys in order to fully understand the nature of gender-based forms of violence and abuse.

IBSA: The law and beyond

Introduction

In response to the increasing prevalence of image-based violations in an increasingly digitised society, many jurisdictions have introduced offences to criminalise the non-consensual taking or distribution (including threats to distribute) of nude, sexual or intimate images, to cover instances of so-called ‘upskirting’, ‘downblousing’, ‘sextortion’ and ‘revenge pornography’. Reforms have also been made to civil laws in some jurisdictions to ensure that complainants can seek alternative remedies for the harms perpetrated against them.

This section of the report analyses the development of both criminal and civil justice responses to IBSA. Due to the project’s overall focus on adults, this section does not summarise the laws in relation to under-age sexting or child exploitation material (or ‘child pornography’). The first sub-section explores criminal justice responses in an international and national context. While reforms to criminal law represents an important first step to prohibiting IBSA, criminal justice responses are only one part of the solution. In the second sub-section, civil justice remedies in Australia are explored (with brief reference to civil law measures internationally). The section concludes with a brief discussion of the importance of other remedies and approaches beyond the law. These include: corporate social responsibility measures; victim support services for advice, counselling and support; as well as primary prevention programs and campaigns in schools, universities and the broader community.

Criminalising IBSA: International legislation

Some legal scholars and practitioners have argued that existing (non-specific) criminal offences are sufficient to charge alleged perpetrators for the non-consensual taking or sharing of intimate images (see e.g. Patton 2015; Stokes 2014). Others argue that these laws are too broad in scope, are not being used by police to charge offenders, or do not adequately fit the elements of the offence (Citron 2014; Citron & Franks 2014; Henry & Powell 2015a, 2016; McGlynn & Rackley 2017; McGlynn, Rackley & Houghton 2017). In response to increasing reports of IBSA, as well as the recognition of the serious impacts on victims, many jurisdictions internationally have introduced legislation to criminalise the non-consensual creation and/or distribution of intimate images (including in some jurisdictions, threats to share images).

The first international jurisdiction to introduce such laws was the Philippines in 2009, where a maximum prison sentence of 7 years and a maximum fine of ₱500,000 were introduced for those who create or distribute a sexual photo or video of a person without their consent (*Anti-Photo and Video Voyeurism Act of 2009 (Republic Act No. 9995)*). In 2014, Israel amended its sexual harassment law to include a prohibition relating to the online distribution of sexual images without consent with a maximum sentence of 5 years and the classification of the perpetrator as a sex offender (*Prevention of Sexual Harassment Law, 5758-1998*). Also in 2014, Japan introduced specific criminal offences for publishing a ‘private sexual image’, with a maximum prison term of 3 years or a fine of up to ¥500,000

(*Act on Prevention of Victimization Resulting from Provision of Private Sexual Image, Law No. 126 of 2014*) (see Matsui 2015).

Jurisdictions in a variety of common law countries have also introduced specific or broader offences to criminalise the non-consensual creation, distribution or threat of distribution of intimate (that is, nude, semi-nude or sexual) images. The sub-section below focuses first on the development of criminal laws in international jurisdictions (Canada, New Zealand, the United Kingdom and the United States), before then discussing law reform in Australia, at federal, state and territory levels.

Canada

In October 2012, 15-year-old Amanda Todd committed suicide in her home after a series of interconnected events. First, she was coerced into exposing her breasts on webcam, and was later blackmailed with threats to share the photo to her friends. After the image was posted on the Internet, Todd faced a sustained campaign of abuse, which included in-person physical assault and taunting, as well as cyberbullying by peers and strangers alike. The following year in April 2013, another Nova Scotian teenage girl, Rehtaeh Parsons, took her own life after a period of sustained harassment and bullying following the non-consensual distribution of a photo involving four boys who had sexually assaulted her while she was vomiting with her head stuck out of a window (Dodge 2016).

Both tragic cases provided the impetus for change in Canadian law, leading to the introduction of the federal *Protecting Canadian from Online Crime Act* (S.C. 2014, c. 13) at the end of 2014, which amended the Criminal Code of Canada to introduce new criminal offences for cyberbullying, IBSA and other related offences. The legislation provides that anyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent, or being reckless as to whether or not they had consented, is guilty of either an indictable offence (5 years maximum prison sentence), or a less serious summary offence (6 months maximum prison sentence) (s162.1 (1)). An 'intimate image' is defined in the legislation to mean 'a visual recording of a person made by any means including a photographic, film or video recording, (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity' where there is a reasonable expectation of privacy. The Act provides a defence if the disclosure of intimate images serves the public good (e.g. for law enforcement purposes).

The Act also empowers courts to prohibit the convicted or discharged offender from using the Internet or other digital network unless the court specifies a set of conditions under which they may have restricted access (162.2 (1)). A person who breaches this order can be found guilty of an indictable or summary offence (no more than 2 years' imprisonment). Finally, the legislation includes amendments to empower courts to order the removal of intimate images from the Internet and the recovery of expenses incurred by victims who request that images of them be removed. The court can order the forfeiture of property used in the commission of the offence, and a prohibition on the subsequent distribution of

images. A judge may also issue a warrant to compel the preservation of electronic evidence (s164).

A number of cases have come before the courts after the passing of this legislation. For example, in 2016, a 29-year-old Winnipeg man was found guilty for posting naked images of his ex-girlfriend on Facebook after she confessed to cheating on him. He was sentenced to 90 days in jail and was also banned from using the Internet for three years except for the purposes of work (Khandaker 2016). More recently in May 2017, a woman Googled her name to discover videos of her having sex and naked photographs had been shared on various porn and 'revenge porn' websites between April and May 2015 (*R v AC 2017 ONCJ 317*). While she had consensually shared nude photographs with the perpetrator, she had not consented to the taking of the video, and she never consented to him sharing photographs or videos online. Her personal details also accompanied the images, including her name, age, city and country of birth, as well as abusive and defamatory comments about her. A 32-year old college graduate was charged under the Act and pled guilty before being sentenced to 5 months' imprisonment (followed by 12 months' probation and community service).

Other broader offences under the *Canadian Criminal Code* include: voyeurism (if the image was taken surreptitiously) (s162); obscene publication (if the image fits the classification of 'obscene', such as bestiality, other depictions of sex and violence) (s163); criminal harassment (if the victim fears for their safety or the safety of someone known to them) (s264); defamatory libel (s298-300); or extortion (if the perpetrator threatens to share intimate images) (s346). The problem though is that these offences 'usually require the presence of additional conduct which may not be present in most cases involving the non-consensual distribution of intimate images' (Department of Justice Canada 2013).

New Zealand

Under New Zealand's *Harmful Digital Communications Act 2015* (HDCA), it is a criminal offence to post a harmful digital communication. The maximum sentence is two years imprisonment or a fine of up to \$50,000 (NZD) (or a fine not exceeding \$200,000 for a body corporate) (s22). The aim of the legislation is to 'deter, prevent, and mitigate harm caused by individuals to digital communications; and provide victims of harmful digital communications with a quick and efficient means of redress' (s3(a) & (b)). Harm is defined to mean 'serious emotional distress' (s4).

The legislation is guided by 10 communication principles which courts and the approved agency (Netsafe) should take into account in determining whether or not an offence has been committed, in addition to the rights and freedoms contained in the *Bill of Rights Act 1990*. Relevant digital communication principles include that a digital communication 'should not disclose personal facts about an individual' or 'should not be grossly offensive to a reasonable person in the position of the affected individual' or 'should not contain a matter that is published in breach of confidence'. Netsafe, the approved agency, is empowered by the legislation to: receive and assess complaints about harm caused by digital communications; investigate complaints on behalf of complainants; provide advice

and use negotiation, mediation and persuasion to resolve complaints; establish and maintain relationships with domestic and foreign service providers, online content hosts and agencies; and provide education and advice on online safety policy and conduct (s8).

The HDCA tackles online violence and abuse more broadly, but can apply to the non-consensual distribution of intimate images. New Zealand has not, however, created a specific criminal offence for IBSA. Before the introduction of the HDCA, police and prosecutors could use the Crimes Act (s124) for IBSA cases, where it is a criminal offence for up to 2 years imprisonment to distribute or exhibit indecent matter. However, there is no definition in the legislation provided of what constitutes 'indecent matter' and it is unlikely that many forms of IBSA would be able to be prosecuted under this legislation since in many cases it would not be considered 'indecent' material, given the hyper-sexualisation of the Internet (Barrett & Strongman 2012).

Because the HDCA applies broadly to a number of behaviours (and not exclusively IBSA), there are limitations. One major limitation is that the perpetrator must have intended to cause serious emotional distress to the complainant and there must be serious harm resulting from the disclosure of such images. For instance, a person commits an offence if 'the person posts a digital communication with the intention that it causes harm to a victim; and posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and posting the communication causes harm to the victim' (s22). In determining whether or not the post would cause harm, the court may take into account a range of relevant factors, including the age and characteristics of the victim and the extent to which the images were circulated.

Between 2015 and 2017, there have been 67 guilty pleas (some involving diversion and discharges), 18 denials, and 55 convictions under the HDCA. Most of the convictions have concerned IBSA rather than other harmful digital communications, and most have involved jilted partners or ex-partners seeking revenge (Dennett 2017). A number of cases have also gone before the courts. For example, in August 2017, an 18-year-old Dunedin man was jailed for 9 months after posting naked images of his ex-girlfriend and advertising her for \$1 on a Facebook page to more than 77,000 members after they had broken up (Kidd 2017). In another recent case, a 21-year-old man published naked photos of his ex-girlfriend on Facebook, including her identity and contact details. He received a 12-month jail sentence after the court found that he had intended to cause harm and did cause harm to the victim. On appeal to the New Zealand High Court, his sentence was reduced to 7 months (Stuff.co.nz 2017). Another case that went to the High Court concerned a man who was discharged by a lower court for posting images of his ex-partner on Facebook. While there was evidence to prove that he had posted those images with the intent to cause harm, the evidence could not be established that the communication caused serious emotional distress to the complainant. The High Court, however, upheld the appeal saying that posting intimate images on Facebook did meet the harm threshold under the Act (Hill 2017).

The legislation does not prohibit either taking nude or sexual images without consent (e.g. 'upskirting') or making threats to share images (e.g. 'sextortion'), yet these acts can be prosecuted under other existing offences. For instance, under the *Crimes Act 1961* (s216I), it is a criminal offence to take an 'intimate visual recording' of another person using any device without their knowledge or consent where there is a reasonable expectation of privacy (*Crimes (Intimate Covert Filming) Amendment Act 2006* (2006 No. 75)). An intimate visual recording is defined as images where the person is nude, has their genital or buttock region, or female breasts, exposed, partially exposed or solely clad in undergarments, or is toileting, showering, dressing, undressing, or engaged in a sexual act (s216G). This offence attracts a maximum prison sentence of 3 years for those who have the purpose of publishing, exporting or selling the image, or 1 year for those who do not have such a purpose. Under the *Films, Videos, and Publications Classification Act 1993* (s124), it is also a criminal offence to make an 'objectionable publication', which is defined to include material that depicts 'sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good'.

In relation to applicable offences for those who make threats to distribute nude or sexual images, the HDCA does not criminalise such behaviour and the New Zealand Law Commission (2012) recommended against making the threat to publish intimate images a criminal offence, as it would 'involve considering whether a threat to commit any offence should itself be criminal' and would 'open the door too wide'. Yet, existing criminal offences, such as blackmail (s237) (maximum penalty 14 years prison), may apply if there is intent to cause the person to 'act in accordance with the will of the person making the threat' and 'to obtain any benefit or to cause loss to any other person'. In November 2017, for instance, an Auckland man pled guilty to charges of blackmail in the High Court after threatening a number of young women that he would kill himself if they didn't send him naked photos (Livingston 2017). He was also charged under the HDCA for causing harm by posting a digital communication. Under the *Telecommunications Act 2001*, offences also apply for using a telephone device (maximum penalty: 3-months imprisonment) (s112). In May 2012, for instance, a Christchurch man was prosecuted under this Act after sending a text to a woman threatening to share naked images of her on Facebook (Clarkson 2012).

The United Kingdom

England and Wales

The *Criminal Justice and Courts Act 2015* (England and Wales) criminalises the disclosure of non-consensual 'private sexual photographs or films' with the intention to cause distress to the victim (maximum sentence 2 years imprisonment) (s33). A private image is something that is 'not of a kind ordinarily seen in public' and an image is 'sexual' if 'it shows all or part of an individual's exposed genitals or pubic area, it shows something that a reasonable person would consider to be sexual because of its nature, or its content, taken as a whole, is such that a reasonable person would consider it to be sexual' (s35).

The Act covers photographs or films of a person engaged in a sexual act or depicted in a sexual way, sent as text messages, distributed on social networking sites, or distributed in 'offline' form. It does not include the non-consensual creation of images, the threat to

distribute images, or capture persons who lack the specific intention to cause distress (e.g. who may be reckless as to whether their actions would have this effect). Like the New Zealand HDCA, the *Criminal Justice and Courts Act 2015* is problematic since it fails to capture the diverse motivations for the creation or distribution of intimate images beyond that of revenge, and does not cover situations where the distributor has no intention that victim would find out that their images are being shared.

The legislation also does not cover digitally altered images, 'upskirting' or 'downblousing'. In relation to digitally altered images, the legislation defines a sexual photograph or film even if it has been 'altered in any way', however, is not deemed private or sexual 'by virtue of the alteration' (s35 (5)). Therefore, an altered image that shows the victim's face superimposed onto a naked or sexualised image of another person's body does not come within the scope of this law.

McGlynn, Rackley and Houghton (2017) argue that the offences contained in the legislation are classified as communication rather than sexual offences, and not only does this fail to capture the harms of IBSA, but it also means that victims are not afforded special measures in court proceedings, such as anonymity. Since publicity in a case is likely to increase the number of people who will have access to the intimate images, IBSA is likely to remain heavily under-reported (McGlynn, Rackley & Houghton 2017).

Other broader offences in England and Wales may apply to some instances of IBSA. For example, under the *Malicious Communications Act 1988* (s1) it is an offence to send letters or electronic communications with the intent to cause distress or anxiety where the message is 'indecent' or 'grossly offensive'. Under the *Communications Act 2003* (s127), it is a criminal offence to send, through a public electronic communications network, a message that is 'grossly offensive or of an indecent, obscene or menacing character'. However, both offences are limited as they require that the images depict obscenity or indecency (McGlynn, Rackley & Houghton 2017). Moreover, like the so-called 'revenge porn' laws (see above), there is a requirement that the perpetrator intended to cause distress or anxiety to the recipient of the communication.

In addition, the common law offence of 'outraging public decency' has limited applicability in England and Wales and is not well known by police or victims (McGlynn, Rackley & Houghton 2017). Voyeurism offences in England are also limited to:

a 'classic' scenario of the offender who, for sexual motives, hides himself (or his camera) and looks directly into the private spaces of our homes, changing rooms and toilets. It fails, therefore, to cover modern variants of the voyeurs' activities, such as taking 'upskirt' images in public spaces. In such cases, the victim-survivor is not performing a 'private act'; rather, they are going about their everyday business in public (McGlynn & Rackley 2017: 554).

In terms of how the law is working in practice, the Ministry of Justice released figures for 2015-16, showing that 206 prosecutions had commenced for the offence of disclosing private images without consent, compared with 465 prosecutions in 2016-17 (UK Crown Prosecution Service 2017). One of the first persons to be convicted under the law was a 21-year-old man who pleaded guilty to disclosing intimate images of a 20-year-old woman on Facebook with intent to cause distress. He was given a 6-month prison sentence, suspended for 18 months, 100 hours of unpaid work, a restraining order and was ordered to pay £345 in costs (BBC News 2015).

Scotland

In April 2016, Scotland introduced a new offence under the *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* relating to the disclosure (including making threats to disclose), of an intimate photograph or film without the depicted person's consent (s2). An 'intimate situation' is defined as an act which a reasonable person would consider sexual, or which is not ordinarily done in public, or where a person's 'genitals, buttocks or breasts are exposed or covered only with underwear' (s3). The maximum sentence for a summary conviction is 12 months and/or a fine, or 5 years imprisonment for an indictable conviction and/or a fine. Under the law, the perpetrator must either intend to cause the victim 'fear, alarm or distress' or be reckless (that is, they did not give any thought) as to whether their actions would cause fear, alarm or distress either through disclosing, or threatening to disclose, intimate images. Leading legal scholars have argued that the breadth of intention and the addition of recklessness are major improvements over the law in England and Wales, however, this new law is limiting because it does not capture third parties who lack the reckless intent to cause distress or harm to the person depicted in the image (McGlynn & Rackley 2017; McGlynn, Rackley & Houghton 2017).

The first person prosecuted under the law was a 59-year-old man who sent emails to his former partner threatening to post a video of her on the Internet performing a sex act. He escaped a custodial sentence and was instead ordered to pay £200 compensation to his former partner, and also received a 3-year non-harassment order which prevents him from having any contact with the victim (BBC News 2017). In another case, a 30-year old man, was convicted for threatening to share explicit images on social media of a woman who he had met on a dating site after she had failed to repay the money he had lent her. He was sentenced to a community payback order with 100 hours of unpaid work (the Sunday Herald 2016).

Northern Ireland

In Northern Ireland, an offence of disclosing private sexual photographs and films with intent to cause distress was introduced in 2016 (*Justice Act (Northern Ireland) 2016*). While the wording is much the same as the law in England and Wales, the maximum sentence on summary conviction is 6 months and/or a fine (compared with 12 months in England and Wales), and 2 years and/or a fine on conviction of an indictment.

Ireland

At the time of writing this report, Ireland had not yet passed legislation on IBSA, yet an Irish Law Reform Commission Report released in 2016 made 32 recommendations for reform, which include recommendations for two new criminal offences to address the non-consensual distribution of intimate images (ILRC 2016). The first offence would deal with IBSA where there is a clear intention to cause harm or distress through the posting of images, or where someone is reckless as to whether harm or distress is caused. The second offence deals with posting intimate images without consent where there is no intent to cause harm or distress, which would capture instances of ‘upskirting’, ‘downblousing’ and other voyeuristic sharing of intimate images. The Commission also recommended the establishment of a national statutory oversight system (a Digital Safety Commissioner) that would ‘promote digital safety and oversee efficient take-down procedure’ (ILRC 2016).

McGlynn (2017) notes that while this report contains some positive recommendations (including that victims be afforded anonymity in court proceedings), one downside is that the harms are considered ‘privacy interferences’ not sexual offences. She notes:

... how we describe these harms, how we frame them, will influence our education and prevention campaigns. While image-based sexual abuse – or ‘revenge porn’ – is indeed an egregious breach of privacy, it is not education and prevention campaigns focussed on privacy per se that are needed. It is compulsory, age-appropriate and effective education on sexual ethics and respectful relationships that is vital. Education needs to be about how we navigate intimate relationships and the use of technology; on valuing women’s sexual expression and autonomy; on sexual consent and coercion, especially within sexual relationships of young people.

United States

To date, 38 American states, plus the District of Columbia, have passed some form of legislation on non-consensual imagery. Punishment for these behaviours varies. Illinois, for example, classifies the ‘non-consensual dissemination of private sexual images’ as a felony, punishable by up to three years in prison and/or a fine of up to \$25,000 (USD) (§11-23.5, Illinois Criminal Code). New Jersey makes it a crime to make a non-consensual observation or recording, or disclose such a recording, that reveals another person’s ‘intimate parts’ or shows the person engaged in a sexual act without consent. It is classified as a criminal invasion of privacy, punishable by up to five years imprisonment (NJ Rev Stat § 2C:14-9 (2013)).

Other American state laws only prohibit behaviours involving an intent to cause harm or distress (like the England and Wales, Northern Ireland, Scotland and New Zealand laws). For example, in Alabama it is a criminal offence to non-consensually distribute an intimate, private image if the sender intends to harass or intimidate the depicted person (s13A-6-72 Code of Alabama 1975). In California, not only does intent to cause serious emotional distress to the victim need to be proved, but there is also the requirement that the victim actually suffered serious emotional distress through either the taking of pictures or videos

of a person's intimate body parts, or distributing the images where the victim is identifiable (California Penal Code 647(j)(4)). Accordingly, in some American jurisdictions, a person who secretly shares intimate images on online websites would not fall within the scope of the criminal law (see CCRI 2014; Citron & Franks 2014; Franks 2016; Goldberg 2017).

In most American states, the non-consensual recording of intimate images is not specifically prohibited, with a focus mostly being on the non-consensual sharing of such images. This conduct may, however, be covered under broader legislation such as the federal *Video Voyeurism Protection Act 2004*, which criminalises the non-consensual recording of someone else's nude image, but only when the recordings are on federal property. Most American states further prohibit the non-consensual recording of someone in a state of undress (Citron 2014: 125).

In relation to specific laws on making threats to share nude or sexual images – also known as 'sextortion' – while some American states specifically prohibit such behaviours, many do not, although the federal *Telecommunications Act of 1996* may apply, which makes the use of a telecommunications device with intent to 'abuse, threaten, or harass any specific person' a misdemeanor, with a maximum sentence of two years in prison and a fine (Citron 2009: 124–5). Wittes, Poplin, Jurecic and Spera (2016) note:

There is no consistency in the prosecution of sextortion cases. Because no crime of sextortion exists, the cases proceed under a hodgepodge of state and federal laws. Some are prosecuted as child pornography cases. Some are prosecuted as hacking cases. Some are prosecuted as extortions. Some are prosecuted as stalkings. Conduct that seems remarkably similar to an outsider observer produces action under the most dimly-related of statutes.

In June 2017, a new federal bill was introduced by Katherine Clark, Susan Brooks and Patrick Meehan (the Online Safety Modernization Act) which is more broadly designed to tackle abusive online behaviour, including 'doxing' (the act of posting private information online about someone); 'swatting' (where a person reports a false emergency to police to have the armed defenders visit the targeted person's house); 'revenge porn'; as well as sextortion. The legislation would also include greater resources for federal law enforcement to be able to deal with online abuse and harassment (see González-Ramirez 2017).

At the time of writing this report, no specific federal criminal offence for 'revenge porn' of IBSA exists in the United States. However, in November 2017, four senators introduced the Ending Non-consensual Online User Graphic Harassment (ENOUGH) Bill. This is based on an earlier Bill – the Intimate Privacy Protection Act (IPPA) – that was introduced by Congresswoman Jackie Speier in July 2016 to address the non-consensual sharing of intimate images (Dickey 2017). This Bill would make IBSA a federal offence in the United States.

In summary, the criminal laws on IBSA internationally point to a patchwork of offences where different levels of intention or proof of harm are required in some jurisdictions, and a

range of different penalties apply. According to Goldberg (2017), the key to designing effective criminal laws on IBSA is to ensure that offences apply to 'real-world harms' while being narrowly crafted to ensure compliance with constitutional or human rights law. She also states that the punishment should be sufficient to act as a deterrent to future offending. Finally, Goldberg notes that it is crucial that criminal law be designed to capture a 'full range of intentional offenders' regardless of whether their motivation is to get revenge against an ex-partner or friend, obtain sexual gratification or monetary gain, make fun of another person, or to boast to their peers about their sexual prowess and status.

Criminalising IBSA: Australian legislation

At the time of writing, four Australian jurisdictions have introduced specific offences to criminalise IBSA behaviours: South Australia (2013), Victoria (2014), New South Wales (2017) and the Australian Capital Territory (2017). There is currently no specific offence at the federal level in Australia, and the Northern Territory, Queensland, Tasmania and Western Australia also do not (currently) have specific IBSA laws in place. However, proposals and developments are underway to introduce new offences in these Australian states and territories.

The discussion below explores both specific and broader applicable offences for the non-consensual taking, sharing, and threats of sharing, of nude or sexual images in Australia, starting with the existing federal legislation.

Federal law

The *Criminal Code Act 1995* (Cth) includes a number of different offences within the telecommunications section of the legislation, for instance, using a carriage service for child pornography material, and making threat to kill or cause serious harm. Relevant to IBSA behaviours against adults is s474.17, where it is an offence to use 'a carriage service to menace, harass or cause offence' (*Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004*). The exact wording is: 'A person is guilty of an offence if: (a) the person uses a carriage service; and (b) the person does so in a way (whether by the method of use or the content of the communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'. The maximum sentence under this provision is 3 years imprisonment.

This telecommunications offence has been used to prosecute a variety of IBSA behaviours. In a 2015 case, for instance, a Queensland man pleaded guilty to use of a carriage service to menace, harass and cause offence after he used his phone to send a series of sexually explicit images and videos to a friend of the woman who had a domestic violence order in place against him. He received a suspended jail sentence of 3 months (The Chronicle 2015). Another well-known case, problematically referred to as 'the Skype Scandal', involved an Australian Defence Force Academy cadet who filmed himself having consensual sex with a female cadet and set up live footage via Skype with the help of another man, which streamed the encounter to another room for several male cadets to watch without her knowledge or consent. The victim was originally told that the offenders would escape with a

minor charge of 'prejudicial conduct' so she went public, and the two were eventually prosecuted under this law. The jury found the pair guilty of sending offensive material over the Internet through the use of a carriage service to menace, harass or cause offence. One of the accused was also found guilty of committing an act of indecency with the woman. One of the accused received two 12-month good behaviour bonds, to be served concurrently, and the other received a single 12-month good behaviour bond (see *R v Daniel McDonald and Dylan Deblaquiere [2013] ACTSC 122*).

In a more recent case in November 2017, a 29-year-old New South Wales man was charged with distributing intimate images without consent under the newly passed New South Wales legislation (see discussion below), as well as using a carriage service to menace, harass or cause offence. In April 2017, he had allegedly created a fake Facebook and Instagram account on which he posted images of his former partner. He also allegedly made threats to the woman that he would distribute her nude images on social media, and demanded money from her to remove the images (Barr 2017). This case bears similarity with a Western Australian case in October 2017, where a 56-year-old man pleaded guilty to 4 counts of using a carriage service to menace, harass or cause offence after he had posted sexually explicit images of his ex-partner on social media. He avoided a jail sentence and instead was ordered to pay a \$5,000 fine (Lynch & Morris 2017).

The Commonwealth legislation is overly broad, and a number of scholars, policy and legal experts, victim support advocates and others have argued that it should be amended to include specific criminal offences relating to IBSA behaviours. In October 2015, two Labor MPs, Terri Butler and Tim Watts, introduced a private members bill, the Criminal Code Amendment (Private Sexual Material) Bill, that proposed to create three specific telecommunications offences relating to: using a carriage service for the non-consensual sharing of 'private sexual material' (with a proposed maximum penalty of 3 years imprisonment); using of a carriage service to make threats to share private sexual material (with a proposed maximum penalty of 3 years imprisonment); and possessing, controlling, producing, supplying or obtaining private sexual material through the use of a carriage service (with a proposed maximum penalty of 5 years imprisonment). The Bill, however, lapsed in April 2016.

On 12 November 2015, the matter of sharing or recording private sexual images without consent was referred to the Legal and Constitutional Affairs References Committee for inquiry and report (titled: *The Phenomenon Colloquially Referred to as 'Revenge Porn'*). The Federal Senate Inquiry report was released in February 2016. The Committee made a number of recommendations, including that the federal government introduce a new criminal offence of 'knowingly or recklessly recording an intimate image without consent; knowingly or recklessly re-sharing intimate images without consent; and threatening to take and/or share intimate images without consent, irrespective of whether or those images exist'. The Committee also recommended (among other things) that other states and territories in Australia enact similar legislation and that an agency be given the power to issue takedown notices.

Since the Senate report was released at the beginning of 2016, there has been no movement from the federal government to introduce specific criminal offences at the Commonwealth level for IBSA. Nonetheless, the Commonwealth Attorney-General published the National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images in May 2017. The National Principles (Law, Crime and Community Safety Council 2017) clearly state that IBSA is unacceptable behaviour, requiring a ‘variety of responses ... including criminal offences of specific or general application, civil responses, education, awareness, prevention and support for those impacted’. Importantly, the National Principles recognise that ‘responses to the non-consensual sharing of intimate images should be designed to encompass the broad range of conduct, motivations, relationships and means of distribution that such behaviour can involve’. Moreover, guidance is provided that any new offence should not require proof of harm to the victim, or that the perpetrator engaged in the behaviour with the intention to cause distress or harm; that it is enough that the perpetrator knew that there was no consent to share the image or was reckless as to whether consent had been obtained.

South Australia

In 2013, South Australia became the first Australian jurisdiction to introduce offences criminalising the non-consensual distribution of ‘invasive images’ (*Summary Offences (Filming Offences) Amendment Act 2013 (SA)*) under the *Summary Offences Act 1953 (SA)* (s26C). Perpetrators face a maximum of 2 years imprisonment or a \$10,000 fine if it can be proven that they knew or should have known that the victim did not consent to the distribution of the image or images (if the victim is under 17 years of age, the maximum sentence is 4 years imprisonment or a \$20,000 fine). The legislation is not specifically or solely concerned with non-consensual nude or sexual images. Unlike Victoria (see below), the legislation defines ‘invasive image’ more broadly 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’. The distributor must know, or should have known, that the person did not consent to the distribution of the image. The invasive image also must depict the person in a place other than a public place.

In 2016, the South Australian legislation was amended to include, among other things, a new offence of threatening to distribute an invasive image or an image obtained from indecent filming with the intent to ‘arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused’ (*Summary Offences Act 1953 (SA)*, s26DA). The maximum penalty is 1 year imprisonment or a fine of \$5,000 for this offence (if the victim is under 17 years of age, the maximum sentence is 2 years imprisonment or a \$10,000 fine). The legislation also amended the definition of ‘invasive images’ to include female breasts (s26A).

South Australia also has other offences under the *Summary Offences Act 1953 (SA)* for ‘humiliating or degrading filming’ (including distributing of an image obtained by such filming) (s26B), as well as ‘indecent filming’ without consent (including distributing an

indecent image) (s26D). These two offences attract the same penalties as the non-consensual distribution of invasive images (maximum prison sentence 2 years or fine of \$10,000). Indecent filming is defined to mean 'filming of another person in a state of undress in circumstances in which a reasonable person would expect to be afforded privacy; or another person engaged in a private act in circumstances in which a reasonable person would expect to be afforded privacy; or another person's private region in circumstances in which a reasonable person might not expect that the person's private region might be filmed' (private region is defined to include a person's genital or anal region, or female breasts whether covered by underwear or bare). This may capture acts of secret recordings in a public or private place, such as 'upskirting' (see Plater 2016).

In October 2017, a 44-year-old man was jailed for 5 years and 11 months after pleading guilty in the District Court of Adelaide to blackmail and 7 counts of distributing invasive images without consent (blackmail attracts a maximum sentence of 15 years imprisonment). At the time of the offence, he was on parole for other violent offences, and his partner had ended their relationship while he was still in prison in November 2015. He demanded that she return gifts and \$1,500 he had spent on her, and threatened that if she didn't do so, he would share with others sexual videos of her. He also threatened the victim's mother that he would distribute images of her daughter unless \$1,000 was repaid and his property returned. Within a few weeks of being released on parole, the perpetrator sent via mobile phone, four photographs and a video of the victim engaging in sexual acts to one of his contacts. In the weeks that followed, he sent out other images to other contacts via mobile phone and Facebook. He also sent the images to the victim's mother via Facebook (case on file with authors).

While the term 'invasive images' under the South Australian legislation can imply either the quick and harmful spread of something and/or the intrusion of privacy, which may seem to perfectly capture the nature of the harms of non-consensual imagery, it is the act itself of creation, distribution or threat of distribution that is invasive, not the image per se. Therefore, the term 'invasive image' does not adequately capture the harms of the acts themselves sufficiently; for instance, the image may be a sexual act that was recorded in the context of a loving relationship and as such, the image itself is not 'invasive', rather, it is the act of distributing that image without consent that is invasive.

Victoria

Victoria became the second Australian jurisdiction to introduce specific offences for IBSA in 2014, making it a criminal offence to intentionally distribute (s41DA), or threaten to distribute (s41DB), 'intimate' images of another person without their consent under the *Summary Offences Act 1966 (Vic) (Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic))*. The maximum penalty is 2 years imprisonment for distribution and 1 year imprisonment for threat of distribution. Like the South Australia legislation, although the accused must intentionally distribute, or threaten to distribute, an intimate image of another person, there is no requirement that they have the specific intent to cause distress or harm, and no proof of victim harm is required either.

Under the Victorian legislation, 'intimate image' is defined as 'a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or content that is sexual; or (c) the genital or anal region of a person, or, in the case of a female, the breasts'. The legislation also states that community standards of acceptable conduct must be taken into account, including regard for the nature and content of the image, the circumstances in which the image was captured and distributed, and any circumstances of the person depicted in the image, including the degree to which their privacy has been affected.

Victoria also has 'upskirting' legislation under the *Summary Offences Act 1966* (Vic) (*Summary Offences Amendment (Upskirting) Act 2007* (Vic)) which imposes criminal penalties on persons who intentionally observe, with the aid of a device (s41A); intentionally visually capture (s41B), or distribute an image (s41C) of another person's genital or anal region in circumstances in which it would be reasonable for that other person to expect those regions could not be observed (except baby photos). Under Section 41A there is a maximum sentence of 3 months imprisonment, whereas both s41B and s41C have a maximum sentence of 2 years imprisonment. This legislation captures situations where an individual takes photos on digital devices up women's skirts in public places, regardless of whether they then go on to distribute those images.

Data provided by the VCSA reveals that between 1 January 2015 and 18 July 2017, there were 53 cases (or 28 arrests) of intentionally observing another person's genital or anal region (*Summary Offences Act 1966* (Vic) s41A); 415 cases (62 arrests) of the non-consensual distribution of an intimate image (*Summary Offences Act 1966* (Vic) s41DA); and 144 cases (52 arrests) of threatening to distribute an intimate image (*Summary Offences Act 1966* (Vic) s41DB). The majority of cases reported to police involved offenders who were either aged 25 years or over (42%) or aged 18 to 24 years (20%). Furthermore, of those aged 10 to 17, this group was the most likely to receive cautions, rather than being arrested or summonsed. This suggests that, in Victoria at least, police are using their discretion in ways that do not appear to overcriminalise minors.

New South Wales

In August 2017, a new law came into effect in New South Wales to introduce three new criminal offences related to IBSA behaviour: recording intimate images without consent; distributing intimate images without consent; and threatening to record or distribute intimate images under the *Crimes Act 1900* (NSW) (s91P, s91Q, s91R) (*Crimes Amendment (Intimate Images) Act 2017* No 29 (NSW)). All three offences attract a maximum sentence of 3 years imprisonment. The legislation defines 'intimate images' as 'an image of a person's private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy'. Such images include depictions of a person's genital or anal area, whether bare or covered by underwear, or breasts of a female person or transgender or intersex person identifying as female. The legislation covers other private images, such as undressing, using a toilet, showering, bathing or 'engaged in a sexual

act of a kind not ordinarily done in public'. It also covers acts of so-called 'morph porn' where an image has been altered or manipulated.

Like other Australian jurisdictions, there is no requirement under the law that the prosecution either prove that the victim suffered distress or harm, or that the perpetrator intended to cause distress or harm. The mental element is more clearly defined compared with South Australian and Victorian laws as:

Person A must know that Person B did not consent to recording or distribution, or was reckless as to whether or not Person B was consenting, or intended to cause the other person fear.

In relation to threats to record or distribute, it is irrelevant whether or not the image or images actually exist. There is also no requirement that the prosecution prove that the person did actually fear that the threat would be carried out, only that the accused intended to cause that other person fear that the threat would be carried out. Furthermore, the prosecution must seek approval from the Director of Public Prosecutions in order to prosecute a person under the age of 16 years. There is also a list of exceptions contained in the legislation, for instance, it is not an offence if a reasonable person considers the conduct of the accused person to be acceptable having regard for the nature and content of the image; the circumstances surrounding the recording and/or distribution of the images; and other factors, such as the relationship between the accused and the person depicted in the image, the degree of privacy violation, and the age of the victim.

Finally, what sets this legislation apart from South Australian and Victorian laws, is that a court that finds the perpetrator guilty of an offence may order that person to take reasonable steps to remove, delete, destroy those images. Failure to do so without reasonable excuse attracts a maximum penalty of 2 years imprisonment.

Before this law was introduced, the only available legal avenues for IBSA victims in New South Wales was through much broader criminal offences at either the state or federal level, or through the civil law (see discussion below). For example, under s578C of the *Crimes Act 1900* (NSW), perpetrators can be prosecuted for 'publishing indecent articles'. There are also other existing criminal offences under the *Crimes Act 1900* (NSW) that might apply, for instance, 'filming a person engaged in a private act for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification' (s91K) or 'filming a person's private parts for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification' (s91L), as well as blackmail and voyeurism offences. In a 2015 case, a female nurse took photos of a patient's genitals while she was under anaesthetic. In this case, as no motive of sexual gratification could be established under s91L, the nurse could not be prosecuted under any existing legislation (Scott 2015), demonstrating a major loophole in the law. This case, and others, served as a catalyst for the changes that were eventually made to the law. This is also a problem with the *Sexual Offences Act 2003* (England and Wales), which likewise defines voyeurism as an act 'for the purpose of obtaining sexual gratification'.

Since the legislation was introduced in August 2017, there have been 22 people charged, 3 convictions, and 19 cases yet to be decided (A Current Affair 2017). In November 2017, a man was fined \$3,750 and ordered to delete intimate images recorded on his phone without consent. Another man received a suspended sentence of 9 months jail after distributing non-consensual intimate images. And in a third case, a man received an 18-month good behaviour bond and a \$1,000 fine for threatening to distribute intimate image (A Current Affair 2017).

The Australian Capital Territory

The Australian Capital Territory became the latest Australian jurisdiction to introduce new criminal offences relating to IBSA behaviours in August 2017. Three new criminal offences were created under the *Crimes (Intimate Image Abuse) Amendment Act 2017 (ACT)*, as an amendment to the *Crimes Act 1900 (ACT)*. The first includes the non-consensual distribution of intimate images (s72C), where the offender knows that the other person did not consent to the distribution, or is reckless as to whether the other person consents to the distribution. The maximum penalty is 300 penalty units and/or 3 years imprisonment. The second offence concerns the distribution of intimate images of a young person under 16 years of age, with a maximum penalty of 500 penalty units and/or 5 years imprisonment (s72D). Under this section, it is a defence if the perpetrator proves that at the time of the offence, they believed that the person depicted in the image was at least 16 years old. It is also a defence if the person depicted in the image is at least 10 years old but no more than 2 years younger than the perpetrator, and that they consented to the distribution of the intimate image.

The third offence refers to threats to capture or distribute intimate images (s72E). The mental element is that the perpetrator must have intended that the other person would fear that the threat would be carried out, or is reckless as to whether the other person would fear that the threat would be carried out. This offence attracts a maximum penalty of 300 penalty units and/or 3 years imprisonment. A threat may include 'conduct whether explicit, implicit, conditional, or unconditional.' It is also not necessary to prove that the other person actually feared that the threat would be carried out, and it is irrelevant whether or not the image actually exists.

Finally, if a person is found guilty under s72C, s72D or s72E, the court may order the perpetrator to take 'reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period' (s72H). Moreover, the legislation creates an additional offence for non-compliance of court rectification orders, with a maximum penalty of 200 penalty units and/or 2 years imprisonment.

Under the legislation, 'intimate image abuse' is defined as including images which depict the following: the breasts, of a female, transgender or intersex person who identifies as a female, whether covered by underwear or bare; a person engaged in a private act, such as a state of undress or using the toilet, showering or bathing, or engaging in a sexual act (of a kind not ordinarily done in public); or the genital or anal region whether bare or covered by

underwear. It also includes images that have been altered ‘to appear to show any of the [above] things’.

Other Australian jurisdictions

At the time of writing, the Northern Territory, Queensland, Tasmania and Western Australia had not introduced specific IBSA laws. Although existing broader criminal offences can be used to charge offenders for image-based violations in those states or territories, such as stalking, blackmail, voyeurism or indecency laws, these laws are arguably too broad in scope to capture the types of harms caused when intimate images are taken or distributed, or threatened to be distributed, without consent.

There are proposals underway, however, for law reform in most remaining Australian jurisdictions without specific offences in place. For instance, a new law was proposed in the Northern Territory in November 2017 to prohibit the non-consensual sharing of intimate images, as well as making threats to share intimate images (maximum penalty for both offences: 3 years’ imprisonment) (Criminal Code Amendment (Intimate Images) Bill 2017 (NT)).

In Queensland, there are proposals for new laws that would apply to sending or threatening to send intimate material without consent, (Caldwell 2017). Likewise, In Tasmania, a Labor Party opposition bill is due to be debated in Parliament at the end of 2017 or in early 2018, which aims to address online harassment behaviours more generally, and includes proposed provisions relating to IBSA. The proposed legislation would, among other things, include takedown orders and injunctions, in order to force content removal (Shine 2017).

Finally, in Western Australia in 2016, the government amended the definition of family violence in the *Restraining Orders Act 1997* (WA) to include IBSA behaviours (s5A). The *Restraining Orders Act 1997* (WA) also empowers courts in making a family violence restraining order to restrain an individual from ‘distributing or publishing, or threatening to distribute or publish, intimate personal images of the person seeking to be protected’ (10G(2)(g)). At the time of writing this report, the Western Australian government was in the process of drafting a bill on IBSA that is expected to be ready in 2018 (Walsh 2017).

Table 11: Australian IBSA Criminal Laws

Jurisdiction	Legislation	Offence(s)	Maximum sentence
Federal	<i>Criminal Code Act 1995</i> (Cth)	s474.17: Using a carriage service to menace, harass or cause offence	3 years
Australian Capital Territory	<i>Crimes Act 1900</i> (ACT)	s61B: Intimate observations or capturing visual data etc s72C: Non-consensual distribution of intimate images s72E: Threaten to capture or distribute intimate images s72H: Court may order rectification [for non-compliance with court order to take reasonable action to remove, retract, recover, delete or destroy an intimate image involved under s72C, s72D or s72E]	2 years 3 years 3 years 2 years
New South Wales	<i>Crimes Act 1900</i> (NSW)	s91K: Filming a person engaged in private act s91L: Filming a person’s private parts	2 years 2 years

		s91M: Installing device to facilitate observation or filming	2 years
		s91P: Record intimate image without consent	3 years
		s91Q: Distribute intimate image without consent	3 years
		s91R: Threaten to record or distribute intimate image	3 years
		s91S: Court may order rectification [for non-compliance with court order to take reasonable steps to remove, retract, recover, delete or destroy any intimate image involved under s91P or 91Q]	2 years
		s578C: Publishing indecent articles	12 months
Northern Territory	N/A	N/A	N/A
Queensland	<i>Criminal Code 1899</i> (Qld)	s227A: Observations or recordings in breach of privacy	2 years
		s227B: Distributing prohibited visual recordings	2 years
South Australia	<i>Summary Offences Act 1953</i> (SA)	s26B: Humiliating and degrading filming	2 years
		s26C: Distribution of invasive image	1 year
		s26D: Indecent filming	2 years
		s26DA: Threat to distribute invasive image or image obtained from indecent filming	1 year
Tasmania	<i>Police Offences Act 1935</i> (Tas)	13A: Observation or recording in breach of privacy	12 months
		13B: Publishing or distributing prohibited visual recording	12 months
Victoria	<i>Summary Offences Act 1966</i> (Vic)	s41A: Observation of genital or anal region	3 months
		s41B: Visually capturing genital or anal region	2 years
		s41C: Distribution of image of genital or anal region	2 years
		s41DA: Distribution of intimate image	2 years
		s41DB: Threat to distribute intimate image	1 year
Western Australia	<i>Restraining Orders Act 1997</i> (WA)	10G(2)(g): Restraints on \ from distributing or publishing, or threatening to distribute or publish intimate personal images of the family member	2 years

In summary, Australia has a patchwork of criminal laws to address IBSA: the laws are inconsistent across different jurisdictions, there is no specific criminal offence at the federal level, and some states and territories are yet to introduce specific offences (see Table 11). However, criminal law should not be considered the only legal avenue for responding to this problem. In fact, in some contexts, other legal mechanisms, such as civil courts, tribunals or complaint-handling mechanisms, may be far more effective in providing quick and efficient remedies for victims of IBSA. In the next sub-section, privacy, tort, sex discrimination and copyright laws are discussed, as well as the potentials and limitations of civil remedies that are available to victims in a number of common law countries.

Civil remedies for IBSA

The right to privacy

The right to privacy is protected under the *Universal Declaration of Human Rights* (UDHR) (Article 12) and the *International Covenant on Civil and Political Rights* (ICCPR) (Article 17). The ICCPR provides that: ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation’; and, ‘Everyone has the right to the protection of the law against such interference or attacks’. The human right to privacy has been incorporated into law by state parties, for instance, in common law countries as a statutory ‘tort’, which in practice is a wrongful act or omission that causes harm or injury, or otherwise through the common law (the law as passed down by judges).

In Australia, the right to privacy is inherently limited. *The Privacy Act 1988* (Cth) is concerned only with 'information privacy' and therefore excludes individuals acting in their own capacity. There is also no statutory cause of action for an invasion of privacy by individuals under state, territory and federal legislation, and no development of a common law tort for invasion of privacy either. Although the right to privacy is formally protected under the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the only two jurisdictions that have any kind of human rights charters or legislation in Australia), none of these existing laws create any new cause of action for bringing a legal action against another party for an individual whose privacy has been seriously invaded (see ALRC 2014).

Like Australia, the United Kingdom has no statutory cause of action (as a tort) for serious invasion of privacy, but it does have a human rights framework through the *Human Rights Act 1988* (England and Wales) and the *European Convention on Human Rights*, which provides an explicit right to respect for private life and can thus provide compensatory damages for breach of confidence and the misuse of private information. In New Zealand, there is a common law tort covering invasion of personal privacy by public disclosure of facts. In the United States, some states – such as California – have introduced a statutory tort for invasion of privacy, and privacy torts overall have been established for decades, although this is limited by the free speech protections in the First Amendment of the United States Constitution. Likewise, some Canadian states have enacted statutory torts for invasion of privacy and some courts have recognised common law protection against invasions of privacy (ALRC 2014). For instance, in 2016, new laws were introduced in Manitoba to enable victims to sue perpetrators for breach of privacy in civil courts, for the non-consensual distribution of intimate images under the *Intimate Image Protection Act 2016* (Can). Also in 2016, an Ontario court awarded more than \$140,000 (CAD) in damages to a victim after her ex-boyfriend posted an intimate video of her on a mainstream pornography site without her permission – as a new tort of 'publication of embarrassing private facts' (The Star 2017).

Although the right to privacy is not absolute and must be balanced with other rights, such as freedom of expression, freedom of speech and protecting national security, providing robust protection against serious invasions of privacy should aim to ensure that individuals can live 'dignified, fulfilling, safe and autonomous' lives, including the ability to form and sustain relationships with others, exercise freedom of speech, thought, expression, movement and association, and be free from undue interference or harm from others (ALRC 2014: 28).

Breach of confidence

Another civil remedy for victims of IBSA is through the tort of breach of confidence or the tort of intentional infliction of emotional distress. In a Victorian case (*Giller v Procopets [2004] VSC 113*), the parties had been in a de facto relationship, but after they broke up, the defendant showed some people a video cassette of them engaged in sexual acts (some of which had been recorded without her knowledge), left a copy of the video with the

plaintiff's father, and made threats to show the video and photographs taken of the video with others, including her employer. The plaintiff sued him for damages for three actions: breach of confidence, intentional infliction of emotional distress, and invasion of privacy. For breach of confidence to succeed, it must be proved that: a confidential relationship existed between the parties; the material was of a confidential nature; there had been unauthorised use of the information by the defendant to the detriment of the plaintiff; and that the plaintiff suffered injury as a result. The plaintiff was successful in the Supreme Court of Victoria Court of Appeal (*Giller v Procopets [2008] VSCA 236*) and was awarded \$40,000 in damages (\$10,000 of which was for humiliation and distress) (see Witzleb 2009).

The decision in in this case to grant compensation for emotional distress in a breach of confidence action was followed in a 2015 case in Western Australia (*Wilson v Ferguson [2015] WASC 15*), where the court awarded almost \$50,000 in damages to a woman whose ex-partner had posted explicit photos and videos of her onto his Facebook page. In making this judgment, the Supreme Court recognised the importance of law keeping pace with the development of new technologies and awarded damages on the basis of embarrassment and distress to the plaintiff, even though damages would usually only be awarded for financial harm. Although this was a ground-breaking case (at least in the Australian context), there is no guarantee that the decision will be followed in other courts.

Other civil laws

Anti-discrimination, defamation and copyright law are other available options for responding to IBSA, but with limitations. In relation to anti-discrimination law, under Australian sexual harassment laws, behaviours must occur in a specified area of public life, such as the workplace, accommodation and education. This body of law is ill-suited to most cases of IBSA which occur in private settings. Under defamation law, victims may seek compensation and/or an injunction to prevent the further publication of images. The plaintiff must prove that the publication (to one or more people) identifies them and is disparaging of their reputation.

Another option for victims is copyright law (see Levendowski 2014), however, this avenue is not open to victims who do not own the image. As discussed in the literature review of this report, some legal experts have proposed amendments to copyright legislation in various jurisdictions so that the owner is understood to be the person depicted in the image (Bambauer 2014; Folderauer 2014; Tushnet 2013).

In Australia, following the introduction of amendments to the *Copyright Act 1968* (Cth) in 2015, copyright owners are able to apply to the Federal Court for an injunction to require Internet service providers to block access to copyright infringing overseas websites. In December 2016, the Federal Court for the first time ordered Internet companies to block five copyright infringement sites such as Pirate Bay (Ford & Hall 2017). Blocking websites that host non-consensual imagery (e.g. 'revenge porn' or 'ex-girlfriend' sites) could be a potential solution, however, such sites can easily change their domain name, and consumers can access these sites through the use of Virtual Private Networks. As such,

other measures are likely to be more effective in responding to IBSA and blocking sites alone is not going to solve the problem.

Limitations of civil laws

Overall, although existing civil laws are important for addressing IBSA, there are a number of limitations. First, as the above discussion demonstrates, many of these laws are ill-suited in their applicability and do not adequately capture the harms associated with IBSA. Second, there are significant costs for victims who may not have the financial means to bring civil action. Third, civil laws arguably privatise the issue of image-based harms and do not serve as an effective deterrent against future behaviours. Fourth, civil laws (like criminal laws) cannot stop the spread of the image once it has been distributed online, even if certain takedown powers are given to courts and other agencies. And finally, victims may be deterred from initiating civil proceedings out of fear that their names will be made public, which could expose them to further humiliation if their images continue to be circulated online.

Indeed, one of the most harmful aspects relating to IBSA concerns the lack of control the victim has over the image once it has been distributed, in that there is no way of controlling where the image ends up, or how long it stays on another person's phone, computer, other device, or the Internet at large. Some jurisdictions in Canada, New Zealand and the United States have empowered courts or external agencies to issue takedown notices that require a person or organisation to remove the images, which may include an additional criminal offence for failing to comply with a takedown order. Although such powers do not guarantee the images are completely removed from the Internet or personal devices, they may give victims some relief.

Takedown powers and civil remedies

In New Zealand, under the HDCA, Netsafe is empowered with the responsibility to resolve complaints on behalf of complainants. The legislation also gives the New Zealand District Court powers to issue takedown orders and impose penalties on people who do not comply with such orders when Netsafe is unable to resolve a complaint (maximum penalty of 6 months imprisonment or a fine not exceeding \$5,000 for a natural person, or \$20,000 for a body corporate). The problem is that in such cases, where Netsafe fails to resolve the complaint on behalf of the victim, victims must themselves proceed with legal action in the District Court using their own resources if they want to see action taken on the removal of their images. While technically it is free to pursue such a complaint in the New Zealand District Court (as there is no filing fee), if the plaintiff has legal representation, this may constitute a power imbalance and as such, a lack of equality, if the complainant is comparatively under-resourced. Moreover, the District Court will not be effective in getting images removed rapidly since it is a time-consuming process.

Under the HDCA, online content hosts are also protected against proceedings against them (called a safe harbour defence) provided they follow the complaints handling procedure prescribed under s24 (with some exceptions – including content procured by the host itself). The prescribed process includes: notifying the author of the content within 48 hours of

receiving a complaint; removing the content if the author is not contactable, or does not submit a valid counter notice within 48 hours of receiving a complaint; removing the content as soon as the author consents to its removal and no more than 48 hours later; if the author does not consent, notifying the complainant and providing information that identifies the author (if the author consents to the release of that information) (see s24(2)(b)). Under the HDCA, content hosts can be required to identify authors of anonymous communications through a civil order. Netsafe is the approved independent agency to receive, assess and investigate complaints under the Act, such as cyberbullying, IBSA and online harassment. However, this only applies to content hosts who have voluntarily signed up to this scheme.

In Australia in December 2017, the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 was introduced into federal parliament to amend the *Enhancing Online Act 2015* (Cth) and to give the Australian eSafety Commissioner powers to administer a complaints system and impose civil penalties on those posting or hosting non-consensual 'intimate images' (including making threats to post non-consensual intimate imagery). 'Intimate images' is defined to include: the depiction of private parts (including the person's genital or anal area whether bare or covered by underwear; the breasts of a female, transgender or intersex person identifying as female); the depiction of private activity (including material that depicts a person in a state of undress, using the toilet, showering, having a bath or engaged in a sexual act (or any like activity) of a kind not ordinarily done in public); or the depiction of a person without attire of religious or cultural significance.

Various enforcement mechanisms under this proposed legislation include: civil penalties, formal warnings, infringement notices, enforceable undertakings, injunctions, as well as removal notices to perpetrators, social media services and website/content hosts with penalties for non-compliance. Essentially, the proposed legislation would enable Australian victims (or authorised persons) to make a complaint (an 'objection notice') to the eSafety Commissioner about content hosted in Australia, and posted by an Australian resident. The Commissioner would then be able to investigate the complaint and impose a formal warning or removal notice and/or a civil penalty of up to 500 penalty points to end-users (\$105,000) or a social media, Internet service or hosting service provider (\$525,000) (with conferral of jurisdiction on the Federal Court of Australia).

Civil remedies, in conjunction with consistent and coherent criminal legislation, are important steps towards providing quick and efficient relief to victims of IBSA. However, the law should not be seen as the only mechanism for addressing these behaviours. In the final sub-section below, a range of other measures that will supplement and support criminal and civil legal options are discussed.

Beyond law

Corporate social responsibility

The problem with IBSA material is that when nude or sexual images are distributed online, they can be easily copied by third-party web scraping tools, and once downloaded by another individual, can be republished on multiple sites. Even if a particular site shuts down,

or if images are removed on some sites or by individuals on their personal devices, it may be impossible to prevent the image from resurfacing elsewhere. Therefore, consideration of technological tools is crucial in order to identify and combat IBSA. This is particularly relevant given the rapid developments in artificial intelligence, where the computer can be trained to swap the faces of actors in pornographic videos with faces of well-known celebrities or ordinary people with convincing effect (also known as 'deepfakes' - see Henry, Flynn & Powell 2018). Technological tools have been useful in relation to child exploitation material. For instance, investigators can use a range of tools including: Microsoft's PhotoDNA, which compiles a digital signature of an image which can be matched against a database of images; F1, which generates unique hashes of child exploitation videos to more easily identify copies or partial copies; Griffeye Analyze DI, a platform to support investigations and streamline the reviewing process, including flagging similar and previously identified images; and Hubstream, which allows law enforcement personnel from all over the world to upload and compare illegal images in order to identify both perpetrators and victims. Similar technological tools (using artificial intelligence) may be used to identify IBSA material.

In November 2017, Facebook announced a pilot trial in partnership with the Australian Office of the eSafety Commissioner to prevent IBSA from occurring on its platforms. In May 2018, this trial was expanded into Canada, the US and the UK. The trial allows people who are concerned that someone might share an image of them on Facebook (and their subsidiaries) to contact the relevant partner agency and complete an online form. The agencies include the Office of the eSafety Commissioner in Australia, the Revenge Porn Helpline in the UK, the Cyber Civil Rights Initiative and the National Network to End Domestic Violence in the US, and the YWCA in Canada. The person will then be sent an email containing a secure, one-time upload link, where they can upload the image(s). A community operations analyst from Facebook accesses the image and creates a 'hash' of the image, which essentially is a unique 'digital fingerprint'. Then if any person attempts to upload or share the image on Facebook or its subsidiaries, they will be automatically blocked, and the image will not be able to be shared. Once the hash has been created, Facebook will delete the image. The use of 'digital DNA' is not new – this technology was first developed by Microsoft in 2009 (as mentioned above) to prevent child exploitation material from being circulated on the Internet. It is important to note that these measures will not prevent images being shared on other platforms.

Many Internet intermediaries (including some pornography sites) also have in place policies and reporting mechanisms to combat IBSA. For instance, in 2015, Microsoft and Google announced new reporting options so that victims can request to have content involving them excluded from Bing or Google searches. Other platforms, such as Facebook, Twitter, Reddit, Tumblr, Pornhub, SnapChat, Instagram and Flickr (among many others) have introduced reporting mechanisms for victims of non-consensual intimate imagery. However, these measures are not fool proof. In May 2017, Facebook's internal rulebook for moderators was leaked by the Guardian newspaper revealing that non-consensual images will be removed only if the image or images are meant to 'shame or embarrass' the person

depicted, and only if the image was ‘produced in a private setting’. This means that images secretly recorded or distributed, or images taken non-consensually in public settings (e.g. ‘upskirting’ images), might not fit the criteria for content removal (Hopkins 2017).

Other measures should include those focused on corporate bodies; for example: traditional media, as well as social media and other platforms, technology companies and Internet service providers. There is important work to be done around promoting service agreements and community codes of conduct that include clear statements regarding the unacceptability of these acts; strategies for victims and other users to report content in violation and have it removed; and appropriate consequences for an individual’s violation of such terms of service/codes of conduct on these platforms.

Victim support

In October 2017, the eSafety Commissioner went live with their online image-based abuse reporting portal. The portal provides assistance, support and advice for victims to help them get images removed from online sites and personal devices, including guidance on how to communicate with someone who has their intimate images in their possession; advice on collecting evidence; and advice on the applicable Australian laws. Victims are also able to report directly through the portal, and the eSafety Commissioner will then be able to work directly with social media providers, websites and search engines to help facilitate the removal of images.

The development of information resources (such as a website and print materials) for victims advising them of their legal and non-legal options is also vital. This might also be delivered via existing victims of crime, legal aid, health and other information services, as well as through existing national hotlines (such as 1800 RESPECT, the Men’s Referral Service and Kids Helpline). Staff responding to these hotlines should also be trained in legal and non-legal options so as to effectively respond to and advise victims of IBSA. Furthermore, law enforcement training and resources should be provided to assist police in responding appropriately to victim reports, and proceeding with an investigation should the victim wish to pursue this option.

Education and primary prevention

The development of prevention strategies through public education campaigns in traditional and digital media, workplace harassment and anti-discrimination resources, and school curriculum packages are critical for addressing and preventing IBSA. Some of the harms can be understood to result from the same attitudinal support for violence against women, that minimises violence, blames victims and excuses perpetrators (see VicHealth 2014). As such, prevention strategies could include content which: (a) identifies and challenges the gender and sexuality-based social norms and cultural practices that underlie the stigma that is directed at victims of technology-facilitated sexual violence; (b) redirects the responsibility onto the perpetrators of IBSA; and (c) encourages and provides tools for individuals to take action as bystanders and support a victim, report content for removal, and/or call-out victim-blaming and shaming where they encounter abhorrent behaviour of others. By

challenging the blame and stigma too often directed at victims of IBSA, and communicating a clear message of the responsibility of perpetrators and those who knowingly take, distribute or threaten to distribute these images, cultural change can be achieved to support victims seeking redress, and ultimately, prevent these harms before they occur.

Conclusion

Amendments to various state and territory legislation over the past five years in Australia have resulted in a patchwork of inconsistent legislation, with no specific offence at the federal level. However, the more recent law reform efforts in New South Wales and the Australian Capital Territory are exemplary in an international context in terms of capturing the harms associated with IBSA, and introducing proportionate penalties that will at least in part act as a deterrent to future behaviour. Importantly, these new laws do not require intent to cause distress or harm, and as such capture a range of offenders regardless of whether their motivation is revenge, sexual gratification, monetary gain, or some other reason. These laws then capture a much broader array of behaviours and perpetrators than many other laws internationally that are focused on the more paradigmatic 'revenge porn' behaviours.

But IBSA is a complex phenomenon and the criminal law is not the only answer. Indeed, as was shown in this section, it is vital that civil remedies are also made available to victims, as well as other non-legal measures to provide support, advice and assistance to victims, and to educate the broader public about the prevalence, nature and impacts of IBSA.

Stakeholder perspectives on IBSA: Qualitative findings

Introduction

This section of the report presents the qualitative findings from 44 interviews conducted with 52 Australian stakeholders. It responds to the final core research question: What are the perceptions of key legal, policy and support stakeholders regarding the effectiveness of existing legislation and the need for new legislative models for responding to IBSA in Australia?

The section begins by discussing participant perspectives on IBSA laws, and the overwhelming support expressed for the introduction of consistent federal and state/territory criminal laws that respond to this significant harm. The section then considers the seven main findings arising from the interview data relating to the effectiveness of existing and future legislative models. These findings relate to: (i) definitions; (ii) intent and harm; (iii) altered images or ‘morph porn’; (iv) cultural standards; (v) victim anonymity and reporting; (vi) penalties; and (vii) policing challenges. The section concludes by considering participant perspectives on the role of civil law remedies and corporate responsibility in relation to IBSA in Australia.

IBSA law

As discussed in the previous section of the report, there is currently a patchwork of inconsistent laws relating to IBSA in Australia. To date, only the Australian Capital Territory, New South Wales, South Australian and Victoria have specific criminal offences. At the time of writing, other jurisdictions are considering introducing new offences, but at present, victims have limited option for criminal redress in these jurisdictions unless the behaviour can be prosecuted under other laws, such as stalking, indecency or surveillance devices offences. At the federal level, there are no specific criminal offences for IBSA. While there is a possibility to prosecute image-based violations under federal telecommunications law (*Criminal Code 1995*) Cth, s474.17), where it is a criminal offence to use a carriage service to menace, harass or cause offence, this law is overly broad and fails to capture the harms caused by IBSA.

A key limitation of the current laws identified by participants was the gap between the law ‘on the books’ and the law ‘in practice’. As Kelly (Legal Expert) observed:

We caution against relying too much on the law to resolve the issue because you can create all the laws that you want, it doesn’t mean that the police are necessarily going to act upon them or that people are going to feel that their issue has been addressed, and harms in the length of time that it can sometimes take [for the law to operate] can be really problematic.

Other participants pointed to the small number of prosecutions under recently introduced laws as evidence of the limitations of existing IBSA legislation in Australia:

I know that when I first started doing research on this issue, it was around June last year [2015] and there were only nine offences that were recorded (Amanda, Legal Expert)

I did a bit of a head count on this and we've only had a couple [of charges]. (Dean, Legal Expert).

I had a look to see in South Australia how many cases have come to the attention of either the courts or the media since the legislation has come through and ... I could only find about four cases (Maki, Academic).

It's been really infrequent to see that charge come through these doors. I don't think I've seen more than three ... and that's in the last three years (Robert, Legal Expert).

These comments indicate low numbers of prosecutions in Australia and reflect the data provided to us by the Victorian Crime Statistics Agency (VCSA) discussed in the previous sections of the report. The low number of prosecutions and reporting of IBSA contrast with the survey findings, discussed earlier, that 1 in 5 (or 23%) Australian respondents aged 16-49 years reported being aware that a nude or sexual image of them had been taken without their consent, and 1 in 10 reported that a nude or sexual image of them had been distributed without their consent.

A common criticism identified by participants of the existing IBSA laws that may also restrict their use, was their implementation as 'summary offences' (in South Australia and Victoria), which limits law enforcement responses in a number of ways, including removing powers of arrest. As Dean (Legal Expert) outlined:

We're substantially hamstrung when we use the summary offences for investigation ... There are many other investigative powers including arrest for interview and when we arrest, we seize exhibits. ... So, we will take his phone off him when we arrest him and we will go through his phone and we can crack open these things. We have people to do this, but we can't do that with a summary offence ... If it was indictable, but you could try [it] summarily, you'd have those powers available to officers.

Kate (Legal Expert) similarly claimed:

It needs to be indictable just so that it's easier to actually prosecute, so that police have the powers they need to seize evidence and devices and also to take a really strong stand on this issue.

These limitations mean that police may be forced to find a more serious offence to investigate and the IBSA summary offences become part of a 'package' of offences. As legal experts in two jurisdictions explained, it would be more likely that the police would pursue substantive offences, such as stalking or blackmail, in addition to IBSA offences, rather than run with an IBSA offence alone. While it is not unusual for the police to charge or investigate the more serious of applicable offences (on the basis that charges can be downgraded at a later point if necessary), the new legislation that came into effect in New South Wales in August 2017 may help to bypass some of the restrictions faced by police in jurisdictions where summary offences apply (e.g. South Australian and Victoria) because they are

indictable offences, which can be tried summarily in the Local Court or on indictment in the District Court.

Other participants also mentioned that having an intervention (or apprehended violence) order in place can be an incentive for police to intervene:

I think with the image-based sexual abuse itself, as a claim, when we go to the police, it doesn't really get their attention. As I said, it needs to become [a] breach of intervention because of the contact, but it doesn't really come down to that because the type of order that you use around this sort of thing [doesn't provide enough guidance around IBSA]. ... But they are quite responsive if something like that could be part of a breach of intervention order – then they would have grounds to apply for criminal charges ... (Amal and Nabila, Support)

Support for IBSA legislation

All participants supported the introduction of specific IBSA legislation that captures the non-consensual creation of nude, semi-nude or sexual images; the non-consensual distribution of nude, semi-nude or sexual images; and making threats to distribute nude, semi-nude or sexual images. The threat to distribute was considered a key element of any IBSA legislation, 'because that can have similar consequences to the actual sharing of it in terms of the abusive power and what that person might then do, if they're threatening to share' (Cynthia, Youth Representative). Participants also identified the threat to share as particularly relevant in family violence contexts: 'what we see often in the family violence work is that the threat to distribute images to a woman's family or workplace, or whomever that might be, is often as powerful as actually doing it' (Megan and Justine, Victim Support Advocate). As Amanda (Legal Expert) explained, 'often it's the threat that really silences people and can have such a detrimental effect on someone's career and their mental health, just knowing that it could be sent. Once it's out there, obviously that's horrific, but the threat can be just as bad'. This supports the survey findings, discussed earlier, which showed that 80% of Australians who had experienced threats to distribute an intimate image reported psychological distress consistent with a diagnosis of moderate to severe depression. This was the highest rate of psychological distress among any victimisation group. Accordingly, stakeholder participants also supported the offence being in place regardless of whether the images actually exist:

For the clients that we're working with, whether the image exists or not is irrelevant because it has – a threat has an impact of causing anxiety, causing fear, causing a sense of powerlessness. So that's why we'd very much like to see threat to distribute in there with no requirement of proof that the image actually exists. Because that causes just as much damage as if the image does exist (Penny, Victim Support Advocate).

In this regard, several participants pointed to the Victorian legislation as ‘leading the way’ (note: the majority of interviews were conducted before the introduction of new laws in New South Wales and the Australian Capital Territory in August 2017):

We [should] also target this threatening behaviour as well too, because that is a significant issue and there have been instances of intimate photos being used as a tool for bribery, particularly by former partners, and I think that that is, of course, deeply inappropriate. So, it’s not just instances where these have been shared, it’s instances where it’s been threatened that they be shared in order to influence particular action on a particular person, so I think it’s important that the laws target those too and I think it’s good that the Victorian law targets both of those particular aspects (Peter, LGBTIQ Representative).

Participants were asked to reflect on whether they thought specific state, territory and federal offences were needed. Among participants, there was clear support for a dedicated federal criminal offence and like offences then implemented in all jurisdictions:

The only way we can effectively tackle [IBSA] is to have federal legislation and then mirror state legislation which isn’t technology specific (Kate, Legal Expert).

It would be ideal to have a uniform approach across all states and territories. We do need that national legislative approach. But then if we can have mirroring provisions in each state, that would also be good (Amanda, Legal Expert).

It makes sense the more that we do federally, the better in terms of this space. We have so many anomalies around things like apprehended violence orders looking like this in NSW and then you cross the border to Queensland and it looks completely different, and a lack of sharing between police forces and jurisdictions around that stuff, it would make sense to me that you would do it federally, and then that you would try and get the states to obviously be a really driving force in terms of actually making this stuff work on the ground (Lia, Victim Support Advocate).

Cynthia (Youth Advocate) also noted:

[T]here’s so many grey areas in this area in terms of the globalisation or the globalised nature of sharing images and technology that if we don’t create a national response then it can just mean that boundaries are blurred between states, what’s okay and what’s not okay or where something may have occurred. So, I think we definitely need a national response.

In discussing the benefits of having specific laws, the participants pointed to the symbolic role of the law in facilitating social change as a key justification:

Legislation is always a really good starting point. You have to have a stick, you have to, otherwise you’re never going to achieve the sort of culture change. There’s no

point having a stick if it's a bit toothless. ... There's no point in prevention programs or awareness raising programs if people are still allowed to get away with that sort of behaviour (Lisa, Victim Support Advocate).

A similar view was expressed by Jackson (Academic) who stated:

The criminal law serves a very important purpose in setting the boundaries of appropriate modern conduct. The criminal law may sometimes lead or help guide society's attitudes. ... As a matter of decency and a matter of integrity in modern society, the criminal law needs to state that this kind of behaviour is wrong, and the reason why, because you are humiliating people by taking, distributing their explicit images or invasive images without their consent, and that should be made crystal clear that that is a significant criminal offence, and you hope that then will guide society's attitudes.

A recurring perspective among participants was that IBSA law is needed because it 'sends a message' to the community 'that it's not acceptable and that we as a society don't condone this sort of behaviour' (Natalie, Academic). Amanda (Legal Expert) likewise maintained that 'the law is one of the most important tools that we have for creating social change ... it's a very clear way of sending a message to the community that the Government and the law enforcement don't tolerate a specific kind of behaviour'. Peter (LGBTIQ Representative) also commented on the law as 'sending a powerful message that we want to create a culture in which non-consensual sharing of intimate images is inappropriate and wrong'. Louise (Victim Support Advocate) considered this message important in the context of community education, and specifically, educating young people about the harms and consequences of engaging in IBSA perpetration. She explained:

The laws send a message that their behaviour is unacceptable for our community and particularly if they have strong penalties with them, that are then acted upon. ... I'm very pleased it's there, when I do education in schools, I tell people about that because they don't tend to think that whatever they post can actually get them in trouble that way, and so it actually is good to be able to say to them, 'that's against the law and they're not allowed to do it'.

In line with the role of the law in sending a message, many participants also noted that simply merging IBSA into an existing crime, such as stalking or voyeurism offences, would not be sufficient to respond to this form of harm. As Bianca (Legal Expert) observed:

If you actually wanted to specifically target this behaviour I think just fitting it into an existing crime is not actually calling out to the public that it's a new offence that needs to be looked at. ... [You] need an offence that actually targets this particular problem, coupled with an education campaign. I think if you just fit it in, you're actually just – you're not sending a clear enough message.

Further to sending a message that such behaviour is unacceptable and breaches social norms and expectations, participants also pointed to law as providing a vehicle to highlight the significant harms of IBSA, and in particular, as Lisa (Victim Support Advocate) explained:

We're not just adding an extra thing to the real family violence or to the real sexual assault. We're saying that this [IBSA] is a significant enough and a prevalent enough problem ... that it needs a particular response and a particular legal response, because whilst there are some very strong similarities with other ways of perpetrating violence against women, this is a slightly different one. ... Legislation often makes people take it seriously.

Participants also pointed to the benefits of legislation in highlighting the seriousness of IBSA behaviours for those working with the law. As Amanda (Legal Expert) explained, 'the police are more inclined to take it seriously with specific legislation in place as well'. Lisa (Victim Support Advocate) similarly argued that police would have 'more confidence to act where they have legislation behind them that is specific'.

While all participants recognised the benefits of legislative reform, there was a common sentiment that the law could not operate in isolation, and that multiple approaches were required to respond to the harms of IBSA:

Law reform is unlikely to be successful without social and policy change behind it that's properly funded and properly strategized (Heather and Tara, Legal Experts). It only provides a deterrent if people know it exists. ... You need a campaign, a public campaign so that people know it exists. If you don't do that then it's a new piece of law that someone can actually enforce, but it will catch people by surprise (Donna, Victim Support Advocate).

Legislation on its own isn't going to work. Legislation is only going to be effective if it's going to be enforced. Then it also needs an education campaign around it. So that goes back to the issue of education with kids, education in the wider community as well. So, I think you don't have one tool in the toolkit. You need a variety of tools that complement one another. But legislation would certainly be very important as part of that process (Penny, Victim Support Advocate).

It's going to have to combine civil and criminal legal remedies, also education and culture and then issues obviously in enforcement and jurisdiction. [It's] certainly not a simple issue (Jackson, Academic).

As these comments demonstrate, a consistent recommendation from participants regarding any change in IBSA laws, whether at a national or state/territory level, was the need for the legislation to be accompanied by a two-pronged education campaign that targets the community, and that targets the organisations responsible for enforcing the law. Without this, Robert (Legal Expert) claimed, it is 'unlikely there will be a change in police responses

to the new laws'. Julie (Legal Expert) also observed, 'it takes time for new offences to get traction out there':

[Sexual offences teams] would all know about these offences ... but it takes time, I guess, for new offences to filter out and a lot of it is word of mouth, so the sergeant finds out and then when the constable puts in their brief with the charges on it, the sergeant says, 'well, actually, are you aware that there's charges? Well, I want you to lay this charge'.

Bianca (Legal Expert) also discussed the importance of an education campaign targeted at law enforcement:

If [the law] stays with the Victoria Police or the Federal Police, the education campaign needs to go there about how important it is and that it shouldn't be seen as second priority, like non-contact assaults. I mean, you could even call it something like non-contact assault. It's not really my area of expertise, how to design education campaigns, but I really think the end result is really trying to affect a cultural shift.

Andrew (Victim Support Advocate) similarly observed that:

The law needs to be coupled with a really widespread educational campaign for practitioners. I had cases reported to me where the victims have simply been told, get a new phone number, rather than seriously taking into account the offending, and go and do something about it, so it becomes an easy way for authorities to avoid having to invest in conducting an investigation. There is a tendency to minimise the use of telecommunications to perpetrate the offences, such as sending an image, because, once again, I don't think that some of the people in the authorities fully appreciate the harm that is done.

A targeted awareness and education campaign was also suggested beyond the police to the judiciary, to make sure the courts are 'properly educated on the harms of revenge porn and the need not to blame victims in these particular circumstances' (Peter, LGBTIQ Representative).

IBSA legislation: Effectiveness and need

In discussing the effectiveness of existing criminal legislation and the need for new criminal legislative models for responding to IBSA in Australia, the interviews revealed seven main findings relating to: (i) definitions; (ii) cultural standards; (iii) intent and harm; (iv) altered images or 'morph porn'; (v) victim anonymity and reporting; (vi) penalties; and (vii) policing challenges. A discussion of participant perspectives according to each key finding is presented below.

Definitions

As discussed in the previous section of the report, a key challenge in developing effective legislation is including clear definitions that adequately capture the array of IBSA behaviours and contexts in which it occurs. In the stakeholder interviews, two main terms where some conjecture existed as to the most appropriate definition to include in specific IBSA laws were: (i) distribution; and (ii) intimate images.

Distribution

Under the current Australian laws, the definition of distribution is mixed and arguably quite broad. Under the federal telecommunications law, the term 'distribution' is not used, instead, the offence is defined as 'using a carriage service to menace, harass or cause offence'. This means the distribution of material must be through a telecommunications service, which is defined as 'a service for carrying communications by means of guided and/or unguided electromagnetic energy' (*Telecommunications Act 1997 (Cth) s7*). This is limited to a fixed or mobile telephone service, an Internet service or an Intranet service, thus this law cannot capture distribution through non-technology-facilitated methods, for example, putting up posters or mail-outs of videos or photographs. In this regard, David and Jenny (Legal Experts) argued that the current federal law is inadequate in its capacity to capture all forms of distribution, and that a new federal law is needed that is 'wide enough to capture things that haven't been discovered or invented or created'. They explained:

Distribution should really be given a very wide meaning to capture all the types of ways it can be distributed ... even when it's printed out and shown to people. There's really no difference.

Christine (Victim Support Advocate) also questioned whether the definition of distribution under the current federal law would capture all forms of changing technology, like Airdrop and private chat groups:

One of the things [with the Federal law] is that it has to be online, so it has to be on the Internet, whereas actually it could be distributed through a whole range of other means, and I think that that is something that's going to change in the future. To define it to being online or on the Internet and not distributed through some other means, I think we've got to be broad in that context, because more and more young people are just sharing through their online chat groups. That's not technically on the Internet, really, it's not just published to a web page. ... And that's the other thing, it's done in closed groups. It's done by email. It's done by Snapchat or however it's done through these massive group chats that young people have now. ... And there's Air Drop now. ... So that's just coming off one device onto another ... it's just Bluetooth.

Under New South Wales law, distribution is defined to include: '(a) send, supply, exhibit, transmit or communicate to another person, or (b) make available for viewing or access by another person, whether in person or by electronic, digital or any other means' (*Crimes Act*

1900 (NSW) s91Q). In South Australia, distribution includes to 'a) communicate, exhibit, send, supply, upload or transmit; and (b) make available for access by another' (*Summary Offences Act 1953* (SA) s26C). While under Australian Capital Territory law, distribution means:

any of the following conduct, whether done in person, electronically, digitally or in any other way:

- (i) send, supply, show, exhibit, transmit or communicate to another person;
- (ii) make available for viewing or access by another person, whether in person or by electronic, digital or any other means ... (*Crimes Act 1900* (ACT) s72B)

Under the ACT legislation, a person is taken to have distributed an image 'whether or not another person views or accesses the image' (*Crimes Act 1900* (ACT) s72B(2)).

A minority of participants raised concerns about broader terms like 'showing' or 'communicating'. Michelle (Legal Expert) for example, stated 'I've always thought distribution actually mean sending rather than showing ... I feel like distribution should actually include [having] the sent button on it [pressed]'. Michael (Legal Expert) likewise argued that distribution should be 'carefully defined' and follow the guidance provided by defamation law:

I understood that publish meant to communicate and broadly distribute to two or more people. ... A definition similar to that might be appropriate. So, you know, if you showed one person, then it may not be an offence, but if you show two or more people in a group then maybe that would be or should be an offence. I don't think distribution should be limited to only conduct that relates to it being sort of transmitted electronically or anything like that, but I do think that one person showing another person probably wouldn't capture the sort of – the type of conduct that you'd hope to outlaw with laws such as that.

Samantha (LGBTIQ Representative) likewise supported a definition that adopted 'a standard definition of public communication involving more than two people'. While recognising that 'it's not ideal that someone shows someone something on their computer or phone or whatever', Samantha argued that, 'there might have to be some degree of common sense ... to go for a definition of public that is communication between ... more than two people'.

Olivia (Industry Representative) went further than this, saying that:

For me, distribution would be in the true sense of actually sharing it on a mass scale. So, it wouldn't just be showing someone. It would be sharing it on an online forum or even making a PornTube clip or something like that. I think that would be clearly a form of distribution.

This view contrasted with the majority perspective of participants, who indicated their support for having a broad definition of distribution, much like that included in the Australian Capital Territory legislation (which was introduced after the majority of the

fieldwork was completed), which captures showing even just one other person the image, and can occur 'whether or not another person views or accesses the image' (*Crimes Act 1900* (ACT) s72B(2)). It also does not require the distribution to involve a carriage service. As David and Jenny (Legal Experts) observed:

You have to capture it whether they send it particularly to the world at large or particularly to someone's workmates. You have to capture where they post it to a website particularly tailored [for IBSA]. ... In America, there's all this hullabaloo because they have those websites where you can upload revenge porn pictures, it has to cover that as well. If you send it to – so this is where the victim sends it to their boyfriend or whatever, meaning their boyfriend only looks at it and [the] boyfriend goes and shows other people, that also should be covered. ... Where it's distributed to one person or distributed to 100, where it's uploaded to a website. And even – I mean when you upload it to a website you don't necessarily know who's going to look at it, but you know people are going to look at the website. So, it doesn't have to be that the accused person's assumed that XYZ is going to look at it. So, I really think it needs to be given a wide definition.

Eleanor (Youth Representative) similarly argued that the number of people shown the image should be irrelevant as to whether it constitutes an offence, because the harm exists regardless:

There is an obvious line of if somebody's putting something up on the Internet and it can't be taken down, that there's an ongoing harm that is exponential because it can't be taken down ... but to say that somebody sharing one image with one person isn't going to [cause] harm, that's not going to work either because obviously there's lots of examples of where that could be used very directly to harm a person, you could lose your job, you could lose your relationship. If you were in a court case for custody you could lose. There's lots of very significant ramifications for one image being shared in a way that's harmful.

Heather and Tara (Legal Experts) adopted a similar view, maintaining that 'distribution should be construed broadly, so showing someone the image or a video should constitute distribution'. Isabel (Youth Representative) likewise claimed that 'distribution [is] any form of sharing whether it's electronic or in-person showing someone. ... Any way that other people are exposed to something'. Louise (Victim Support Advocate) expanded on this definition:

Distribution should mean that it comes to your device and then you use that device to then send it to another device, whether it's the iPhone, whether you uploaded [it] to a website or whatever, those sorts of things, whether you screen shot it, print it out and stick it on the wall, [all] that sort of stuff.

While almost all participants supported a broader definition of distribution that included 'showing' the image, there are evident problems that emerge with legally proving that a

perpetrator showed another person an image, given there is unlikely to be any evidence of this:

Showing their friends ... realistically, it wouldn't be able to be enforced in a way that would really lend itself to that legislation then being practical. Is it practically enforceable by police? How would you prove it? How would you enforce it? It's going to come down to a matter of evidence. If you don't have reliable witnesses, I just don't think you're reasonably going to get a positive prosecution out of that. So, it might be symbolically important for it to be included in an Act, but I think there's a practical issue around collection of evidence and prosecuting that particular act (Mia, Victim Support Advocate).

While also recognising the limitations of the broad definition, Bianca (Legal Expert) argued that the social change potential of law provided a strong basis to include 'showing' in any IBSA legislation:

It should include showing. ... It could be harder to prove that ... [but] it still should probably go in there, especially as a lot of the point of this would hopefully [be] to make a cultural shift and a behaviour change. Really, that's what we really want. We don't really want to prosecute people; we want people to stop doing it. So at least it would help an education campaign to say that even showing somebody is against the law, and even if that one's less easy to prosecute, well that's going to always be less easy. It's still a criminal action.

Intimate images

Within existing Australian legislation, the terms 'intimate image' and 'invasive image' are used to capture the types of images that when taken, shared or threatened to be shared are considered IBSA. Victoria, New South Wales and the Australian Capital Territory all use the term 'intimate image'. In New South Wales, an intimate image is defined as an 'image of a person's private parts' which includes 'a person's genital or anal area, whether bare or covered by underwear', and the breasts of a female or person who identifies as female. It includes an image of 'a person engaged in a private act', which includes a person 'in a state of undress, using the toilet, showering or bathing, engaged in a sexual act of a kind not ordinarily done in public, or engaged in any other like activity' and 'the circumstances are such that a reasonable person would reasonably expect to be afforded privacy'. The legislation also includes digitally altered images (*Crimes Act 1900* (NSW) s91N). The Australian Capital Territory law adopts a similar definition. In contrast, South Australia uses the term 'invasive image', which is defined as the depiction of a person:

In a place other than a public place –
Engaged in a private act; or
In a state of undress such that –
in the case of a female – the bare breasts are visible; or

in any case – the bare genital or anal region is visible (*Summary Offences Act 1953* (SA) s26A(2)).

A 'private act' is defined as 'a sexual act of a kind not ordinarily done in public' or 'an act carried out in a sexual manner or context' or 'using a toilet' (*Summary Offences Act 1953* (SA) s26A(1)).

In the interviews, participants had several conflicting views on the most appropriate term to include in legislation relating to the content of the image, as well as how this term should be defined. There was some support for using a term, like 'intimate images', to move beyond only nude or sexual images being captured by the law. This was also considered important in the context of perpetration against individuals with a disability. As Esther (Disability Support) explained, the law needs to include 'photos of someone going to the toilet or engaging in personal care activities, because that is often where carers would take photos if they're assisting someone with those kind of intimate care activities'. Ashley (Victim Support Advocate) further advocated that the definition should cover 'any image that makes a woman feel victimised and harassed. ... In an ideal world, it would protect any kind of feeling of an image that someone viewed to be private. ... Personally, I would like it to be as broad as possible, just to protect victims'.

Jenny and David (Legal Experts) also commented on the possibility of moving beyond only a sexual element to the definition, and instead focusing on the assumption of privacy:

If legislation gave an example it should be non-exhaustive ... naked or partially naked, irrespective of whether the genitals are exposed and irrespective of whether the type of pose they're engaged in or if they are or aren't engaged in sexual activity, because the naked images can still cause hurt, embarrassment, distress. ... So, they're not necessarily what we call 'sexually explicit' or they're not adopting a sexual pose, they're not engaged in sexual activity but there's still a photo that they have a reasonable expectation to privacy. ... So yes, naked images we think or partly naked images we think these should be included. They have the same effect. ... A person depicted in a way which by context or content would suggest that it's of an intimate or private nature. So, they might not be naked, they might not be engaged in a sexual activity, they might be posing in lingerie, they might be in some sort of other sexual pose or it might just be the one where you might see their genitals.

This concept of privacy, or an assumption of privacy as mentioned by Jenny and David, was common among participants in defining what type of image should fall under the law, particularly when considering the case study example provided as a point of discussion in the interview involving an individual partially clothed on the toilet or at the beach. This can be seen in the following exchange with Donna (Victim Support Advocate):

Q: What constitutes an intimate image in your view?

A: One of a sexual nature.

Q: In saying that, if a person were to go to the toilet or someone sunbaking in their bikini on a beach do you think that that would be an intimate image?

A: Going to a toilet? Yes, because it's something we do in private. Sunbathing on a beach isn't something we do in private.

Q: Sunbathing on a beach you'd say that is an intimate image?

A: No, because you're already in public, unless you went to a nudist beach and the assumption is that, you know, you've gone to that beach it's a secluded space.

Bianca (Legal Expert) similarly observed:

The word intimate actually would cover going to the toilet and probably not sunbaking on a beach, because the person's in a public place. ... A private activity was an activity carried out in circumstances that may reasonably be taken to indicate that the parties to it, desire only to be observed by themselves ... but it doesn't include an activity carried out in any circumstances in which they should reasonably expect that they are observed. I think that that idea – looking at the subjective and the objective elements that the VLRC [Victorian Law Reform Commission] did in terms of what's private – could actually inform that concept of what's intimate, and it takes it away from [the definition] being just sexual.

Further to privacy as a pivotal element of defining what constitutes an intimate image, Heather and Tara (Legal Experts) stressed that any definition has to 'take into account the context a photo has been taken in'. They maintained:

It would obviously be something which involves a naked body or a sexual act, but I think that it's very difficult to narrowly define that because of the fact that it means different things to different cultures. I don't think it needs to be sexually explicit because sometimes, images are taken of people without their knowledge while they're in a change room or at the beach.

Louise (Victim Support Advocate) also maintained that context and privacy are key factors in determining what constitutes an intimate image:

Intimate image to my mind will be defined by an image taken of someone in a context in which they thought that they could expect to be private. So, if I'm down on a beach, I have no expectation of privacy. If I'm going to the toilet with the door shut, then I would have an expectation of privacy. ... The intimate images that I think need to come under this heading are ones that people expected to remain private or non-existent in the first place.

Along the same line, Lisa (Victim Support Advocate) identified the importance of context, but in doing so, she challenged the notion that the photograph must be sexual in nature:

Sexually explicit would be showing genitalia and sexually suggestive would be showing the top of the pubic bone and the pubic hair or the area where there's supposed to be pubic hair. Someone going to the toilet to me is probably fairly sexually explicit. ... I'm using sexual as a euphemism for showing particular aspects of the body which is really problematic, which is why I think we're probably using language around intimate. The bikini thing is problematic because it is a public place and we choose to put ourselves in the public place, however, we don't choose to have photos taken of us and we're not consenting to that. So, the short answer probably is no, I don't think that they need to be sexually explicit. I think we need to not limit ourselves to if it shows boobs, bum, or penis or vagina ... because that doesn't actually cover the full gambit of what we're talking about.

A key concern with the use of the term 'intimate', or anything that went beyond the scope of sexual imagery (e.g. nude and semi-nude images) identified primarily by academic and legal expert participants, was the potential for the law to be 'diluted' if the definition was expanded too broadly. As Jackson (Academic) explained:

You've got to be careful not to over-extend the criminal law. There comes a point where behaviour may perhaps be a little bit questionable, a little bit tacky, but shouldn't necessarily be in criminal law. And I think we all know that 'revenge porn' definitely should be a criminal offence, but I think we need to be hesitant or wary about trying to extend the reach of the criminal law into every conceivable kind of scenario that might arise. Rely on the common sense of individual judicial officers and or juries, or prosecution discretion and also remember the point that the broad offence, it's not absolute.

Michael (Legal Expert) likewise identified the dangers of using a broad definition and term like 'intimate', while at the same time recognising the difficulties in finding a term that adequately captures the full breadth of images that he believed should fall under any specific IBSA criminal law:

I think if you're looking at developing an area of law dealing with revenge porn, I think you'd risk sort of diluting it a bit and watering it down by making the definition, you know, too broad. I think there'd need to be some requirement for the image to be – I was going to say sort of sexually centred, but that's not necessarily so, because a nude image, you know, may not be sort of motivated sexually, but that would still be an intimate image. But something like that. I think nudity per se probably wouldn't be included, but certain types of nudity may be. Again, a really difficult area.

Michelle (Legal Expert) argued that in order to achieve some effectiveness in the legislation, it was important there was 'some sort ... of sexual component to it [the definition]'. She explained:

That's not to say that a photo of somebody who is going to the toilet and the image has been taken without their consent is something that is not abhorrent because it exists but, yeah, I think if it's somebody who's at the beach in their bikini, I just think it can really open up too many – it can be too much and it can then become almost farcical. That would make it very difficult for enforcers and decision-makers – our digital decision-makers to really take this particular law seriously and we do need to take them seriously. So perhaps if we start with the sexual – having a sexual component to it first and then, if there is a situation where more and more non-sexual but inappropriate images are being sent of adults ... perhaps that's something that should be considered later on down the track.

The comments from participants demonstrate the difficulties in ensuring any IBSA law can adequately capture the variety of circumstances in which these forms of abuse take place, what they entail and how the conduct occurs. There does not appear to be a gold standard method to addressing these definitional questions, however as informed by the discussion in the previous section, the laws introduced in the *Crimes Act 1900* (NSW) go some way towards meeting the tension between being too broad and too specific in relation to distribution and appropriately defining what constitutes an image that should be captured under the law.

Cultural standards

There has been much debate about ensuring any criminal legislation adequately captures the varied contexts in which IBSA occurs, without broadening the scope of the laws too extensively so that they become almost symbolic, as opposed to useable. A key area where there has been significant debate in this context is whether or not the criminal law should capture images that breach the cultural standards of the victim. In particular, this question has been posed in relation to Muslim women, primarily relating to images of them not wearing a hijab. As Amal and Nabila (CALD Representatives) observed, 'for some culture, no hijab is naked. So [the] cultural [context], it need[s] to be taken into account. ... I think laws need to enforce that. ... We need to actually be culturally sensitive'. Using a different example, Cameron (Industry Representative) argued:

I think a slightly better example [than a Muslim woman without her hijab] would be, say a Muslim woman in a bikini would potentially be an issue. ... Context needs to be taken into account but I think it's going to be difficult. I think it would be difficult to write legislation that criminalises the sharing of a picture of a young Muslim woman in a bikini without actually becoming a pretty heinous restriction on free expression, so that's a tricky one. But there's definitely a cultural context that needs to be taken into account.

Andrew (Victim Support Advocate) provided another example for consideration:

Imagine that a young Muslim girl decides to go out clubbing one night without her father knowing and so people go snap, snap, snap and then distribute non-consensual images of her that are culturally inappropriate that result in her

becoming the victim of some honour type action because it is seen to be so abhorrent by particular men in that culture.

In reflecting on this scenario, Andrew identified one of the two opposing arguments relating to the criminal law having a focus 'only on the sexual images':

My starting point is this, there should be no unnecessary intrusion into a victim's privacy, so to the extent that any image that is circulated without a person's consent or approval impacts upon and causes some form of harm, then that ought to be a consideration.

The alternate argument is that the law must have 'a sexual nature to it' in order to 'have clear legislation' (Erin and Kirsty, Victim Support Advocates). As Donna (Victim Support Advocate) explained in the context of a Muslim woman not wearing her hijab:

If it was specifically because she's not got her headscarf on then – I think that's different to if she had had a naked picture of herself distributed; and is that because I'm being culturally insensitive I'm wondering? But I think not, because she might well have pictures of herself [displayed] at home without her headscarf on, but [she] would certainly not have on the mantelpiece a picture of herself naked, and nor would most of us.

Samantha (LGBTIQ Representative) also queried whether the cultural context is 'better framed in the context of other laws like discrimination and possibly vilification? ... Perhaps [it's] better to keep it separate [from IBSA] and somewhere else'?

While most participants were sympathetic to cultural standards and felt that the impact on the individual victim should be taken into consideration, they also recognised the difficulties in creating laws that would adequately capture cultural sensitivities, while not 'diluting laws ... [which] can be harmful' (Eleanor, Youth Representative). The difficulty in including culturally sensitive circumstances in legislation was well articulated by Kate (Legal Expert), who identified the potential impacts if the law was too broad in scope:

This is a really difficult question, especially from a legal perspective and legislating on it and the implications of having something like that. Having talked to a lot of Muslim women about this issue, I think that the harm that they suffer, the embarrassment they suffer when those images are distributed where they're not wearing a headscarf is quite equivalent to some of the shame and embarrassment that women feel when intimate images or sexualised images are distributed or shared without their consent. My concern from a legal standpoint though is if you have something like that, then how far does it go? For example, when I had these discussions with my colleagues when I was previously working at, one of my colleagues thought that it should also be an offence if, for example, you were a white woman and, in your culture, being fat or looking hideous or obese was somehow something that you were ashamed of and if your ex-partner then went and distributed really unflattering

and awful photos of you, then you should equally be able to use this sort of [law]. I think that is completely too extreme and no one would take this law seriously – legislators wouldn't enact it. But it made me think if we were going to try and put a clause into any legislation that allows it to be not just sexual images, but images from a cultural context, then is there a danger that it could be pushed to that sort of extreme and, therefore, dilute what this legislation would actually really be there for. So, while it's really important to think about these cultural implications, it needs to have a lot more thought put into it and what repercussions could come out of it. ... At this stage, we're still really fighting to even get this legislation to cover when it's sexual images or recordings. I wonder whether that will be the next step of this evolution, to take it further and look at wider cultural implications. But I think that it will be hard for us to get there until we first just cover sexual images. ... From a practical standpoint, we're up against people who already think that this sort of legislation would take things too far. So, while we need to be aspirational and try and get the legislation right and make it so it's as effective as possible, we still need to navigate what's actually going to be realistic in this day and age, in the political climate that we have.

Similar concerns were identified by Heather and Tara (Legal Experts) who indicated that broadening the legislation too far could have adverse consequences: 'the argument could be put forward that someone could potentially say that any photo of them in any situation was exploitive'.

Ultimately there was some support among participants for IBSA legislation to take into consideration culturally sensitive scenarios, but overall, the majority agreed that focusing on nude, semi-nude and sexual imagery as a starting point was important, particularly to ensure this form of abuse is recognised as an extension of sexual violence. As Louise (Victim Support Advocate) observed:

I think if we're talking about 'revenge porn', I think when you're talking about cultural things like that, it's getting away from the sexualised violence, [the] nature of the violence, because it's again, with the intimate image materials, there's a lot of social stigma about that and also again, there's a large trust issue to do with how they got that image in the first place. I'm not saying that it wouldn't be upsetting and it wouldn't be offensive to those [Muslim] women, I just see it as a slightly different issue.

Intent and harm

One of the key considerations of IBSA legislation is the concept of 'harm': the perpetrator's intent to cause harm, and the victim's experience of harm. In the current Australian legislation on IBSA in the Australian Capital Territory, New South Wales, South Australia and Victoria, there is no requirement to prove the victim has experienced harm or to prove intent to cause harm, however, as outlined previously, several of the laws introduced in international jurisdictions include one or both of these requirements.

All participants agreed that the onus should not be on the victim (or prosecution) to prove the victim has experienced harm in order for an IBSA offence to have occurred. Participants justified this on the basis that there may be instances where the victim may have been unaware that the image had been shared (e.g. where it has been shared on private pages or dedicated voyeurism websites), the difficulty of proving harm or the extent of harm experienced, the different ways people may experience IBSA victimisation (e.g. some may find it devastating and others less so) and because the nature of the offending behaviour should assume that harm has been caused by the creation, distribution or threat to distribute an image without the other person's consent:

It's very hard to prove emotional distress. How do you prove things like shame or fear or not being able to leave your house or saying, 'I'm afraid to go online' or 'I'm afraid to apply for jobs'? I think proving those kind of things, it's not an easy thing to do. ... This is more emotional and mental fear [than physical harm] which has real life consequences that are arguably just as crippling (Ashley, Victim Support Advocate). We just think that the fact the harm has occurred is sufficient in itself. We don't believe that the focus should be on the perpetrator. ... The focus should be on the behaviour, not the impact to the victim, because that very clearly leads us into potential victim-blaming when we're requiring people to show whether or not they have in fact suffered harm from the behaviour, which we already agree is unacceptable (Heather and Tara, Legal Experts).

I think intent to cause harm or distress is a kind of tricky bar, because I think firstly harm is going to be caused whatever the intent was, and I think often the intent might not be in relation to the victim, but more about personal gain, like bragging to your friends (if it's a low-level offence), or it might actually be commercial gain if it's trading in images. So, it's not really about the victim, and I don't think it should be about the victim. ... I think it's still an offence, whether they intended to cause harm to the person or not (Bianca, Legal Expert).

Just because you're not showing PTSD and really serious distress does not mean that what happened isn't criminal, so no. I've never been really good on you have to show serious harm, I think well, what does it say for people who are really quite good at managing their affect and good at managing distress? And some people are. It doesn't mean they shouldn't have penalties still available to them (Donna, Victim Support Advocate).

Rather than requiring proof of harm, it was suggested that the harm caused to the victim could instead be considered in the sentencing stage as an aggravating factor (Michael, Legal Expert).

The question of whether IBSA law should require 'an intent to cause harm' was somewhat more contentious among participants. Some participants, particularly from the law

enforcement and legal expert groups, were more likely to advocate for the inclusion of intent – ‘all crime has to be deliberate’ (Dean, Legal Expert). Eleanor (Youth Representative) likewise claimed:

Intent is very important in criminal matters and particularly when it comes to young people because the Internet and technology is changing things rapidly. ... The ability to do harm unintentionally is quite large. So, I think we’re opening ourselves to a very complex, difficult conversation if we didn’t have the intent part in there. ... A law should be about the broad scope of what a law should cover, rather than just looking at the one or two instances where it could be really misused. And I think that’s just to challenge us trying to create laws and boundaries for 24 million people, but that’s their responsibility and I think we have to look at intent in there. I think the court system has a history of being able to have those complex conversations, they just need the laws in place to be able to enforce them.

The majority of participants did not support the law including a focus on intent to cause harm or distress to the victim, given the varying motivations that can underpin this form of abuse. As Jacqui (Victim Support Advocate) explained:

When you’re looking at why people share other people’s nude images without consent, they do so for a whole variety of reasons, and it’s not necessarily always to cause harm or distress. That, however, does not mean that the act didn’t cause harm or distress, and in fact, what I’ve seen in my experience is that men share these images without consent for a whole variety of other reasons; that it might be something as simple as to brag to their mates, it might not be to humiliate the victim but it might be simply to big-note themselves with their friends. It might be to prove an aspect of their masculinity amongst their peer group, it may be that they’re just bored sometimes. There’s a whole variety of reasons. ... So, I think if the law says that it includes an intent to cause harm or distress, the problem with that is that in many cases they weren’t necessarily trying to cause harm or distress, they weren’t thinking about the impact on the victim at all. ... It’s really important when we’re dealing with any kind of sexual offence [that] we stop prioritising the perpetrator’s interpretation of the event over and above the victim’s experience of it. A perpetrator doesn’t need to intend harm in order for the victim to experience immense harm, and what the law should be responding to is actually the harm caused, not just whether or not the perpetrator intended it that way.

Ashley (Victim Support Advocate) expanded on this view, questioning whether an intent to cause harm requirement in the law would make it ‘an easy way for a perpetrator to fall through the cracks’:

From what I know, people who perpetrate revenge porn or technologically-facilitated violence, they do it for a number of reasons. I think with that definition in the law, if it doesn’t fall inside those things, if they’re doing it for money or they’re

doing it for fun or that sort of sporty misogynistic, 'look what I did?' type of thing, or notoriety or fame, it doesn't cover those kind of things. So, I think the scope needs to be bigger ... just because the intent can be so broad.

An example of an intent provision allowing a perpetrator to 'fall through the cracks' occurred in July 2015 in New South Wales when IBSA offences were (loosely) captured by s91L of the *Crimes Act 1900* (NSW): 'filming a person's private parts'. Under this law, it is only considered an offence to film another person's private parts for 'the purpose of obtaining or enabling another person to obtain sexual arousal or sexual gratification'. In this instance, a female nurse took and distributed an explicit photo of a woman's genitals while she was under anaesthetic. Despite the evident harms to the victim and the offending nature of the behaviour, this act could not be captured under the law because the motivation was not deemed to be for sexual arousal or gratification. As a result, no criminal charges could be laid.

Comparing an intent requirement to cause harm in IBSA laws with other offence types, Louise (Victim Support Advocate) suggested that it could open the floodgates for a 'slippery slope' of 'excuses':

With every bit of revenge porn there is intent to cause harm. The issue is going to be if you have to prove that in court, then it becomes a slippery slope and that's where you get things like, 'I was drunk and I was joking' and that sort of stuff. Because I think if you ask someone, if you took an intimate image of someone and uploaded it to a public place, against their will and you know this person wasn't doing it themselves or wasn't wanting [you] to do that, do you think it would harm them or not? I think if they're a rational, sane person, they would say yes. Then you must concur that they've done it maliciously, because otherwise they're doing it to hurt that person, or knowing that it's going to hurt that person, and then that's not a joke, is it? But I think when you get into criminal matters, as soon as you put in those types of intent things, it just becomes a real quagmire then because there are so many loopholes ... and they're going to hang onto those defences with both hands and never will they admit, 'I did it maliciously'. So, I think that by the very act of them doing it, then you have to say, 'it's done maliciously'. It's like someone saying, if this was to do with robbing a bank, if you had to prove that the person intended to deprive someone of their income and the intent was to do it maliciously, you would really not have a lot of bank robbers going to jail. I don't understand why intent has to come into it. Can't the act itself be enough?

Jackson (Academic) also argued that the intention to cause harm requirement would result in the law getting 'bogged down in questions of mens rea', which he described as 'an unnecessary red herring'. Accordingly, Jackson argued that intention 'could be an aggravating feature, but it shouldn't be a necessary element of the offence'. Isabel (Youth Representative) similarly suggested intent could be considered at the sentencing stage as a way to ensure the penalties imposed reflected the varying levels of aggravation in the

offence. While recognising that ‘it can be devastating for people who aren’t aware of the level of harm that they’re impacting on someone else to wear the consequence of that’, Isabel maintained:

If they intended to cause harm that should absolutely be part of an understanding in sentencing, but harm can be caused whether or not you intended it, and if you took actions that weren’t respectful or weren’t consenting, that can have significant harms for someone – it’s like manslaughter, isn’t it? It’s still a harm.

Ultimately, the majority view was summarised by Samantha (LGBTIQ Representative), who claimed there should be ‘no intent – and I would be putting expressly in there to strengthen it words like, to borrow from equal opportunity law, motive is irrelevant’.

Altered images or ‘morph porn’

‘Morph porn’ (another problematic term like ‘revenge porn’) is defined by Dickson (2016: 46) as the situation in which a ‘victim’s face is copied, cropped and pasted onto the body of another person who is engaging in explicit sexual acts’. Overwhelming, participants supported IBSA laws capturing digitally manipulated images, on the basis that it can ‘have the same effect on a victim’ as a non-manipulated nude or sexual image of the individual (Amanda, Legal Expert). Eleanor (Youth Representative) considered this form of IBSA to be particularly harmful because ‘you’re likely to get your hands on much more explicit things than you would from just an actual person in an actual relationship. ... Google images searches of something really horrific [and] you have a lot more options that way and suddenly it can be more harmful’. Only three participants felt that broadening the legislation to include altered images was unnecessary. Two of these participants based this view on the harm to the victim being less significant. Cameron (Industry Representative), for example, claimed:

Let’s say there’s a photo, fully naked but pixelated the breast and the groin or whatever, that’s probably still quite harmful. Photoshopping your head on somebody else’s body is quite a different thing. ... I think it’s a very different thing if you take somebody’s head and put it on someone else’s naked body because that’s arguably just stupid and rude rather than necessarily – it’s not your body. So, I think there needs to be some sort of line there. ... If I’m just getting creative with Photoshop and doing things, maybe that doesn’t count, whereas if I’m literally just bringing a black dot over the really bad bits then that obviously should still probably be an offence.

Louise (Victim Support Advocate) likewise described the harms as being ‘less personal’ when there was digitally altered images involved:

If someone has a picture of their ex-girlfriend’s face, and they then put it on a nude photograph of Kim Kardashian, or someone like that and then they meme it to say, ‘check out what my babe did’ or whatever and then uploaded it, I think it would be a

lesser thing. I think it's probably more like copyright. The difference in my mind is that in order for them to have an intimate image of someone, it's meant that they had to be in a position of trust. When they are manufacturing an image, utilising Photoshop or other things, that the person in the image has not physically been standing in the same room with them doing it. So that image then has a different connotation. I'm not saying it's not still nasty and malicious, because it is, but I think if people were going to have two different images uploaded, one of which was an intimate image that had been taken by someone standing in the room with them, and the other one was an image that's been manipulated and put up, and you said 'which of these two do you prefer to be released?', they would go to the manipulated image, because I think it would be less personal. ... I don't think it's as significant as the other sort.

Peter (LGBTIQ Representative) also queried whether the criminal law was the most effective response for altered or manipulated images, and instead pointed to defamation law:

It does have a different nature to it. I think it's quite a different phenomenon in some ways to revenge porn. I think photoshopping somebody's head onto another body is a different form of conduct than what we would call 'revenge porn', so perhaps that needs to be put into a separate basket and dealt with somewhat separately I think. Defamation laws may be able to deal with that. ... I do feel that whilst a serious issue, it is a separate issue.

These views ran counter to the majority of comments from participants that the harm caused to victims by an altered image is significant. Samantha (LGBTIQ Representative) discussed this in the context of a non-operative transwoman:

Someone gets somehow a readily available picture of a non-operative transwoman and puts someone else's face on it. How many people are going to immediately get out [a] magnifying glass, examine it and go, that's photoshopped? The negativity, the emotion, that's still there. ... Yeah, I think there has to be something that is done about that, where something is photoshopped. It's still about the impact on the victim.

Heather and Tara (Legal Experts) likewise claimed, 'I've read of a number of cases where women's faces are photoshopped onto quite violent sexual images, and that can have just as harrowing an effect as actual images'. Thus, the majority view among participants was to include morph porn images in legislation. As Erin and Kirsty (Victim Support Advocates) maintained, 'if someone's face or something is put on a naked image and that again is broadcast, that is an attack on their sexuality, and it is again non-consensual if they haven't consented to. It still a form of sexual violence. ... [It] can cause the same damage'.

Victim anonymity and reporting

Some stakeholders in the study spoke about how traditional masculine values, victim-blaming attitudes and a lack of understanding of the harms of gendered violence contributed to how IBSA is policed. According to Jacqui (Victim Support Advocate):

There are cultural problems within the police. ... The police often still operate as a 'boys' club', and on top of that, I think that there's a lack of community trust in how the police actually respond to these crimes, because what I hear frequently from people who have experienced this is, 'well, there's no point in going to the police, because I know someone else who this happened to and they went to the police and absolutely nothing was done'.

Victim-blaming attitudes, particularly when held by police, were strongly linked with low reporting rates. Drawing on several of her clients' experiences, Kate (Legal Expert) claimed, 'they don't think anyone's going to believe them and they're worried that the police are just going to turn around and say, 'well you shouldn't have taken those photos in the first place''. The harms of this victim-blaming mentality were strongly articulated by Jacqui (Victim Support Advocate):

We know the common impacts of victim-blaming include things like shame, self-blame, being re-traumatised and having the trauma that they're already dealing with exacerbated, a sense of betrayal and [feeling] isolated – they often feel incredibly alone. They are [also] less likely to report. They are less likely to engage in help-seeking behaviours.

Further to potential victim-blaming views among law enforcement, participants identified other barriers preventing victims from reporting, including as Kate (Legal Expert) observed, a reluctance to share images with police: 'I've had other clients where they don't want to go to the police because they don't want to have to show the police those images'. Maki (Academic) similarly said:

... the idea of having to share images with a stranger who may or may not respond appropriately or an office – potentially an office of people who will then look and assess [the images] – that is quite overwhelming. For example, you have a fairly high confidence that, say, people who might work in child exploitation sections are not sharing around images of child porn because everybody acknowledges that it's abhorrent. Whereas images of naked or semi-naked women, you know ... I can imagine guys thinking that that's a nice part of their job.

Kate (Legal Expert) also noted that some victims fear that reporting the incident of IBSA will result in retribution from the offender, including the release of the images:

I've had other clients ... [where] the reason that they aren't giving their full, honest version of what's happened [to police] is because of that fear of retribution because the other person's holding over them this sex tape. ... They are worried about the

images being sent to their family. So that's another issue, especially for women from different cultural backgrounds.

Several participants also reflected on a victim's diversity and background as fuelling a lack of trust towards police. According to Kate (Legal Expert):

I've got a client ... from a CALD background, but also the images were recorded in an extramarital affair. So that adds an extra layer of awfulness to this. ... Because of the cultural implications of all of that on top of these ideas that already exist about victim-blaming culture, she really doesn't want to come forward. She really doesn't want to talk to the police. ... She's just completely in a corner.

Peter (LGBTIQ Representative) similarly identified these concerns existing within the LGBTIQ community:

We still do get instances of police not dealing with these issues appropriately, not taking victims seriously, and that continues up until today within our [LGBTIQ] community, and that's why we have such low reporting rates. ... Generally, LGBTIQ people are much more reticent to report criminal offences because of their lack of trust towards the police.

Esther (Disability Support) also identified the multiple 'unique' barriers for people with a disability in terms of reporting to police:

Police might decline to take reports because they have difficulty understanding people with disability or because they are inadequately equipped or trained to take statements from people with disability. ... They may be unable to physically attend a police station by themselves. ... Reporting or complaints mechanisms might be inaccessible. So, if they want to call up to report something, you know, some automated telephone systems might not be accessible to them if they have a hearing impairment. Form-based complaints systems can be quite inaccessible to people with intellectual disability and people with visual impairment. So, there's lots of accessibility concerns about the actual process of making a report. People with disability may also have a lack of trust in authority figures. They may fear the consequences of reporting to the police and that might be because of previous encounters with the police or with other authority figures. Women with [a] disability in particular may be fearful of reporting crimes against them because they may fear having their children removed from their care.

Participants also pointed to the potential secondary victimisation in the courtroom as a key factor hindering victims from reporting incidents of IBSA, both in terms of facing potentially distressing cross-examination, but also because the victim's privacy will be violated again through the revelation of the image/s, which may then appear in the media. Christine

(Victim Support Advocate) reflected on one such example in the context of IBSA and family violence:

Sometimes I get women who don't want to go down that legal path either, because they don't want to be re-victimised. ... [One] particular woman – all of those images – she had family law proceedings. The judge and the QC [Queen's Counsel] that he hired for the family law proceedings spent a day and a half cross-examining her about the [revenge] porn images, to the point where she was so re-victimised and abused through that process that she consented to the orders because she didn't want to be cross-examined by the \$10,000 a day QC that he'd managed to hire. ... She's re-victimised through that.

Peter (LGBTIQ Representative) also discussed these concerns in the context of a victim's right to privacy:

We first have to encourage victims to come forward and report these offences, so they need to know that it's going to be taken seriously. ... We need to make sure that there's appropriate provisions around the courtroom, that the victim isn't persuaded against using things such as communicating through a screen or communicating through video link or that the court hearing may need to be a closed hearing or their name redacted from the records or swapped with another particular name to ensure that their anonymity is protected.

Currently, laws on IBSA in Australia do not include anonymity provisions for victims and this was a key critique among participants. Some provisions suggested by participants included media blackouts (Amanda, Legal Expert), closed courtrooms (Amal and Nabila, CALD Representatives), video conferencing (Ashley, Victim Support Advocate), providing the 'same anonymity [protections] as in normal sexual assault cases' (Bianca, Legal Expert) and introducing 'anonymity provisions in the courtroom to prevent others from accessing the images' (Donna, Victim Support Advocate). As Eleanor (Youth Representative) observed:

Laws that are put in place to protect people should do everything that they can to keep that protection. The process shouldn't cause them harm. There are things in place that we have for child abuse cases and things like that; processes that could be adopted for that exact reason because you wouldn't want the court case to be doing the exact thing it's supposed to be fighting against. Making images more accessible, would not be the best. But when it comes to and at the moment we have the *Child Pornography Act* with the under 18s anyway, so there's regulations within that [legislation] that protects victims, so it could easily be adapted and I think it would be wise for the courts to look to [also] be protecting the [adult] victim as much as possible.

Penalties

In discussing penalties for IBSA offences, most participants supported a penalty scheme similar to that enacted in Victoria (note: the majority of interviews were conducted before the introduction of new laws in New South Wales and the Australian Capital Territory in August 2017):

I think the Victorian response which is up to two years imprisonment is really good (Ashley, Victim Support Advocate).

I think it's great that Victoria's taken the lead on this issue (Bianca, Legal Expert).

In Victoria, IBSA offences relating to capturing and/or distributing a non-consensual intimate image are punishable by up to 2 years imprisonment, while the threat to distribute an intimate image is punishable by up to 12 months' imprisonment (*Summary Offences Act 1966* (Vic)). Some participants suggested imprisonment was not appropriate, and punishment would be better served through community-based orders, fines or if necessary, 'a short sharp sentence' (Donna, Victim Support Advocate). Others suggested the Victorian penalties were insufficient, particularly when the perpetrator was profiting from the images. In these instances, participants instead suggested 'a hefty' fine, and 'longer' terms of imprisonment (Michelle, Legal Expert):

If you're getting any commercial gain or financial gain from trading in these images, I think 2 years is really nowhere near enough, so I think in some cases the penalty should be greater. Well, websites should carry a potentially higher penalty. I don't think 2 years is really enough. I mean, sexual assault penalties are way higher, so I think look at [the] other kind of comparable contact assaults and consider if they're similar (Bianca, Legal Expert).

The main area where there was some concern raised about penalty options related to young perpetrators:

The progressive understanding and mental cognitive development that happens for a young person is – we know that it's up to 25 [years] for young males, particularly before their brains are fully formed and for young women, depending on who you talk to, but it [also] takes a while. So, the fact that a 14-year-old got hold of a picture and then sent it to his friends is not really the same [as an adult]. Sending a 14-year-old to jail for 2 years is not going to be helpful for that young person in their future life (Eleanor, Youth Representative).

Penny (Victim Support Advocate) likewise claimed:

There need to be consequences for young people, but we question how severe the consequences should be for young people. ... So, I'm not saying that if a young person takes an image and then shares it with all his friends, I'm not saying they should get off scot free. ... Should there be a prison sentence? Yes, there should be,

as an option ... but we just note there are obviously some positives and negatives [in that].

While recognising the potential limitations of the Victorian penalties for young people, a number of participants acknowledged the positive work of the courts in ensuring there was a focus on rehabilitation and second chances. As Robert (Legal Expert) observed:

They [young people] end up in court but it's unlikely that there would be any real punitive element. ... This also depends exactly on their ages, but there's programs that they can be entered into which are effectively, if they complete these programs properly when they come back in 12 months' time, the charges are either withdrawn or expunged. ... It really is based around educating and trying to deter them, trying to make sure they understand what their offending was and trying to get them to understand why they did it so that it's preventative insofar as them having to come back to court again. And I think in the vast majority of kids' [IBSA] matters ... those kids don't come back to court.

Eleanor (Youth Representative) also noted that 'the court systems do that [rehabilitation] really well'.

Policing challenges

One of the greatest challenges in creating effective IBSA legislation is the often blurred and intersecting, or non-complementary, jurisdictional borders. For IBSA, this issue goes beyond individual perpetrators to also include website hosts, who are often located in other countries:

If I was a malicious enough person to set up a revenge porn website I certainly wouldn't do it in Australia. I'd host it somewhere where I'd be fairly confident that the police aren't going to come knocking on my door (Cameron, Industry Representative).

A key challenge for policing IBSA thus relates to working in a cross-jurisdictional context with external law enforcement agencies. These cross-jurisdictional issues were identified in relation to both national and international borders:

There's a real morphing around the geographic lines of these offences. So, thinking about another client who was located here [Victoria], the other party's in New South Wales. They were sending ... threatening emails, or hacking Facebook, there was some element that was Internet-based and crossed jurisdictional boundaries. She had a lot of difficulty liaising between New South Wales and Victorian police because neither one was really confident to pick it up in that particular state jurisdiction (Mia, Victim Support Advocate).

In response to these complications in a national context, the Australian Cybercrime Online Reporting Network (ACORN) – a national policing initiative involving Commonwealth, State and Territory law enforcement agencies – was established to provide a central place for victims to report cybercrime offences. ACORN receives reports and then disseminates them to the jurisdiction in which the offender resides. When the ACORN report concerns something of a more serious nature, specialist squads will typically investigate, otherwise, if it is a local issue, the report may be sent to suburban criminal investigation officers to investigate.

While this sounds like a positive step towards co-operation among law enforcement agencies across Australian borders, some participants expressed the view that police still ‘handball’ IBSA offences elsewhere (e.g. Cameron, Industry). The difficulties around jurisdictional borders are of course not unique to cybercrime offences, yet it is widely recognised as a major challenge for law enforcement in this area. Reflecting on his experiences, Cameron (Industry Representative) observed that:

Law enforcement and the state police particularly are just not really set up to deal with these things. They all have tech crime units but we’ve had situations where people have said ‘talk to the feds’. The feds have said, ‘oh no, this is a state issue’.

Michelle (Legal Expert) similarly observed that ‘there does seem to be a bit of hand-balling in relation to when there are specific federal laws and then state laws’. The difficulties around jurisdictional borders are of course not unique to IBSA offences, yet it is recognised as a major challenge for law enforcement in this area that is further complicated by an absence of laws in some jurisdictions, a lack of federal law leadership, as well as the piecemeal and inconsistent approach to criminalising IBSA across Australia.

Further to jurisdictional complications, an additional obstacle faced by law enforcement relates to procuring adequate evidence to charge and prosecute perpetrators. These challenges are further exacerbated in cases involving threats to distribute an intimate image, where participants questioned how evidence can be produced, particularly if the threat is ‘verbal’ (Erin and Kirsty, Victim Support Advocate). Although technology serves in some cases as an excellent repository of evidence (e.g. proof of text messages, emails, screenshots, ISP addresses), there are significant challenges for police in proving who created, shared or threatened to share an image:

How do you prove that that particular Facebook account is operated by the defendant? ... There are difficulties for the police, even getting proof of that kind of thing and often it can take months and months and months to prove. ... It can mean that you’re faced with insurmountable difficulties when it comes to proving that the defendant was the person threatening to publish (Michael, Legal Expert).

Several participants reflected on the challenge of proving identity in IBSA cases. Julie (Legal Expert), for instance, said:

... identity is a big thing that we always have to prove to courts ... that they're the person that actually did it. So that can be a real challenge sometimes with digital things, if it comes from a phone, but it's not a contract phone, and how do you prove that that was the person? Even if it's their phone, how do you prove that they're the one that sent it?

Dean (Legal Expert) also commented on this problem:

These are hard things to prove, so the mere fact that a person's social media account publishes information will not prove that the person you've charged is the author of what was published beyond reasonable doubt. It proves it to about 50%, but beyond reasonable doubt is a long way past that. So, if you can guess someone's pet name and hack their Facebook account and set them up ... then how can a court or a jury be satisfied to the point of near certainty that the person you've charged is the publisher of abusive information from a social media account?

Christine (Victim Support Advocate) explained how these challenges can unfairly result in the onus being on victims to produce evidence:

At the end of the day, it's pretty black and white for police in terms of, 'if it's a crime, show me the evidence'. But again, it's like sexual assault. The onus is on the woman to produce the evidence, whereas [with] a burglary, somebody else is going to do an investigation for you – so again, it's this whole issue about having to produce the evidence and it's so complicated because you've got to be quite tech-savvy to be able to prove where something is, or where it's hosted, that's not an everyday thing that people can do.

A secondary evidentiary challenge identified by participants was the lack of cooperation from service providers, social media and technology companies (see also Powell & Henry 2016) and the costs associated with collecting evidence. As Penny (Victim Support Advocate) explained:

We've been told that the police can only prosecute so many technology-facilitated stalking and abuse offences because it's very costly to do so. ... The different providers charge different amounts of money and they [the police] have to make a call. They don't have unlimited resources – so they have to make a decision.

In addition to the costs of procuring evidence from the service providers, social media and technology companies, legal experts also mentioned the massive costs associated with having the right infrastructure in place, and the necessary equipment available in the first instance, in order to be able to produce evidence in IBSA cases (Anonymous, Legal Expert). Indeed, as mentioned by many participants, combatting cybercrime is extremely resource-intensive, not just in terms of money, but also in relation to technical skills and knowledge.

Several participants provided examples where police had advised victims that there was nothing they could do and provided unhelpful advice, such as telling victims to turn off their phone or deactivate their social media accounts:

If you get a response at the desk that there's nothing we can do about that, you just wander off don't you, because what can you do? The police have told you they can't do anything. ... And if you call your general duties police station, it's all right if they know that legislation, if you get a young constable who doesn't, you'll get sort of put off the whole process (Donna, Victim Support Advocate).

This outcome was so common for one participant (Denise, Victim Support Advocate), that she said she provides her clients with a printed version of the relevant legislation to take to the police counter when reporting the offence.

Further to not understanding the laws (where they do exist), several participants suggested that some police lacked basic knowledge of the Internet, particularly social media, and as a result did not know how to address the issue: 'one of the biggest problems that the cops often have is that the desk sergeant isn't on Facebook, so the lack of understanding of the technology, that's an issue' (Louise, Victim Support Advocate). Heather and Tara (Legal Expert) similarly observed that:

We had a consultant who works with the police and ... she spoke about when someone came into a police station, attempted to make a complaint about this type of thing happening on Facebook, and the police officer [did] not actually understand what Facebook was or how it operated.

Even where police demonstrated awareness of IBSA law and had some knowledge of social media sites, almost all participants pointed to monetary budgets and the availability of technical equipment as hindering the policing of IBSA cases. As some of our legal expert stakeholders explained, the biggest challenge in policing cybercrime concerns the infrastructure that is needed to support an investigation, particularly given the enormous amount of data behind such criminal offending (Anonymous, Legal Expert).

The suggestion of a gulf between budgets for fighting terrorism or child exploitation compared with budgets for addressing violence against women was expressed by several participants:

The police force has large budgets for other things and I think it's really just a matter of culture and a lack of understanding of the issues. Given that there are very few terrorist activities and that has quite a large budget, I think we can put the safety of women at a high[er] level of priority (Heather and Tara, Legal Expert).

There was a consistent view that police prioritised investing resources into contact (physical) offences over offences that cause ‘virtual harms’ (see Powell & Henry, 2016), despite most participants acknowledging that ‘the damage can be often as great [even though] it’s not actually physical’ (Cameron, Industry Representative). This view was fairly common among the Victim Support Advocate participants:

Contact offences will always take priority. I think if they thought the electronic offences led to contact offences you might get more response from them but I don’t know if there’s evidence that shows that (Donna, Victim Support Advocate).

Jacqui (Victim Support Advocate) likewise maintained:

The comment that ‘the contact offences will always be of higher priority than non-contact offences’ is a widespread attitude among many police that I’ve encountered. I think it’s a deeply problematic one and it reflects a failure to understand the nature of the harm that is caused by offences such as non-consensual nude image sharing. I also think it reflects that a lot of police – not all, but a lot of police – are still more comfortable in that kind of cops-and-robbers’ role of responding to contact offending, while some of the more complicated nuances of this kind of offending that we’re seeing, particularly around these sexual offences, is just put in the too-hard basket. ... If somebody punches someone in a pub or whatever, that’s always going to be of a higher priority than something like nude images being shared without consent.

These resourcing issues highlight some of the difficulties for police in responding to IBSA and the limitations of the criminal law alone in being able to address these behaviours. Below, some additional responses including civil law remedies and corporate responsibilities are discussed that could work in tandem with criminal law to address this significant social harm.

Civil law responses

There was general support for civil law being an option for victims in responding to IBSA, however, this support was premised on there also being appropriate criminal legislation in place, given the costs associated with the civil justice system that remove this avenue as a viable option for many Australians (see e.g. Flynn & Hodgson 2017). As Christine (Victim Support Advocate) observed, ‘the reality for many women is that they don’t have the financial resources to be able to do anything. ...Your financial status or socio-economic status will have an impact on whether or not you choose to proceed’. Amanda (Legal Expert) similarly highlighted some of these concerns, noting that the system is ‘not efficient. It’s not quick enough. It’s expensive and it doesn’t really – it doesn’t send any kind of message [to the community]’. Heather and Tara (Legal Experts) also identified the limitations of civil law remedies as ‘often [being] inaccessible to many victims because of the nature of legal expenses’ and because it does not send ‘a clear statement that society will not tolerate this

kind of behaviour'. Erin and Kirsty (Victim Support Advocates) likewise stressed that while they support civil law options:

There is a need for protection and justice for victims of violence that is not dependent on an individual's ability to bring about civil proceedings, nor relies upon their own financial and emotional resources. That's one of the limitations currently – the individual being able to finance it.

Jackson (Academic) also identified the complexities of civil law as impacting on its effectiveness as a response for the majority of victims of IBSA:

The problem with the current civil law in this area is the civil law is a complex mesh. There are various remedies that may or may not arise. They are complicated, [and] expensive. The solution could well be to have a single, overarching tort of privacy which would then encompass not just the situation of revenge porn, but various other egregious or serious breaches of privacy. The alternative might be if, for whatever reason, someone is wary of a wide, general tort of privacy, would be to have a new tort designed specifically at the revenge porn situation, rather than relying on the existing civil remedies, which I emphasise again, are very complex and are certainly incomplete and the emphasis being on simple, effective, and accessible, something which victims can readily understand and go to.

Kate (Legal Expert) similarly observed that the complexities and piecemeal approach of current civil laws in this area may limit its effectiveness to operate without being accompanied by adequate criminal laws:

There definitely is a role for civil law. I think it needs to be criminalised as well as having a civil avenue. I think people do suffer real harm, quantifiable harm which should be – when that person [perpetrator] has deep pockets, that they should pay for it. I think that we are getting there slowly, but we're still not there. We've got things like breach of confidence in Australia, which isn't recognised in all jurisdictions to extend to emotional harm. It also isn't recognised outside Victoria and Western Australia to be an equitable action where you can get that monetary compensation for a breach of confidence. I don't know whether all these revenge porn scenarios are going to necessarily fall into a breach of confidence? ... So, I think that there should be a civil action that's available. I don't think that can be the only remedy.

Primarily, participants felt the civil law was an appropriate option for victims when the defendant was a commercial entity. As Eleanor (Youth Representative) outlined:

Civil things work best in the commercial space and so particularly when it comes to platforms creating profit by using images sent without consent, I think it's probably actually a very wise response because trying to prove criminal activity from commercial stuff is challenging, but showing that there was profit made from without consent is probably easier.

David and Jenny (Legal Experts) likewise maintained that 'civil law works best where it's [a] website host ... [and] people are making money from it'. They explained:

[I]t's going to be a much longer, slower process in terms of civil law. You've got to quantify that out of personal harm, distress, humiliation, put a monetary value on that. ... [But] there should be both the criminal and civil because they're making money from it.

Some participants also identified the potential for a civil penalties scheme, in the form of a body that can prosecute civilly on behalf of victims as a way to respond to IBSA beyond the criminal law in an affordable way for victims. Bianca (Legal Expert) outlined this proposal:

A tort of protection of privacy would be great, and it probably would cover these kinds of things, but it's going to be very prohibitive for most people. It's going to be very expensive to take someone to sue them. ... A good way of dealing with this could be to have a regulator, such as the ones we were talking about – like a purpose-built one or the privacy commissioner – who's actually got civil powers to prosecute. And sure, the penalties may not be as big, but at least they would be an active kind of prosecutor, and it would help with that educative function.

Ultimately, while supportive of a civil law option, the clear message from participants was that IBSA is a serious social harm that needs to be reflected as such in criminal law. As Jacqui (Victim Support Advocate) noted:

Should victims additionally have an avenue through which they can seek compensation? Yes, I think they should. ... [But] it's not a mere privacy violation or a mere breach of confidence, it's a lot more serious than that and it's a lot more serious because of the nature of the harm that it causes.

Takedown powers and corporate social responsibility

In October 2017, after interview data collection ended, the eSafety Commissioner launched an online reporting portal for individuals who have experienced IBSA. As part of this portal (hosted on their website), individuals can report incidents of abuse and seek support and assistance in relation to: (a) getting the image/s removed from social media or an app; (b) getting the image/s removed from a website; (c) helping in situations where an intimate image has been shared by email or text without permission; and (d) guidance on how to communicate with someone who may have an intimate image to request they remove it. Unlike the cyberbullying reporting scheme operated by the eSafety Commissioner, which is focused on removing offensive content of those aged under 18 years, this service is available to anyone who has experienced IBSA.

Also after the completion of fieldwork (and as explored in the previous section of the report), Facebook partnered with the Australian eSafety Commissioner to trial a prevention program aimed at stopping the online sharing of non-consensual images via Facebook and its subsidiaries, before the image is distributed. This pilot program, which was announced in November 2017, is running across several countries, with Australia being the first country to commence the trial.

These are two significant initiatives that seek to respond to the needs of victims, which the data indicates is often primarily focused on having the image removed from wherever it has appeared. As Christine (Victim Support Advocate) observed, 'most women just want the

images down. They want the images down and they just want to reclaim their name and have that expunged'. David and Jenny (Legal Experts) likewise claimed:

The sooner you take it down, it means less people have looked at it. So, they [victims] can draw a line in the sand. That is really what I think victims – first of all that's what they want. They may want the bastard prosecuted, but what they really want is the image gone ... and [gone] quickly.

Almost all participants supported the introduction of an external body responsible for assisting victims with the taking down of images. Erin and Kirsty (Victim Support Advocates), for example, stated:

We are in favour of engaging with Internet service providers and enabling law enforcement to be able to take down images. We understand it's currently quite difficult, but we would be in favour of anything that makes it a little bit easier to give victims that recourse.

Michael (Legal Expert) likewise claimed:

[An agency responsible for takedowns] would work in more ways than one because it would sort of circumvent any legal proceedings, which means it would – I'm sure it would lead to much quicker results if a takedown notice is issued. Presumably they'd have a number of hours or days to do it. And also ... it would mean the victim could avoid going to the police which is obviously, for them, would be quite humiliating, embarrassing as well as everything else. ... I think that's a really good idea.

Before the eSafety Commissioner (formerly the Office of the Children's eSafety Commissioner) took on this role through their online reporting portal, several participants identified them as a possible body to be responsible for the removal of images online:

I think that there should be an oversight body that is responsible for administering this law. ... I don't think the police is the right body. So, they mightn't have all the powers but, say, the Child [e]Safety Commission[er], it could be a body like that ... and so they would have an educative function, and they might be able to have takedown powers (Bianca, Legal Expert).

I think we already have that in our eSafety Commissioner, but it's only for under 18's, so I think that should be extended to be for everybody (Louise, Victim Support Advocate).

We think there is value in having takedown mechanism for the eSafety Commissioner. We understand that would require legislative – well, I anticipate it would require a legislative amendment, because I think he's [sic] focused on children. Whilst he [sic] has been doing some education work regarding women, I don't know if that's reflected in the legislative changes for the takedown orders. Because it would be useful if you could just go to somebody that could act very quickly. I have to say, in terms of the eSafety Commissioner, we've heard anecdotally that the material [of under 18s] is coming down quickly. ... So, we're really pleased to hear that it's coming down quickly and hope that it continues (Penny, Victim Support Advocate).

While the majority of participants supported a takedown process, some of the industry representatives were critical of how this body could function:

The reality is that in that situation, it doesn't really matter what the Australian law says. They're not coming down until the person decides to [take them down] and if they're in wherever, overseas and they're running a revenge porn website, the likelihood that they're going to give a shit about what the Australian police say is pretty low (Cameron, Industry Representative).

Other participants also highlighted some concerns around the logistics of takedown orders. Erin and Kirsty (Victim Support Advocate), for example, claimed:

There would be a number of challenges, primarily in the nature of actually contacting Internet service providers. My understanding is that the turnaround times can be quite slow and practically, it can be quite difficult to actually know who to contact at those companies, such as Twitter or Facebook [and] when Internet providers or sites are based offshore, outside of Australia, that can add an additional layer of difficulty. There are certain sites which are purely dedicated to revenge porn and so quite clearly, those sites in and of themselves are unlikely to be responsive because they're located offshore.

Although such difficulties exist, the benefits of having a body accessible for victims that can facilitate the taking down of IBSA images far outweigh these concerns. As Isabel (Youth Representative) surmised:

It seems a really important response to be able to stop the re-victimisation. I understand that it's a technically difficult part of it, but we do it with child exploitation sexual materials. We don't say, 'well, it's too hard to get them down'. It is too hard to get them down, but nonetheless, we seek to do so, which is appropriate.

Linked into better facilitating the logistics of takedown orders, a key theme identified among participants was corporate responsibility. Cynthia (Youth Representative), for example, said:

I think that it is about pressure and putting pressure on them [corporations] to actually create policies that address this and I know that Facebook and Google, I think, and even Twitter have got some good policies. ... I think there's a responsibility for those companies and also for the media to just have a set of standards that they adhere to and the media can be a slippery beast, and they can sensationalise things a lot of the time, but I think they really do have a responsibility.

Cameron (Industry Representative) again highlighted some of the logistical difficulties in large corporations taking responsibility for preventing and responding to IBSA, noting 'issues of scale' and that at any time, Facebook 'is dealing with probably 150 different governments'. However, he claimed that, on balance, social media corporations 'actually do a reasonably good job, but they could always do a hell [of a] lot better and they could put a lot more resource into it as well, given the sorts of profits they're making but you're still going to have those problems with scalability'. Heather and Tara (Legal Experts) also felt the companies could 'go further':

I think [technology companies] should take a leading role, given that the platforms they offer are highly lucrative structures which enable advertising to large groups of people in a very cost-effective way. I think that they have the responsibility to address these issues and that it is unacceptable to wash your hands, so to speak, of any sort of negative effects that your social media platform has. I do believe from our interactions with an expert on the issue that

these companies are starting to recognise this and be more responsive, but I believe they could go further, particularly given the fact that there is still a lot of ambiguity around how do you contact the companies to ask them to take down images.

Dean (Legal Expert) similarly suggested more could be done in the way of corporate responsibility. From his perspective, social media operators could be more cooperative with law enforcement in relation to IBSA investigations:

I'm starting to think about making it easier for investigating bodies to rip open social media platforms, so Facebook – [they are] extremely difficult to deal with. So, I don't know. It always sounds a bit rich if a police officer is asking for powers, so I hesitate to say, 'how about some legislation that obliges companies who are social media platforms trading in Australia from being obliged to cooperate with investigating bodies?' [But] that would help.

Isabel (Youth Representative) also mentioned the importance of corporate responsibility in terms of supporting broader cultural change and the capacity for social media and Internet service providers to promote any relevant criminal laws around IBSA. She explained:

They have a responsibility to not behave as big faceless multinational massive companies that don't care in a context where they are the platform through which these harms are propagated, and they, arguably, have a role in being proactive in terms of trying to set standards. ... Law's not worth a lot if we don't know what it is and if it's not policed, and maybe these companies have a responsibility to help raise people's awareness about the terms and conditions of the use of their platforms and to try to influence culture on their platforms, ... to make sure that they're responsive to victims and to be doing some proactive things in terms of setting up structures that minimise the risk of their platforms being used in these ways and also to promote understanding.

Michelle (Legal Expert) similarly maintained that:

Tech companies should be really on board. They should – this is a great opportunity for them to really take a lead in this education ... helping to change cultural shifts as well. And the big ones, like Facebook – that's not a tech company, but you know what I mean – should also play a lead role in trying to prevent revenge porn from continuing at the rate it is continuing.

Michael (Legal Expert) also identified corporate responsibility as extending to having an educative role in informing the community about IBSA:

They're the vehicles through which these things happen. ... I mean, they're the ones who allow and facilitate professional advertising campaigns online and so I think they do have to take some responsibility for their clients' or customers' online activities, so their users' online activities, and there's no reason why they couldn't and shouldn't be made to, again, facilitate and even fund in some way, some, you know, more sophisticated educational campaigns.

Conclusion

This section of the report presented the qualitative findings from the qualitative interviews with a specific focus on analysing the perceptions of key legal, policy and support

stakeholders regarding the effectiveness of existing legislation and the need for new legislative models for responding to IBSA in Australia. Overall, the study found that participants supported specific criminal offences, as well as a range of other legal and non-legal measures that will in practice provide support and assistance to victims, and ensure accountability for perpetrators and online content hosts and other corporate entities.

Conclusion and recommendations

Over the past five years, there has been greater attention to IBSA globally, as evidenced by parliamentary inquiries, public consultations, law reform efforts, media attention, as well as other proposed or enacted legal and non-legal measures in various jurisdictions. However, there continues to be a number of barriers to responding to IBSA, including inconsistent laws, a lack of resources, evidentiary limitations, jurisdictional restrictions, and victim-blaming attitudes that contribute to underreporting.

IBSA is more prevalent, and affects a wider range of Australians, than is commonly understood. One in 5 Australians aged 16 to 49 who participated in this research reported experiencing at least one incident of IBSA victimisation in their lifetime, and 1 in 10 Australians self-disclosed engaging in at least one IBSA behaviour.

IBSA occurs in a range of different relational contexts. For example, in the form of peer-to-peer harassment, such as where the perpetrator is a friend or acquaintance of the person targeted, and in the context of an intimate partner, or former intimate partner, relationship. The diversity of those affected by IBSA is also much wider than previously understood. There are evident groups within the Australian community that are more vulnerable to, and/or are more likely to be targets of, IBSA, including Aboriginal and Torres Strait Islander people, Australians with a disability, members of the LGB community and young people aged 16 to 29 years. It is therefore important that any information provided to stakeholders (e.g. law reformers, victim support advocates, law enforcement personnel), or communicated via an online portal or in public communication campaigns, reflects both the lived experience and information needs of diverse populations on the basis of gender, cultural background, sexuality, disability and age, as well as taking into account the varied situational and relational contexts in which IBSA occurs. For instance, while some individuals may require guidance on actions to have a single image removed, others may also need support to access additional services including the police, civil protection orders, and/or counselling services in relation to intimate partner- and/or stalking-related abuse. Accordingly, there needs to be increased support, advice and information for a diversity of victims, to help them review the different options available, and to support them through what can often be a highly stressful experience that is not easily resolved by any one mechanism alone.

One of the most significant barriers to preventing violence and abuse concerns attitudes, beliefs and values. Unfortunately, many Australians continue to hold attitudes that blame the victims of IBSA and minimise the harm associated with it. Of the study's survey respondents, 70% agreed that 'People should know better than to take nude selfies in the first place, even if they never send them to anyone' and 62% agreed 'If a person sends a nude or sexual image to someone else, then they are at least partly responsible if the image ends up online'. Overall, 1 in 2 men (or 50%) and 1 in 3 women (or 30%) held attitudes that either minimised the harms or blamed the victims of IBSA.

Victim-blaming attitudes are not only problematic among perpetrators or potential perpetrators, but when those affected by IBSA hold self-blaming attitudes, they are less likely to seek assistance and support. Additionally, when other members of the community hold these attitudes, they may be ineffective as 'first responders' and inadvertently cause further harm to someone who discloses their victimisation. The survey findings indicate there is a clear need for community education campaigns and information resources to challenge the culture of victim-blaming that both excuses perpetrator behaviour and prevents victims from seeking assistance. Such campaigns should focus on consent and respectful relationships, raise awareness of IBSA, and promote proactive bystander interventions to challenge problematic behaviours and attitudes.

There is a demonstrable need for a range of consistent legal remedies, starting with federal leadership in creating a national approach to criminalising IBSA (which mirrors that of New South Wales and the Australian Capital Territory), which can then be mirrored across all states and territories. While criminal law reform is not the only way to address IBSA, it is an important part of the solution.

In addition to criminal law, there is a key role for civil remedies. There is a need to strengthen civil law remedies for victims who wish to sue in civil courts, including the strengthening of privacy laws and the introduction of a civil penalties scheme. It is important that a focus on civil responses does not detract from the importance of introducing consistent criminal laws across Australia or minimise the serious harms of IBSA.

In terms of corporate responsibility, there is also a clear role for Internet intermediaries in responding to and preventing IBSA. Indeed, intermediaries, such as social media and other online platforms, can do much more to respond to IBSA, including: measures to improve reporting mechanisms for victims; action to ensure the takedown/removal of IBSA content (e.g. through photo-matching technologies); and adequate policies that prohibit this form of abuse. There is also a need for internet platforms to take proactive measures which recognise the harms of IBSA, and that seek to create safe online spaces for victims. It is important to note that Internet intermediaries are just one part of the problem. There are many online distribution sites where IBSA is actively encouraged and supported (Powell & Henry 2015, 2017). It will take a much larger effort from multiple service providers to tackle this problem.

Introducing specific criminal offences, civil law remedies and increased corporate responsibility measures are important steps in addressing this problem, but further attention needs to be given to resources and training. Training for a variety of relevant stakeholder groups who currently respond to victims, including victim support agencies and criminal justice authorities, is vital. Such training will vary according to jurisdiction. However, it is important that training be given to all criminal justice authorities and victim support agencies on the relevant state or territory offences (where applicable), as well as the current Commonwealth telecommunications offence that can be used as a way to prosecute IBSA. Training should also focus on appropriate responses to victims when receiving reports of IBSA victimisation.

While presenting new empirical data, including the first-ever national survey on IBSA victimisation, this report is informed by the observations of stakeholders across only three Australian jurisdictions. Further research is needed to understand the nature of the problem, how laws are working in practice, the impacts of new policing technologies (e.g. cloud computing, digital DNA, data mapping), what challenges police face in relation to technology-facilitated abuse both locally and transnationally, and how corporate measures are operating in practice, including ways this could be improved. Future research into IBSA victimisation must also capture information about the nature and context of that abuse, including: the sex of the perpetrator, any relationship between the victim and the perpetrator, an indicator of harms and practical impacts caused by the abuse, and the channels of distribution of IBSA. It is also important that qualitative research be conducted with victims and perpetrators on the ways in which images are being shared on the Internet through other means (e.g. mobile phones, email, private social media pages), and the reasons for sharing such images in the first place.

This report makes the following key recommendations:

Strengthened legal options

- The introduction of consistent criminal offences across all states and territories, and at the federal level.
- The introduction of legislation that empowers courts and/or independent government agencies to request and enforce individuals to take all reasonable steps to remove, delete or destroy non-consensual nude or sexual images, with further criminal or civil penalties for non-enforcement.
- Review of the regulatory frameworks that impose legal obligations on Internet service providers, search engines, social media companies and websites to screen content, have clear guidelines on their takedown (removal) policies, and take responsibility for the removal of images in a reasonable timeframe.
- Strengthening civil law options for victims who wish to sue in civil courts (including the strengthening of privacy laws; making civil action affordable for ordinary Australians; and the introduction of a civil penalties scheme through the Office of the eSafety Commissioner.

Victim support services and perpetrator programs

- Telephone, in-person and online information and support that is accessible and relevant to the diversity of victims, including young people, people with a disability, Aboriginal and Torres Strait Islander people, and members of the LGBTIQ+ community.
- Online advice to perpetrators and bystanders who receive and/or share nude or sexual images regarding content removal and other actions to take.
- Primary prevention campaigns that focus on consent and respectful relationships; raise awareness of the problem of IBSA; and promote proactive bystander interventions to challenge problematic behaviours and attitudes.

Research

- Qualitative investigation of victims' experiences of IBSA.
- Qualitative research with perpetrators and bystanders to better understand the nature of their experiences, and potential barriers to education and other prevention strategies.
- Mixed methods research on corporate policies and practices around IBSA.
- Comparative research across different country contexts.
- Evaluation of digital ethics and consent education training and programs.

Overall, the study found that addressing the harms of IBSA requires a combination of both legal and non-legal efforts. In particular, there needs to be both criminal and civil law remedies available for victims of IBSA. It is also vital that social media, technology companies and website providers exercise due diligence in better detecting and removing IBSA material, and imposing restrictions or penalties on those who engage in such behaviours. The introduction of an image-based abuse reporting portal on the eSafety Commissioner's website in October 2017 is an example of a positive step in the collaboration between government and industry to respond to this social harm.

Most importantly, this study found that educational campaigns and programs are crucial for fostering awareness of the prevalence, nature and impacts of IBSA, and that training and resources need to be provided to those tasked with investigating and responding to IBSA. In sum, a multi-faceted approach is necessary to both respond to, and prevent, IBSA.

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