

# REGULATING THE NON-CONSENSUAL SHARING OF INTIMATE IMAGES ('REVENGE PORNOGRAPHY') VIA A CIVIL PENALTY REGIME: A SEX EQUALITY ANALYSIS

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*The 'non-consensual sharing of intimate images', more commonly known as 'revenge pornography', is a widespread issue, which can have devastating consequences for victims. However, it is an area where the law has only just started responding to technology, with legislative reforms in several states including South Australia, Victoria, New South Wales, the Australian Capital Territory and Western Australia. This paper provides an overview of relevant state and federal laws. Its main focus is to critique the most recent Commonwealth legislative reforms to regulate the non-consensual sharing of intimate images via a civil penalties regime. These reforms were made by the Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018 (Cth), which amended the Enhancing Online Safety Act 2015 (Cth). This paper critiques the civil penalties regime from a sex equality perspective, and makes suggestions to improve the reforms so that victims are better protected and empowered.*

## I INTRODUCTION

It is somewhat unsurprising that the 'non-consensual sharing of intimate images', which has come to be referred to as 'revenge pornography', is now so prevalent. Most people have cameras and internet access on their mobile telephones and other electronic devices, such as iPads. It is relatively simple and easy to take a photo or film, to upload it to a website, and to distribute such images via email or text message within seconds. Photographs and videos taken in the course of intimate relationships, with or without consent, are easily, and in fact instantly able to be, distributed by a few clicks on an iPhone, iPad or computer. A person who is experiencing the rejection and powerlessness of a relationship ending can distribute intimate photographs to take back control. The act of uploading, distributing or sharing these images can convert the perpetrator's feelings of loss and rejection back to those of superiority, control, and satisfaction by distressing and humiliating the person who has rejected them.

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Indeed, there is now a proliferation of websites that enable users to upload and share these images. The nature of the internet means that once that image is distributed it is almost impossible to control — it can be downloaded, saved, and/or redistributed near instantaneously with very little that is able to be done to delete or stop its distribution or sale. However, despite its current prevalence, in an Australian context, the non-consensual sharing of intimate images has only recently been identified as an issue that requires specific legal regulation.

This paper argues that a civil penalties regime is an effective way to regulate the non-consensual distribution of intimate images. It further proposes that such a scheme should adopt some of the key elements of the Model Antipornography Civil-Rights Ordinance ('the Ordinance')<sup>1</sup> drafted by feminist law professor Catharine A MacKinnon and feminist writer and activist Andrea Dworkin.

There have been several reform proposals, both at a state and Commonwealth level, put forward in recent years to attempt to regulate the issue, which this paper will outline. At a Commonwealth level, on 1 September 2018, the *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* ('the Act') commenced. The Act is based upon legal reforms which were proposed in a Commonwealth discussion paper by the Commonwealth Department of Communications and the Arts to regulate the non-consensual sharing of intimate images via a civil penalties regime ('*Discussion Paper*').<sup>2</sup> The *Discussion Paper* was open for public consultation from 20 May 2017 to 30 June 2017.<sup>3</sup> This journal article is based on a submission made by the author in response to the public consultation.<sup>4</sup>

This paper will commence with a brief outline of state and federal laws that either seek to, or may be used to, regulate the non-consensual sharing of intimate images. It will then outline the details of the reforms made by the Act and will critique some specific aspects of these reforms from the sex equality perspective adopted by MacKinnon and Dworkin in the Ordinance. This paper argues that a civil penalty regime does go some way towards empowering victims and deterring perpetrators. However, suggestions will be made as to how the reforms made by the Act could be strengthened through the adoption of some of the key elements proposed by MacKinnon and Dworkin in the Ordinance, including recognising the issue as one of gender inequality, and better compensating and empowering victims.

1 Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography, 1988) 138–42.

2 Department of Communications and the Arts (Cth), 'Civil Penalties Regime for Non-Consensual Sharing of Intimate Images' (Discussion Paper, May 2017) ('*Discussion Paper*').

3 Department of Communications and the Arts, Australian Government, *Civil Penalty Regime for Non-Consensual Sharing of Intimate Images* <<https://www.communications.gov.au/have-your-say/civil-penalty-regime-non-consensual-sharing-intimate-images>>.

4 Michelle Evans, Submission to Department of Communications and the Arts, *Civil Penalty Regime for Non-Consensual Sharing of Intimate Images*.

## II CURRENT LAWS

Some of the current laws which are relevant to the regulation of the non-consensual sharing of intimate images were summarised by the Senate Legal and Constitutional Affairs References Committee ('Senate Committee') in its February 2016 report, *Phenomenon Colloquially Referred to as 'Revenge Porn'* ('Senate Committee Report').<sup>5</sup> Others were enacted after the *Senate Committee Report*. This Part outlines both to give an overview of the laws regarding 'revenge pornography' in both state and Commonwealth jurisdictions.

Until the enactment of the Act, there have been no specific legislative attempts at a federal level to regulate the non-consensual sharing of images. However, the *Senate Committee Report* provided an overview of existing legislation at the time of the *Report* including the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*'), which makes it an offence to use a carriage service in a way that would appear to a reasonable person to be 'menacing, harassing or offensive'.<sup>6</sup> This includes 'use that would make a person apprehensive as to their safety or well-being or the safety of their property, use that encourages or incites violence, and use that vilifies persons on the basis of their race or religion'.<sup>7</sup> The reasonable person standard is established with reference to 'standards of morality, decency and propriety', whether the material has any 'literary, artistic or educational merit', and 'the general character of the material (including whether it is of a medical, legal or scientific character)'.<sup>8</sup>

The *Senate Committee Report* also noted legislation at a state level which does specifically seek to regulate the non-consensual distribution of intimate images. The *Summary Offences (Filming Offences) Amendment Act 2013* (SA) was enacted to amend the *Summary Offences Act 1953* (SA) to insert a new pt 5A 'Filming Offences' and to provide, in s 26C(1) that it is an offence, punishable by a fine of up to \$10 000 or two years' imprisonment, 'to distribute invasive images of a person without their consent'.<sup>9</sup> Similarly, in Victoria, the *Summary Offences Act 1966* (Vic) was amended to make it an offence, punishable with up to two years' imprisonment, to distribute an intimate image without consent. It is also an offence to threaten to distribute such an image, punishable by up to one year imprisonment.<sup>10</sup>

Subsequent to the release of the *Senate Committee Report* legislative reforms were enacted in New South Wales, Western Australia and the Australian Capital

5 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 5–7 [1.24]–[1.37] ('*Senate Committee Report*').

6 *Criminal Code* s 474.17, cited in *ibid* 5 [1.24]–[1.25].

7 Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth) 33, cited in *Senate Committee Report*, above n 5, 5–6 [1.27].

8 *Criminal Code* s 473.4, cited in *Senate Committee Report*, above n 5, 5 [1.26].

9 *Senate Committee Report*, above n 5, 6–7 [1.32]–[1.33], citing *Summary Offences (Filming Offences) Amendment Act 2013* (SA) s 5, inserting *Summary Offences Act 1953* (SA) s 26C(1).

10 *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 25 inserts new provisions ss 41DA–41DB into the *Summary Offences Act 1966* (Vic). These amendments are cited in the *Senate Committee Report*, above n 5, 7 [1.34]–[1.36].

Territory. The New South Wales Parliament amended the *Crimes Act 1900* (NSW) to include specific provisions to regulate the non-consensual sharing of images.<sup>11</sup> These are s 91P which makes it an offence to record an intimate image without consent, s 91Q which makes it an offence to distribute an intimate image without consent, and s 91R which makes it an offence to threaten to record, or to threaten to distribute an intimate image. All of these offences are punishable by a fine or up to three years' imprisonment. The Act also provides, in s 91S, that a court may order that the offender 'take reasonable actions to remove, retract, recover, delete or destroy' an intimate image taken or distributed in contravention of ss 91P–91Q, however, s 91R is omitted from this retraction provision.

In 2016, the Western Australian Parliament enacted amendments to the *Restraining Orders Act 1997* (WA) to recognise 'distributing or publishing, or threatening to distribute or publish, intimate personal images' as an example of 'family violence'.<sup>12</sup> When granting a restraining order to protect a victim from family violence, a Magistrate can impose a range of conditions including restraining a respondent (perpetrator) from 'distributing or publishing, or threatening to distribute or publish, intimate personal images of the person seeking to be protected'.<sup>13</sup> Although the Western Australian legislation offers an empowering remedy for victims of image-based abuse in situations of family violence that they did not previously have, it does not offer any remedies for those who are not in a family or domestic violence relationship with the perpetrator.

This deficiency was however remedied by the enactment, on 19 February 2019, of the *Criminal Law Amendment (Intimate Images) Act 2018* (WA) ('*Amending Act*') by the Western Australian Parliament. The *Amending Act* inserted a new s 221BD(2) into *The Criminal Code* (WA) which came into operation on 15 April 2019. This provision makes it an offence to distribute an intimate image of another person without consent, and is punishable by a penalty of three years imprisonment, or a summary conviction penalty of 18 months and a fine of \$18 000. However, the *Amending Act* did not include provisions regarding threats to distribute intimate images, which are still dealt with under the *Restraining Orders Act 1997* (WA).

Also, on 30 August 2017, the Australian Capital Territory enacted the *Crimes (Intimate Image Abuse) Amendment Act 2017* (ACT) to insert a new pt 3A, 'Intimate Image Abuse' into the *Crimes Act 1900* (ACT). Section 72C makes it an offence to distribute an intimate image of another person, in circumstances where 'the offender knows that the person does not consent to the distribution',

11 *Crimes Amendment (Intimate Images) Act 2017* (NSW) sch 1 cl 2, inserting *Crimes Act 1900* (NSW) div 15C.

12 *Restraining Orders Act 1997* (WA) s 5A(2)(k), inserted by *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA) s 7.

13 *Restraining Orders Act 1997* (WA) s 10G(2)(g).

or ‘is reckless about whether the person consents to the distribution’.<sup>14</sup> Section 72E also makes it an offence to ‘threaten[] to capture or distribute an intimate image of another person’ if the person ‘intends the other person to fear that the threat would be carried out’, or if the offender is ‘reckless about whether the other person would fear that the threat would be carried out’. For both provisions the penalty is 300 penalty units, imprisonment for three years or both.<sup>15</sup> There are also offences for the distribution of an intimate image of a person under the age of 16 years in s 72D, which has a penalty of ‘500 penalty units, imprisonment for 5 years or both’. Section 72H states that if a person is found guilty of an offence under one of the preceding provisions,<sup>16</sup> ‘the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period’.<sup>17</sup> If the person fails to do so, they commit an offence and may receive a penalty of ‘200 penalty units, imprisonment for 2 years or both’.<sup>18</sup>

In summary, whilst these legislative attempts to regulate the non-consensual sharing of intimate images are commendable, a criminal law approach in particular, has some disadvantages for victims. The criminal law does not permit victims to claim damages for the psychological, reputational, financial and other harms they may have suffered as a result of the actual or threatened distribution of their images. Instead, after the perpetrator is convicted, the victim would need to bring a separate criminal injuries compensation claim under separate state legislation.<sup>19</sup> Secondly, the criminal law would not, as with a civil law claim, allow victims to access urgent injunctive relief to stop the images being uploaded or otherwise distributed, not to mention the lengthy court waiting times to hear criminal matters.

Additionally, the criminal law does not seek to address the power imbalance between the victim and the perpetrator, because victims cannot seek a remedy themselves — they have to rely on police to investigate and to exercise their discretion to prosecute the perpetrator. Victims may also be too scared or

14 *Crimes (Intimate Image Abuse) Amendment Act 2017* (ACT) s 5, inserting *Crimes Act 1900* (ACT) s 72F provides that a person does not consent in the circumstances set out in ss 67(1)(a)–(j). In summary, s 67 provides that ‘consent is negated ... if that consent is caused’ through the use or threatened use of violence or extortion against the person or a third person, threats to publically humiliate, the use of actual or threatened violence, physical or mental harassment, by intoxication, mistaken identity, fraudulent misrepresentation, abusing a position of authority, by physical helplessness or incapacity, or by the unlawful detention of the person. Also, s 72F(2) provides that a person does not consent to the distribution of an intimate image because they

- (a) consented to the offender distributing the image or another intimate image on another occasion; or
- (b) consented to someone else distributing the image or another intimate image; or
- (c) consented to the offender or someone else distributing the image or another intimate image in a different way to the way the offender distributed the image; or
- (d) distributed the image or another intimate image to someone else.

15 *Legislation Act 2001* (ACT) s 133(2) defines a penalty unit as \$150 for an individual and \$750 for a corporation.

16 *Crimes Act 1900* (ACT) s 72H(1).

17 *Ibid* s 72H(2).

18 *Ibid* s 72H(3).

19 See, eg, *Criminal Injuries Compensation Act 2003* (WA).

humiliated to complain if they may have to give evidence in court for fear that their sexual history may be on trial, particularly if the perpetrator attempts to argue that they have consented (either expressly or impliedly) to the taking and distribution of the images. Indeed, it would certainly be worth the perpetrator's while to argue such a defence given that criminal offences have to be proven by the prosecution 'beyond reasonable doubt' (as opposed to the balance of probabilities standard for civil matters). Finally, if the victim has been in a domestic relationship with the perpetrator, she may not want him to have a criminal record or to go to prison. It is also questionable whether a judge would impose a custodial sentence at all, except, perhaps for the most serious offences.

It is argued that a civil law approach can, however, be effectively utilised to overcome some of these issues. An example of such an approach is the Ordinance<sup>20</sup> drafted by MacKinnon and Dworkin in 1983.<sup>21</sup> Indeed, although it was drafted before the internet became accessible in homes and businesses, MacKinnon and Dworkin sought to overcome difficulties for victims with current legal approaches such as the criminal law of obscenity,<sup>22</sup> which they argued, ignored the harms suffered by women and instead categorised the images of their abuse as 'immoral' or 'offensive'.<sup>23</sup> Instead, they drafted a civil rights Ordinance which recognised pornography as an issue of sex discrimination which harmed women's equality in society.<sup>24</sup>

The Ordinance empowered victims to bring a civil claim directly against a perpetrator<sup>25</sup> (so that they did not have to rely on others, for example police, to prosecute on their behalf) on several grounds. These grounds included being able to bring a civil claim against a person who had coerced them into performing in pornography, who had forced pornography on them (for example, in a workplace), who had been assaulted as a result of the viewing of pornography (for example, if a perpetrator had forced a person to undertake sexual acts seen in pornography), or defamed a person through pornography (for example, having one's personal image imposed on pornographic images).<sup>26</sup> The Ordinance identified the actual harms suffered by victims, including psychological and financial harms, and provided a range of remedies for victims to compensate for those harms, including injunctive relief to stop pornography being shown, sold or distributed, and punitive and compensatory damages.<sup>27</sup>

20 Dworkin and MacKinnon, *Pornography and Civil Rights*, above n 1, 138–42.

21 For an overview of the history of the Ordinance see Catharine A MacKinnon and Andrea Dworkin, *In Harm's Way: The Pornography Civil Rights Hearings* (Harvard University Press, 1997) 4–5.

22 For a summary of the Ordinance and how it overcomes issues with existing laws including the criminal law, see Dworkin and MacKinnon, *Pornography and Civil Rights*, above n 1, 31–5. See also Michelle Evans, 'Censoring Internet Pornography in Australia: A Call for a Civil Rights Approach to Address Pornographic Harms' (2006) 10 *University of Western Sydney Law Review* 75.

23 Dworkin and MacKinnon, *Pornography and Civil Rights*, above n 1, 27.

24 Section 1(1) of *ibid* 138.

25 Section 5(1) of *ibid* 141.

26 See generally s 3 of *ibid* 139–41.

27 See generally s 5 of *ibid* 141–2.

The Ordinance was, however, never able to be utilised by victims of pornography in the United States. Whilst many victims welcomed such a law, the main criticism of it was that it was an unreasonable restriction on freedom of speech.<sup>28</sup> The Ordinance was enacted in Minneapolis by two city councils, but the Mayor exercised his power of veto over both laws on the basis that it violated the right to freedom of speech in the *United States Constitution* amend I ('*First Amendment*'). The Ordinance was also enacted in Indianapolis, but was successfully challenged on constitutional grounds, and was struck down by the Court of Appeals for the Seventh Circuit for infringing the right to freedom of speech in the *First Amendment*.<sup>29</sup> The decision was affirmed by the United States Supreme Court,<sup>30</sup> which marked the end of the Ordinance.

As mentioned by the author elsewhere, Australia does not share these constitutional limitations, so aspects of the Ordinance could be incorporated into Australian law to better empower victims.<sup>31</sup> It is therefore submitted that the non-consensual sharing of intimate images is more appropriately regulated via a civil, rather than a criminal law approach, which more closely adopts the sex equality approach and remedies incorporated in MacKinnon and Dworkin's Ordinance.<sup>32</sup> This paper therefore analyses key aspects of the Act's civil penalty regime from the sex equality perspective adopted by MacKinnon and Dworkin, with a view to improving its effectiveness for victims.

### III NEW CIVIL PENALTY REGIME

In May 2017, the Commonwealth Department of Communications and the Arts released a discussion paper to facilitate public consultation on a 'Civil Penalty Regime for Non-Consensual Sharing of Intimate Images',<sup>33</sup> with public submissions due by 30 June 2017. The *Discussion Paper* suggested a legislative prohibition such as: 'A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, without that other person's consent on a relevant electronic service or social media service.'<sup>34</sup> Further, the *Discussion Paper* noted Recommendation 4 of the *Senate Committee Report* that 'the Commonwealth government consider empowering a Commonwealth agency to issue take down notices for non-consensually shared

28 Civil rights hearings were held in Minneapolis and Indianapolis prior to the enactment of the Ordinance. The transcript is contained in MacKinnon and Dworkin, *In Harm's Way*, above n 21, 39–202, 269–89.

29 *American Booksellers Association Inc v Hudnut*, 771 F 2d 323 (7<sup>th</sup> Cir, 1985).

30 *Hudnut v American Booksellers Association Inc*, 475 US 1001 (1986). Both decisions are discussed in MacKinnon and Dworkin, *In Harm's Way*, above n 21, 17.

31 Evans, 'Censoring Internet Pornography in Australia', above n 22, 85.

32 The author acknowledges that criminal law and civil law regulation can co-exist. However, the point this article seeks to emphasise is that a civil approach, such as that adopted in the Ordinance, is preferable to a criminal law approach in that it empowers victims to take action themselves and gives them access to better remedies.

33 *Discussion Paper*, above n 2.

34 *Ibid* 9.

intimate images'.<sup>35</sup> It was proposed in the *Discussion Paper* that the eSafety Commissioner, who currently has oversight of a civil penalties regime for cyberbullying, could be empowered by Commonwealth legislation to undertake this additional role. The Commissioner could, it was proposed, investigate complaints, issue infringement notices, warnings, and take down notices, as well as having standing to apply to the Federal Court for the enforcement of civil penalties and injunctions.<sup>36</sup>

Such an approach has been adopted in the Act, which introduces a civil penalties regime which will be administered by the eSafety Commissioner. It does so by amending the *Enhancing Online Safety Act 2015* (Cth) and the *Broadcasting Services Act 1992* (Cth), as well as providing for the enforcement of civil penalties under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

It is argued that overall, a civil penalties regime could more effectively regulate the issue than the existing laws outlined above. The following sections of this paper critique, as well as comment on key aspects of the Act with a view to improving protections and remedies for victims.

## A Terminology

At its core, 'revenge pornography' is about power and powerlessness. The perpetrator seeks to exert dominance and control over his disempowered victim — a victim who can do very little to negate the damage, especially if the images have been distributed using near instant forms of communication, such as being emailed, uploaded to websites such as Facebook or YouTube, or sent via mobile telephone text message. However, the term 'revenge pornography' connotes some sort of wrongdoing or blame attributable to the victim.<sup>37</sup>

Neutral terminology such as 'non-consensual sharing of intimate images' adopted by the *Discussion Paper*, and now by the Act,<sup>38</sup> also downplays the serious negative impact on victims (which is further discussed below) and downplays the seriousness of the perpetrator's offence against the victim. It is suggested that different terminology is more appropriate, such as 'sexual abuse by technology'.<sup>39</sup> This would be a more accurate descriptor of the range of circumstances in which such abuse can occur. For example, such conduct not only occurs in the context

35 Ibid 7.

36 Ibid 7–11.

37 See *Senate Committee Report*, above n 5, 15–16 [2.2]–[2.9] for a discussion of terminology.

38 For example, pt 5A of the Act is called, 'Non-consensual sharing of intimate images'.

39 Other suggestions from victim advocates noted in the *Senate Committee Report*, above n 5, were 'non-consensual sharing of intimate images' (Australian Women Against Violence Alliance, Submission No 19 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon Colloquially Referred to as 'Revenge Porn'*, 14 January 2016, quoted in *Senate Committee Report*, above n 5, 16 [2.7]) and 'technologically facilitated sexual violence' (Project Respect, Submission No 21 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon Colloquially Referred to as 'Revenge Porn'*, 14 January 2016, quoted in *Senate Committee Report*, above n 5, 16 [2.8]).



of intimate relationships, or the breakdown of intimate relationships. It can also occur in the context of abuse by acquaintances or strangers.<sup>40</sup>

Additionally, the Act adopts neutral language to describe the perpetrators of this online abuse, referring to them as a ‘person’ and an ‘end-user’.<sup>41</sup> This downplays the fact that an actual or threatened distribution of an intimate image is an act of abuse. Accordingly, there needs to be an express legislative acknowledgment that the perpetrator’s actions are abusive, and express acknowledgment of the harms which may be suffered by victims, as the following section will explain.

## **B Pornography Is an Issue of Sexual Inequality**

As well as noting the prevalence of the non-consensual sharing of intimate images (or threats to do so), Powell and Henry also highlight the ‘gendered’ nature of online abuse.<sup>42</sup> They state that women ‘are significantly more likely’ to be victims of online sexual harassment by male perpetrators.<sup>43</sup> It is argued that the legislation should adopt the approach in the Ordinance which recognises that the non-consensual sharing of images is an issue of sex equality and sex discrimination that disproportionately harms women and perpetuates their inequality in society as well as contributing to systemic inequality more broadly.<sup>44</sup> The legislative reforms made by the Act do not acknowledge any harm to women’s equality.

The gendered and hierarchical nature of revenge pornography has, however, been identified in several submissions made to the Senate Committee. One victim advocate discussed the use of revenge pornography as a coercive tool in relationships — either to coerce the victim during the relationship, or to punish her when it ends:

[I]t is clear that revenge porn is used as a tool of *power and control*. In one case, intimate images of a woman were shared on Facebook explicitly with the intention

40 See, eg, Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Sydney, 18 February 2016, 1 (Alexis Martin) (emphasis added):

We also recognise that the behaviour affects people who are not in [intimate partner violence] situations. SASS has supported clients who have been *sexually assaulted* by an associate, such as a friend of a friend, and the perpetrator has then *used photos or recordings as a means to silence or blackmail them*. Victims of drink spiking in pubs and other venues may also be targeted. The impacts of the behaviour in all of these contexts are potentially devastating for individuals, families and communities ...

41 *Enhancing Online Safety Act 2015* (Cth) ss 44B(1), 44E(1), inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 26.

42 Anastasia Powell and Nicola Henry, ‘Digital Harassment and Abuse of Adult Australians: A Summary Report’ (Summary Report, RMIT University) 4. Powell and Henry surveyed 2956 Australians aged from 18 to 54, about ‘Digital Harassment and Abuse’ with ‘10.7% reporting that someone had *taken* a nude or semi-nude image of them without their permission; 9.3% reported that someone had *posted* such images online or sent them onto others; and 9.6% reported that someone has *threatened* to post nude or semi-nude images of them online or send them onto others’: at 2 (emphasis in original).

43 *Ibid* 4.

44 Section 1(2) of Dworkin and MacKinnon, *Pornography and Civil Rights*, above n 1, 138.

to punish her for ending the relationship. In a second example, revenge porn was used in an ongoing relationship to *coerce and control* the victim.<sup>45</sup>

As noted above, another victim advocate commented that non-consensual sharing of images is not only used as a means of coercion and control in the context of intimate relationships, but also when the victim and the offender are not in a relationship at all — for example, when the victim has been sexually assaulted:

[I]mage based sexual exploitation may be used as a means by which to threaten and intimidate intimate partners or ex-partners. In the context of intimate partner violence, or IPV, it would appear to add another layer of coercive control. Some of our clients in IPV situations have presented for support after experiencing this form of exploitation.

We also recognise that the behaviour affects people who are not in IPV situations. SASS has supported clients who have been sexually assaulted by an associate, such as a friend of a friend, and the perpetrator has then used photos or recordings as a means to silence or blackmail them. Victims of drink spiking in pubs and other venues may also be targeted. The impacts of the behaviour in all of these contacts are potentially devastating for individuals, families and communities ...<sup>46</sup>

The non-consensual sharing of (or threat to share) images is about perpetuating a gendered hierarchy in which women are suppressed and oppressed. This hierarchy was first identified by Professor Catharine MacKinnon and Andrea Dworkin who argued that, as well as the real physical, psychological, reputational and economic harms suffered by women used in pornography or as a result of the viewing of pornography, pornography contributed to gender inequality in society in that it tainted the way women are perceived, and therefore treated in society. As stated by MacKinnon:

[P]ornography ... institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is.<sup>47</sup>

Thus, the non-consensual sharing of (or threat to share) images reaffirms social power and powerlessness, coercion and control, satisfaction and humiliation, socially equal and socially unequal. Revenge pornography seeks to disempower, humiliate and distress victims in order for a (usually male) perpetrator to gain power and control over a (usually female) victim. The victim suffers, but so does the equality of women in society.

MacKinnon and Dworkin are not alone in identifying the connection between pornography and inequality. The harms to women's equality as a result of pornography have also been judicially recognised in the United States. For

45 Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Sydney, 18 February 2016, 2 (Victoria Laughton) (emphasis added).

46 Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Sydney, 18 February 2016, 1 (Alexis Martin).

47 Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) 197.

example, in *American Booksellers Association Inc v Hudnut*,<sup>48</sup> Easterbrook J of the Indianapolis Court of Appeals stated that:

Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.<sup>49</sup>

Additionally, in the Canadian Supreme Court decision of *R v Butler*,<sup>50</sup> Sopinka J recognised these harms, stating:

[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material.<sup>51</sup>

The non-consensual sharing of intimate images cannot and should not be differentiated from the above comments about the harms of pornography in general. The objective of sharing these images is to degrade and humiliate the victim. Women are disproportionately devalued and objectified. They are reduced to sexualised objects and this in turn reflects how society sees them individually and collectively. Legislative reforms should recognise these harms. This is consistent with current equal opportunity legislation whose objects include educating the public that sex discrimination is real and not acceptable.<sup>52</sup>

The Ordinance drafted by MacKinnon and Dworkin is an example of this legislative recognition, and of how such recognition can form part of a civil regime. MacKinnon and Dworkin drafted the Ordinance (a local zoning law) at the request of residents of the City of Minneapolis who were concerned about the prevalence of pornography in their neighbourhoods.<sup>53</sup> The Ordinance was the first attempt to recognise pornography as an issue of sexual inequality. Section 1(1) of the Ordinance recognised pornography as ‘a practice of sex discrimination’ which has the effect of ‘threatening the health, safety, peace, welfare, and equality of citizens in our community’.<sup>54</sup> Section 1(2) fully describes these harms, and therefore it is informative to reproduce this statement below in full:

Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women. The harm of pornography includes dehumanization, psychic assault, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment. The bigotry and contempt pornography promotes, with the acts of aggression it fosters, diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services; create public and private harassment, persecution, and denigration; promote injury

48 771 F 2d 323 (7<sup>th</sup> Cir, 1985).

49 Ibid 329, cited in MacKinnon and Dworkin, *In Harm's Way*, above n 21, 462–4. See also Catharine A MacKinnon, *Only Words* (Harvard University Press, 1993) 92–5 for a discussion of this case.

50 [1992] 1 SCR 452.

51 Ibid 497 (Sopinka J), citing *R v Red Hot Video Ltd* (1985) 45 CR (3d) 36, 59 (Anderson JA).

52 See, eg, *Sex Discrimination Act 1984* (Cth) s 3(d).

53 Christopher N Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (UBC Press, 2004) 183–4. See generally MacKinnon and Dworkin, *In Harm's Way*, above n 21.

54 Section 1(1) of Dworkin and MacKinnon, *Pornography and Civil Rights*, above n 1, 138.

and degradation such as rape, battery, sexual abuse of children, and prostitution, and inhibit just enforcement of laws against these acts; expose individuals who appear in pornography against their will to contempt, ridicule, hatred, humiliation, and embarrassment and target such women in particular for abuse and physical aggression; demean the reputations and diminish the occupational opportunities of individuals and groups on the basis of sex; contribute significantly to restricting women in particular from full exercise of citizenship and participation in the life of the community; lower the human dignity, worth, and civil status of women and damage mutual respect between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the [Constitutions] and [laws] of [place].<sup>55</sup>

It has previously been argued that the Ordinance should be included in equal opportunity legislation,<sup>56</sup> and the same argument could be said to apply to a civil penalties regime. The Act amends existing Commonwealth legislation, specifically, the *Enhancing Online Safety Act 2015* (Cth) and the *Broadcasting Services Act 1992* (Cth). However, amending current Australian equal opportunity legislation, for example the *Sex Discrimination Act 1984* (Cth), is arguably better placed to recognise the harm of revenge pornography to sex equality.

### **C Remedies Need to Address the Harms Suffered by Victims**

Civil penalties involve a monetary sum, by way of a fine, being paid to government as a punishment for contravening legislation. The Act imposed a monetary penalty of 500 penalty units<sup>57</sup> which amounts to \$105 000 for individuals or \$525 000 for a body corporate.<sup>58</sup> Whilst these amounts are a significant deterrent for perpetrators, a penalty paid to government is inadequate to address the many harms suffered by victims who themselves require compensation.

The Senate Committee noted the submission of the Sexual Assault Support Service Inc which identified a broad range of harms to victims including:

- feelings of shame, humiliation, personal violation, and powerlessness;
- fear and apprehension about personal safety;
- sense of being watched or constantly 'under surveillance';
- fear of being filmed or photographed during sexual activities;
- being approached by strangers and propositioned for sexual activities;
- hypervigilance online (for example compulsively checking websites to see if more images have been uploaded);

55 Section 1(2) of *ibid.*

56 See generally Michelle Evans, 'Pornography and Australia's Sex Discrimination Legislation: A Call for a More Effective Approach to the Regulation of Sexual Inequality' (2006) 8 *University of Notre Dame Law Review* 81.

57 For a contravention of the *Enhancing Online Safety Act 2015* (Cth) ss 44B, 44G, inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 26.

58 See *Crimes Act 1914* (Cth) ss 4AA, 4B(3).

- disruption to education or employment;
- damage to (or concern about) reputation, personal standing in the community ... current or future intimate relationships, relationships with family and friends, and/or future employment prospects;
- social withdrawal;
- body shame;
- trust issues;
- trauma symptoms (including anxiety, sleeplessness, and nightmares); and
- suicidal ideation and/or attempts.<sup>59</sup>

Some of these harms were suffered by a Western Australian woman, Caroline Wilson, who brought a breach of confidence claim in the Supreme Court of Western Australia against her ex-partner, Neil Ferguson, who posted 16 photographs and two videos of a sexual nature on his Facebook page after their relationship ended. The photos could be viewed by his 300 Facebook friends, some of which were co-workers as the parties shared a place of employment, the Cloudbreak mine site. Mitchell J commented that

[t]he publication of the explicit images had the effect on the plaintiff which the defendant evidently intended. When she saw the photographs and videos the plaintiff was absolutely horrified, disgusted, embarrassed and upset. She felt particularly humiliated, distressed and anxious because she and the defendant both worked at the same site. She concluded (and I infer) that many of the parties' mutual friends and colleagues would see the photographs and videos.<sup>60</sup>

Ms Wilson suffered a loss of wages because after publication of the photographs, she felt unable to return to work, as well as suffering ongoing embarrassment and humiliation. At the time of trial she required sleeping tablets and ongoing psychological counselling. Mitchell J, whilst constrained to awarding damages for a breach of confidence in equity, awarded equitable compensation of \$48 404 and an injunction (to stop the images being further published or distributed). A civil penalties regime would have resulted in Ms Wilson receiving no compensation for the harms she suffered because the monetary penalty would instead be payable to the government.

It is argued that the legislative reforms should incorporate the range of remedies provided in the Ordinance drafted by Catharine A MacKinnon and Andrea Dworkin. As well as recognising pornography's harms to equality, the Ordinance recognises the very real physical, psychological, reputational and economic harms caused to victims, and provides victims with a range of remedies for these

59 *Senate Committee Report*, above n 5, 20 [2.23], quoting Sexual Assault Support Service Inc, Submission No 11 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon Colloquially Referred to as 'Revenge Porn'*, January 2016, 3–4.

60 *Wilson v Ferguson* [2015] WASC 15 (16 January 2015) [38].

harms which existing laws do not. These include nominal, compensatory and punitive damages, as well as for 'reasonable costs' including legal costs.<sup>61</sup>

## **D Remedies Must Address Threats to Distribute**

It is vital that any legislative reforms must also deal with threats to share or distribute non-consensual images. Although the *Discussion Paper* suggested that the prohibition should be against the actual sharing of intimate images without consent, and omitted the threat to do so,<sup>62</sup> the Act has included a 'threat to post' as part of s 44B, which may incur a civil penalty. The Commissioner is empowered under s 44K(2) to give a written direction to a person to ensure they do not contravene s 44B, with a civil penalty of 500 penalty units under s 44K(3) if the person contravenes a direction. For example, if a perpetrator threatened to post an image, the Commissioner could issue such a direction, and if a perpetrator posted the image in contravention of the direction, they would incur liability for a civil penalty.

If victims are being threatened with such exposure, they must be able to have recourse to immediate injunctive relief to prevent sharing or distribution from occurring. Injunctive relief was a significant remedy for victims under the Ordinance drafted by MacKinnon and Dworkin. Access to injunctive relief will allow victims to fight back against blackmail or coercion from a perpetrator threatening to release images. Also, preventing the release of images will help to mitigate the harm that a victim will suffer because, if an image is uploaded, shared or distributed, it can be distributed multiple times, to multiple locations, making it impossible to assure that the image has been completely removed from the internet.

A system in which a Commissioner receives an objection, undertakes an investigation, and then issues a direction (which will incur a civil penalty if not complied with) is arguably not immediate enough. Injunctive relief should be able to be sought by victims at first instance to protect victims until the initial investigation is finalised. Under the Act, injunctive relief can be sought by the Commissioner, and not a victim directly, to enforce a civil penalty provision.<sup>63</sup> Hence, injunctive relief is linked to enforcement, rather than prevention.<sup>64</sup> However, at the enforcement stage, an injunction may be too late to prevent or contain the distribution of the image and to stop a victim from suffering substantial and irreparable harm.

61 Section 5 of Dworkin and MacKinnon, *Pornography and Civil Rights*, above n 1, 141–2.

62 *Discussion Paper*, above n 2, 9.

63 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 119.

64 See *ibid* s 118.

## E 'Consent' by a Victim

The prohibition on the sharing of intimate images in s 44B also includes reference to the absence of consent of the victim.<sup>65</sup> Specifically, s 44B(2) states that s 44B(1) 'does not apply if the second person consented to the posting of the intimate image by the first person'. Consent is defined in s 9E as 'consent that is (a) express; and (b) voluntary; and (c) informed'. It does not include consent given by a child or by an adult with a permanent or temporary physical condition which makes them incapable of giving consent or impairs their capacity to do so.<sup>66</sup>

The *Discussion Paper* acknowledged that '[t]he issue of consent is a complex one', and noted the suggestion of the Australian Law Reform Commission that it should be up to the defendant to prove that the victim has consented.<sup>67</sup> Under the Act, the perpetrator bears the evidential burden of proving that they have not contravened s 44B(1), due to the operation of s 96 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).<sup>68</sup> In summary, s 96 provides that a person who seeks to rely on a justification to avoid liability under a civil penalty provision will carry the evidential burden.

A preferable approach is for reference to consent to be removed from the legislation entirely. If consent is available as a defence, the victim may suffer additional humiliation because their alleged conduct is being scrutinised and put on trial. This is exacerbated by the fact that the victim may still have suffered significant harms, despite allegedly consenting, for example, humiliation in front of work colleagues, psychological harm and pecuniary losses. If consent continues to be included in the legislation, it should expressly state that the burden of proving consent of the victim rests with the perpetrator.

There are also issues surrounding how the perpetrator may prove the voluntary consent of the victim. When a photograph is taken, particularly if the victim appears to be a willing participant, it is assumed that the victim has consented. Linda Marchiano was the victim of serious sexual violence at the hands of her husband for a three-year period, and forced to perform in pornography for fear of her life and for the lives of her family members. When she eventually escaped and spoke out about her abuse, she was not believed, with the images made of her cited as proof of her consent.<sup>69</sup> Ms Marchiano testified that '[s]o many people say

65 *Discussion Paper*, above n 2, 9.

66 *Enhancing Online Safety Act 2015* (Cth) ss 9E(d)–(e), inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 18.

67 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 197, cited in *Discussion Paper*, above n 2, 12.

68 The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 96 states that:

If, in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, the person wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating the civil penalty provision, then the person bears an evidential burden in relation to that matter.

69 See generally Linda Lovelace and Mike McGrady, *Ordeal* (W H Allen, 1981). See also Gloria Steinem, 'The Real Linda Lovelace' in Diana E H Russell (ed), *Making Violence Sexy: Feminist Views on Pornography* (Teachers College Press, 1993) 23.

that, in *Deep Throat*, I have a smile on my face, and I look as though I am really enjoying myself. No one ever asked me how those bruises got on my body.<sup>70</sup> Victims may not seek help or a legal remedy because they fear being told they have consented.

Consent is not clear-cut, and can often be coerced. This was identified in the following submission to the Senate Committee:

The key issue is consent. It might happen in a loving relationship; it also happens in an abusive domestic relationship. Again, consent is the issue, because the internet images may or may not be taken with the consent of the subject, the woman. Then, because she is in the context of an abusive relationship, out of fear for her safety, or the safety of her children, or both, she is compelled to comply with the perpetrator and what he is doing with the internet images.<sup>71</sup>

Given the complex nature of consent, it is reiterated that consent should not be an element of any offence regarding the non-consensual sharing of images, and should be removed from s 44B. If consent must continue to be incorporated into the legislation, it should be redrafted to provide that, *prima facie*, consent is regarded *not* to have been given, with the onus on the perpetrator to prove that it was.

## F The Intent of the Perpetrator

The *Discussion Paper* stated that the proposed civil penalty reforms will not include an 'intention [by the perpetrator] to cause harm' or 'seriousness' element.<sup>72</sup> This has been the approach adopted by the Act which makes no reference to the intent of the perpetrator. For similar reasons to those proposed above regarding consent, it is agreed this is an appropriate approach. The victim should not have to prove that the perpetrator intended to cause harm. As detailed above, the harms that result to victims are extensive and devastating enough, without the victim having to prove intent or malice on the part of the perpetrator. Additionally, the perpetrator should not be able to escape liability, or avoid paying the victim compensation, by arguing a lack of intent as a defence.

There was, however, some merit in the proposal made in the *Discussion Paper* that intent or malice could be a relevant factor 'in determining what action should be taken against the perpetrator',<sup>73</sup> for example, the quantum of the penalty (or damages) to be paid by the perpetrator to the victim. However this has not been, and perhaps should be, incorporated into the legislation.

70 Testimony of Linda Marchiano at the Minneapolis hearings quoted in MacKinnon and Dworkin, *In Harm's Way*, above n 21, 62.

71 Evidence to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Sydney, 18 February 2016, 5 (Victoria Laughton), quoted in *Senate Committee Report*, above n 2, 5 [2.14].

72 *Discussion Paper*, above n 2, 13–14.

73 *Ibid* 14.



## G Fast Remedies for Victims

Victims need an expedited remedy once publication or distribution has occurred. Given the prevalence of revenge pornography, and the fact that it can be distributed and redistributed instantaneously, this paper raises the query as to whether a statutory officer, such as the Commissioner, should be able to expeditiously act after receiving a complaint from a victim. Given the prevalence of the actual or threatened distribution of intimate images, the Commissioner's office may receive a high volume of complaints, and thus be unable to deal with them within the urgent time frame warranted by the near-instantaneous, cross-jurisdictional nature of the internet.

This is exacerbated by the complaints process established by the Act. Firstly, s 19A(1) provides that, '[i]f a person has reason to believe that s 44B has been contravened in relation to an intimate image of the person, the person may make a complaint to the Commissioner about the matter'. The person (that is, the victim), must then lodge an objection notice with the Commissioner under s 19B(1). Section 19C provides that the Commissioner will then investigate the complaint to consider whether to issue a removal notice under s 19D regarding the intimate image. A removal notice can be given to a social media service, electronic service or internet service,<sup>74</sup> the end-user<sup>75</sup> and to a hosting service provider.<sup>76</sup> Failure to comply with a removal notice will incur a civil penalty of 500 penalty units.<sup>77</sup> Further, if a person fails to comply, the Commissioner may issue a formal warning.<sup>78</sup>

The *Discussion Paper* suggested that a victim could obtain 'a quick and effective solution' from service providers such as social media safety centres which already have complaints processes in place.<sup>79</sup> It suggested that these service providers could act as a first port of call for victims to lodge complaints, and that a victim could complain to the Commissioner if she did not have a response within 48 hours.<sup>80</sup> Such a complaints process has many steps, and there is likely to be some delay in-between receiving a complaint, the issuing of a removal notice and the actual removal of the image. It lacks the coercive powers to compel perpetrators to remove, destroy or not to distribute intimate images. In a world of near-instantaneous communications, significant distribution can occur in a 48-hour period (or indeed, within seconds or minutes), and once the images are published,

74 *Enhancing Online Safety Act 2015* (Cth) s 44D, inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 26.

75 *Enhancing Online Safety Act 2015* (Cth) s 44E, inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 26.

76 *Enhancing Online Safety Act 2015* (Cth) s 44F, inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 26.

77 *Enhancing Online Safety Act 2015* (Cth) s 44G, inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 26.

78 *Enhancing Online Safety Act 2015* (Cth) s 44G, inserted by *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) sch 1 item 26.

79 *Discussion Paper*, above n 2, 11.

80 *Ibid.*

shared or distributed, it may be impossible to ensure they are entirely removed from the internet.

In *Wilson v Ferguson*,<sup>81</sup> Mitchell J commented on the difficulty of the near-instantaneous means by which these images can be distributed:

[T]echnological advances ... have dramatically increased the ease and speed with which communications and images may be disseminated to the world. The defendant was easily able to upload the images of the plaintiff to a platform where they would be readily seen by members of the parties' social group. He could have as easily uploaded the images to a platform, such as YouTube, where they would have been visible to the world. The process of capturing and disseminating an image to a broad audience can now take place over a matter of seconds and be achieved with a few finger swipes of a mobile phone. No special licence or resources are practically or legally required to achieve such a broadcast. In many cases, such as the present, there will be no opportunity for any injunctive relief to be sought or obtained between the time when a defendant forms the intention to distribute the images of a plaintiff and the time when he or she achieves that purpose.<sup>82</sup>

This makes it imperative that victims are able to immediately access injunctive relief, as discussed earlier in this paper, and raises concerns about whether the Commissioner or indeed, another service provider, as provided for in the Act, will be able to act in a sufficiently short period of time to mitigate the damage suffered by victims after an image has been distributed. This is especially important given the prevalence of the threatened or actual distribution of these images.

It is argued that, as contemplated by MacKinnon and Dworkin's Ordinance, victims should be able to seek an injunction themselves as soon as the distribution or threat to distribute arises, and should also be able to bring a civil claim against the perpetrator themselves, without having to rely on the Commissioner, or a non-government organisation which does not have coercive powers.

#### IV SUMMARY

This paper has suggested improvements to the recently enacted civil penalties regime, with reference to the sex equality approach formulated by MacKinnon and Dworkin in their civil rights Ordinance, to better address the harms of 'revenge pornography' and to empower victims with more effective and expeditious remedies. Specifically, in addition to the amendments made by the Act to the *Enhancing Online Safety Act 2015* (Cth), this paper recommends further amendments in the following key areas:

- terminology should recognise that the perpetrator is committing an act of control, coercion and abuse against the victim;
- 'revenge pornography' should be recognised as an issue of sex equality;

81 [2015] WASC 15 (16 January 2015).

82 Ibid [80].

- given the instantaneous means of transmission of these images, victims need immediate access to urgent injunctive relief as soon as a distribution or threat to distribute is made, and before an investigation is finalised;
- damages should be payable to victims directly (as opposed to a monetary sum payable to government) to compensate them for specific harms suffered, as well as to punish and deter the perpetrator;
- the consent of the victim should be irrelevant, or at the very least, the legislation should expressly provide that the onus is on the perpetrator to prove that the victim consented.

## **V CONCLUSION**

The non-consensual sharing of intimate images is an issue in need of regulation in the Australian states and territories, and it is commendable that the Commonwealth has attempted to do so. A national approach, such as that established by the Act offers many advantages, including providing a nationally consistent approach so that victims in some states are not disadvantaged over others. Also, a nationally consistent approach would resolve any issues concerning the interstate distribution of images, for example, if an image was uploaded in one state and viewed in another.

Regardless of whether the legislative improvements recommended in this paper are made, victims are likely to welcome the reforms made by the Act. The passing of the Act by the Federal Parliament evidences the recognition of ‘revenge pornography’ as a serious issue, and provides a legal framework under which complaints can be made by victims. It is hoped that if the amendments suggested in this paper are made, victims will be further protected and empowered against perpetrators of this abuse.