



SUBMISSION IN RELATION TO

The Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft

Submitted by:	Victorian Women Lawyers' Association Inc
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Submitted to:	The Australian Labor Party
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About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 500 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and the broader community. VWL has undertaken research into work practices affecting women in the legal profession, and provided protocols and training to effect change.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab.

Private sexual material - overview

Since 1996 VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, and achieving justice and equality for all women.

VWL welcomes the opportunity to make this submission to the Australian Labor Party (**ALP**) in relation to the exposure draft of the Criminal Code Amendment (Private Sexual Material) Bill 2015 (**Draft Bill**).

VWL supports the creation of specific criminal offences at the Commonwealth level to deal with 'revenge porn', as is proposed under the Draft Bill. We believe that there is currently a gap in the law in relation to this issue and that it ought be addressed in order to protect women from an emerging form of intimate partner violence.

VWL considers that revenge porn is a form of family violence and sexual assault, and that accordingly it constitutes gendered violence.¹ VWL hopes that any law reform in relation to this issue will be inclusive and sensitive to the needs of victims. VWL also hopes that legislative change will be part of a broader policy approach, including funding of appropriate programs, encouraging corporate responsibility and community education to address gender violence and victim blaming.

Comments on the issues for consideration

1. Threats to share private sexual material

VWL supports the introduction of an offence in relation to threats to share private sexual material. A similar offence was introduced in Victoria in 2014 under the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014, which amended the *Summary Offences Act 1966* (Vic) and the *Crimes Act 1958* (Vic). However, that offence requires the victim to believe that the threat will be carried out. VWL agrees with the Draft Bill's formulation of the offence, in that it does not require the victim to establish such a belief.

Nevertheless, VWL is concerned by the requirement that the threat be carried out using a carriage service. This appears to exclude verbal threats made in an intimate relationship in order to coerce or control the victim. If so, **VWL considers that further consideration should be given to including all threats, regardless of the method of delivery.**

Any offence that is introduced should apply to third party revenge porn situations. It is important that women be protected from all forms of intimidation and sexual violence, even if it does not directly involve their own sexual images.

¹ See discussion in Victorian Law Reform Committee, 'Enquiry into sexting' (2013)



2. The meaning of 'private sexual material'

The current definition of 'private sexual material' in the Draft Bill includes a number of requirements. Human sexuality is complicated, and the definition of 'private sexual material' should reflect this.

The definition needs to take into account the intent of both the creator of the material and the 'consumer' of the material. It also needs to take into account the multicultural nature of Australian society. We note that different cultures have different definitions of sexuality and different ideas as to what constitutes a sexual feature. For instance, in some cultures, a woman's hair is considered sexually attractive.

Any definition of 'private sexual material' needs to recognise cultural differences and ensure that all members of the community are protected from revenge porn, as it may be experienced by them.

In particular, the phrase 'sexual pose or sexual activity' should be clearly defined to note the context of the material, including the cultural context.

Further, any definition of 'private sexual material' should be trans-inclusive. The current definition refers to material that depicts 'the breasts of a female person.' VWL queries whether this would include a female-identifying person.

VWL is concerned that the exceptions in subsection 474.24D(4) of the Draft Bill could potentially encompass material that ought not be excluded from definition of 'private sexual material'. In particular, composite material created from the combination of material originating from two or more separate sources.

For example, where Person A's head or face is edited (or 'photoshopped') onto an image of Person B engaging in sexual activity or in a sexual pose. It appears this may not be considered private sexual material depicting Person A as it would fall within the exception set out in subparagraph 474.24D(4)(b)(iii); that is, it is only because of the combination of the two images that it depicts Person A.

Given the standard of photo editing readily available to members of the community, it is possible that those who view or distribute an edited image may not be aware that such editing has taken place. In the above example, if the perception is that the image is a depiction of Person A (and Person A only), the effect on Person A may be the same as, or potentially greater than, the effect on them where the image actually depicted Person A only. **VWL recommends that consideration be given to the kinds of altered or composite images that are intended to be encompassed within the definition of 'private sexual material'.**

3. Intentions of perpetrators and effects on victims

The proposed offence under the Draft Bill requires, as an element of the offence, that the conduct causes, or there is a risk that it will cause, distress or harm to the subject of the material. In prosecuting other forms of sexual assault the impact on the victim, while relevant, is not a necessary element of the offence. **VWL proposes that the requirement of demonstrating distress or harm be reconsidered and further, that the absence of consent should be sufficient grounds for the establishment of the offence.**

Relevantly, the requirement to demonstrate distress or harm is inconsistent with the 'threaten to distribute' offence under subparagraph 474.24F which does not require harm to be demonstrated – rather, only that the threat occurred. Another relevant comparison is the



Victorian offence under section 41DA(1) of the *Summary Offences Act 1966* (Vic) which do not require the demonstration of harm or distress as an element of establishing the offence.

Concluding remarks

VWL supports the introduction of the Draft Bill. VWL's main concern in relation to the Draft Bill is to ensure that the broad range of conduct that may potentially constitute revenge porn is captured by the amendments to the Criminal Code.

Our suggestions above are aimed at ensuring that the concept of private sexual material appropriately reflects cultural and diverse gender and sexuality differences, that unlawful threats should not be limited by the method of their delivery and that the effect on victims should not be a factor in establishing the offence.

Victorian Women Lawyers
2 October 2015