Revenge Pornography: Are Australian Laws up to the Challenge?

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ABSTRACT

Revenge pornography, or nonconsensual pornography as it is also known, is the distribution of intimate sexual images by disaffected and disgruntled individuals as a means of seeking vengeance against ex partners. It is highly destructive behaviour which can result in victims being humiliated and distressed, may jeopardise personal and work relationships and can lead to victims being stalked and attracting unwanted attention from strangers. In some cases, victims have felt compelled to change their names and even contemplate suicide. This article considers the response of Australian laws to the scourge of revenge pornography and identifies the many deficiencies in the current patchwork of statute laws and case laws in that country.

KEYWORDS

Australia, Confidentiality, Law, Non-Consensual Pornography, Privacy, Revenge Pornography

INTRODUCTION

Caroline was a 29-year-old female mobile plant operator at a remote fly-in/fly-out mine site in Western Australia. There she met Neil, who worked in the same crew, and after some six months they became intimately involved. At one point in the relationship Neil used his mobile phone to take an explicit photograph of himself which he sent to Caroline. She responded by sending a similarly explicit photograph of herself to him. Thereafter they would use their mobile phones to take and send to each other photographs of a sexual nature depicting themselves naked or partially naked. In addition, Neal took explicit photographs of Caroline with her knowledge and consent. Caroline also used her mobile phone to take videos of herself naked and, on at least one occasion, engaging in sexual activity. At some time after the videos were taken, she left her mobile phone unattended in the lounge room of his home while he was present. When she returned to the room he told her that he had used the phone to email the videos to himself. Caroline became upset and an argument ensued between them. She insisted that he make sure that nobody else saw the videos, which were just for him, and he agreed. She also sent text messages to him to the effect that he must not show the photos or videos of her to his friends “or anything like that.”

The relationship between Caroline and Neil began to deteriorate. In arguments between them he threatened to post the photographs and videos of her on Facebook and YouTube. She would beg him not to carry out the threat and try to calm him down. Finally, in 2013, while she was at the mine site and he was in Perth they argued via text messages. She suspected that he had been cheating on her and sent him a text saying that she wanted nothing to do with him. After that message he posted 16 explicit photographs and two explicit videos of her on his Facebook page along with the comment “Happy to help all ya boys at home … enjoy!!” By posting the photographs and videos he made them available to his approximately 300 Facebook friends, many of whom worked at the mine site.
Caroline began receiving telephone calls and text messages from friends asking if she had seen what Neil had posted on his Facebook page. She also received a text message from him, accompanied by an explicit image of himself, which stated that the photos would be “out for everyone to see” and “Can’t wait to watch you fold as a human being.”

As a consequence of the photos and videos being uploaded, Caroline was humiliated, distressed and anxious. She was alarmed and extremely anxious at the thought that many of their mutual friends and colleagues at the mine site, which was a male-dominated working environment, would see the photographs and videos. She was forced to take leave without pay and consulted a psychologist in an effort to cope with her humiliation.

Sexually explicit photography is not a new phenomenon. However, the digital age has seen the advent of mobile devices that can both take photographs and record high quality video, as well as make it easy to share those photographs and videos between partners to the activity. Those devices also provide a new weapon for disaffected and disgruntled individuals to seek vengeance against ex partners by sharing those images and videos with third parties, or even the world at large. Indeed, apart from social media such as Facebook, blogs, emails and texts, there are now hundreds of dedicated websites and other forums that openly solicit the uploading of such “revenge pornography” or “non-consensual pornography,” as it is also known (Citron & Franks, 2014). Indeed the latter may be a more appropriate description since the risk is not confined to the rancorous acts of ex-lovers but also extends to others such as new partners of ex-lovers who happen across the images or videos (Bates, 2015) and opportunist hackers who gain unauthorised access to the images or videos who may have other motives such as profit, coercion, blackmail, fun or self-gratification (Laird, 2013; Franks, 2014) As Henry and Powell (2016) pointed out, for this reason, and due to difficulties associated with describing all such images and videos as “pornography” when, apart from anything else they may have been created in the context of a loving relationship, a preferable term may be “image-based sexual exploitation” (Powell, 2010). However, due to the more widespread use of terms such as “revenge pornography” and “non-consensual pornography” to describe the phenomenon, those terms will be used in this article.

Technoethics is an area of research concerning the relationship “between technology and living entities” (Luppicini, 2008, p.14). As such technoethics has been said to be “an ideal field for dealing with the question of how technology affects the natural instincts of living beings” (Suncic, 2013, p. 58). Luppicini (2010) argued that one of the missions of technoethics is to “address the human side of technology that lies within “individual” minds and bodies that affect and are affected by technology at a deeply personal level” (p. 48). Revenge pornography is an instance of the human side of technology laid bare: a usage that strikes its victims at a deeply personal level. Indeed, for many it may be a life changing event involving a degree of humiliation that can even lead to suicide ideation. A consideration of the human side of technology is also informed by the influences that may affect those who engage in such behaviour. One such potential influence is the law. An effective law can be a potent deterrent against aberrant behaviour: it may operate at a general level by influencing those who might otherwise engage in behaviour to refrain from doing so and it may operate at a specific level by punishing individuals who have engaged in the behaviour and thereby deterring them from repeating their actions for fear of being punished again. It may also operate as a salve for victims by providing them with some form of reparation.

This article uses a doctrinal analysis approach to assess the effectiveness of current laws in Australia in response to the phenomenon of revenge pornography. It commences by a brief consideration of the size of the problem and its potential effects on victims, before analysing current
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