“Revenge Porn”: An Analysis of Legislative and Policy Responses

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ABSTRACT

Currently, a range of criminal offences are perpetrated online. In addition to the commission of traditional offences, such as fraud, stalking, and domestic violence, new phenomena have emerged to warrant attention from the media, government, and communities. The phenomenon colloquially referred to as ‘revenge porn’ stands as one of the greater threats to public morality. To date, legislative responses to circumscribe revenge porn, both internationally and in Australia, have been sporadic and disjunctive. This article critically examines the impact and prevalence of revenge porn and provides a critical analysis of the civil and criminal responses to its commission. It concludes by arguing that addressing the challenges associated with investigating such offences, and educating about the dangers of revenge porn have to some extent been overlooked in the rush to legislate and create new offences. The article highlights that existing legislation may provide adequate protection.

KEYWORDS
Cybercrime, Intimate Images, Privacy, Revenge Porn, Social Media

INTRODUCTION

Our use of new technologies and the Internet is becoming more frequent and, indeed, pervasive. The global Internet population has grown from 2.1 billion in 2012 to 3.4 billion in 2016 (James, 2016). With this increase in the use of new technology comes the risk of greater opportunities for criminal behaviour. New technology is facilitating offences, both old and new. This article provides a summary of the growing trend in revenge porn type offences committed and, indeed, facilitated by new technology. It provides a critical analysis of the policy and legislative responses to such offences. It concludes by arguing that simply creating new specific offences may not be effective in dealing with this phenomenon and a wider response is needed. Such a response needs to focus on better law enforcement responses, and education and awareness in the community.

THE EMERGENCE OF REVENGE PORN

Revenge pornography atypically involves the following: an existing or previous relationship, an intent to cause harm, the unauthorised public release of an intimate image, and the act of releasing the intimate image is facilitated by technology. While this is neither a legal definition nor an exhaustive one, it captures the traditional concept and, indeed, wide-spread perception of revenge porn. In 2010, digital

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revenge porn came to prominent notice with the creation of the Is Anyone Up website that allowed for submission, and distribution of photos of ex-partners without consent (Salter & Croft, 2015).

The unauthorised public release of an intimate image following the breakdown of a relationship was not unknown in Australia prior to the Internet (Salter & Croft, 2015). Such acts, though not criminalised were actionable through the civil law of defamation. In 2001, the Supreme Court of Queensland adjudicated the matter of Shepherd v Walsh, a dispute between a woman, Shepherd, and her ex-boyfriend and the publisher of “The Picture” magazine. Shepherd sought damages for defamation from her ex-Mr. Walsh (and others) after he had sent a nude photograph of her to The Picture magazine that featured in the Home Girls section and it was published. He had done this “as a revenge on his ex-girlfriend”. She received $50,000 in damages.

Media attention to revenge porn has increased dramatically in the last five years. A search of the Factiva media content provider for the term ‘revenge porn’ revealed that in 2011 there were seven stories about revenge porn, in 2015 there were 3411 stories. Recently, mainstream media has used the term to encompass almost any unauthorised release of intimate images, regardless of relationship status between the offender and the victim. The term has also been made synonymous with the mass dumping of images of multiple victims. Recent examples of this include the release of intimate images, in 2015, via the Internet of 400 women in Adelaide and some 700 from Brisbane (Branco, 2015a; Fewster, 2015).

In 2015, as part of a response to the growing concern in relation to what was summarily referred to as ‘revenge porn’, an Australian Senate Inquiry (hereafter referred to as the Senate Inquiry) was convened. The Senate Inquiry noted that revenge porn consisted of the non-consensual sharing of intimate images (Commonwealth of Australia, 2015, p. 2). Important considerations in applying the term seem to hinge on the nature of the image, the context or relationship in relation to the taking or obtaining of the image, and the harm inflicted (Commonwealth of Australia, 2015).

Arguably, revenge porn is one example of technology influencing criminal activity. Movement from the physical to the digital world, globalisation and society’s reliance on technology are some of the reasons why more of our lifestyle activities are conducted in the digital world. Examples of this include technology driven communities such as Facebook, Twitter, and Instagram. Research by analytics software provider Domo shows that society’s use of such platforms has increased dramatically in recent years (James, 2016; Morrison, 2014).

These platforms and others allow people to capture their experiences, including intimate ones, and share them to a potentially global audience. The advent of the smartphone and other mobile technologies has, to some extent, revolutionised our ability to interact with technology daily. The above Factiva search revealed that social media, internet and media are the leading industries associated with media reports of revenge porn. In relation to social media, Facebook and Twitter were the most mentioned social media companies in stories concerning revenge porn.

The creation of, and access to, new markets of victims — no longer constrained by physical location — assists potential offenders. A noteworthy dynamic to the use of technology is the ease with which one can attract an online audience. This is where the internet can act as a force multiplier (Salter & Croft, 2015). Technology has further impacted crime through the extension and facilitation of traditional offences, for example frauds, but in the realm of sex offences, the ability to stalk, meet victims on dating sites. The creation of new offences through technology, revenge porn, unauthorised surveillance, electronic stalking and the use of audience and distribution to magnify the offence are also examples of technology and its influence on criminal behaviour and our policy responses.
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