

Submission in response to Discussion Paper: The sharing of intimate images without consent - 'revenge porn'

Introduction

I thank the NSW Government for consulting with the public on possible legislative measures to adequately address the sharing of intimate images without consent. I take this opportunity through my Submission to provide feedback on the elements of new criminal offences that specifically address the non-consensual dissemination of intimate sexual images to third parties in NSW.

Introduction

The non-consensual dissemination of intimate sexual images to third parties harms people. This harm is understood in different ways; some people conceptualise this as a form of sexual violence facilitated through Information Communication Technology (ICT), others understand it as a violation of a person's ability to define their private sphere. There may be further explanations. I think the harm occurs when a person's private sexual image is shown to someone they did not agree should see it. Although I answer the questions provided, I posit a different construction of the legal problem. Hasinoff claims that digital communication has altered the way we consent¹. I think that you should need affirmative positive consent before you show a person's intimate sexual document² to someone else. I think that for intimate sexual documents, the accused should bear the onus of proving that they had affirmative positive consent to show it to someone else. I shall firstly discuss the findings of recent research, then I shall address the Discussion Questions.

Literature Review

There are a small number of published peer-reviewed studies that investigate the non-consensual dissemination of a sexual image (a sext) in the Australian context. I have searched

¹ Hasinoff, A. (2015) *Sexting Panic: Rethinking Criminalization, Privacy, and Consent*, University of Illinois Press, Chicago, U.S.A.

² I prefer 'document' to image.

and identified five studies that have collected primary data where respondents were specifically asked questions about their views on the non-consensual dissemination of a sext to third parties. I cannot locate any Australian study that uses a representative sample. A number of studies use quantitative methods to establish the prevalence of sexting and disseminating a sext to third parties, with and without, consent. Other studies use qualitative methods to better understand the experience of sexting and what it is like when one loses control over who a sext is shared with. In aggregate, these studies inform us, to a limited extent, of how much sexting is going on in the community, who is doing it, why they do it, what the experience is like, and what is problematic. By understanding the phenomenon and how people relate to it, we can better understand the concepts and where the boundaries lie.

What is the prevalence of sexting in Australia?

From the available evidence it appears that the creation and sending of sexual images using ICT is a relatively common practice in the Australian community. *Figure 1* illustrates, the findings of Crofts, Lee, McGovern, and Milivojevic's research, which indicates that 59% of 19+ year old respondents reported having ever sent a sexual picture or video³. Their study reports that 68% of 19+ year old respondents reported having ever received a sexual picture or video⁴, as illustrated in *Figure 2*. The practice of sending a sexual picture or video was evenly distributed between males and females⁵.

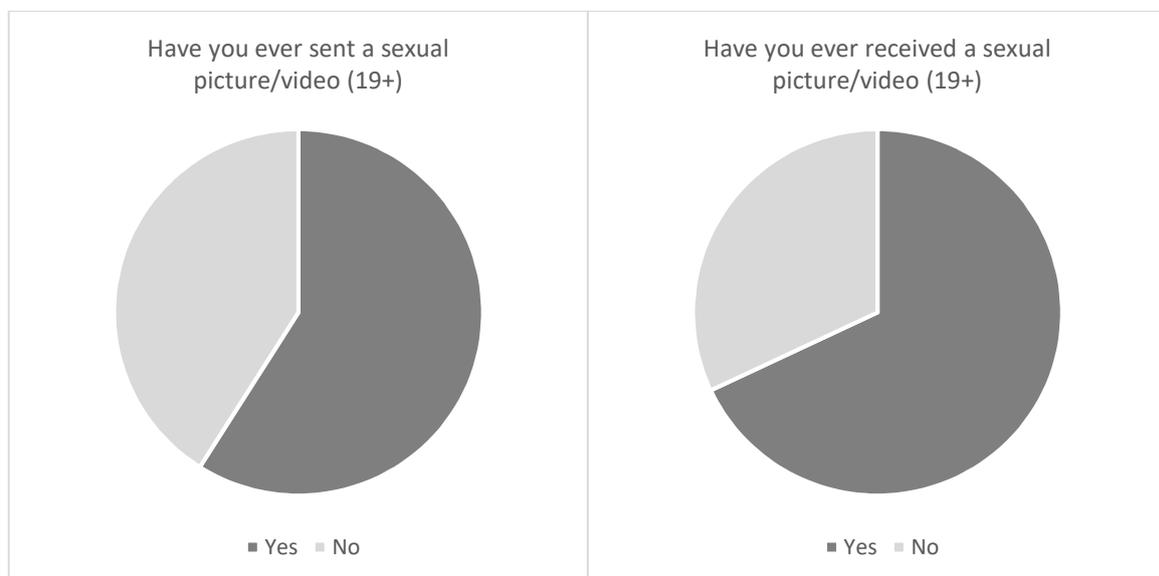


Figure 1

Figure 2

³ Crofts, T., Lee, M., McGovern, A., & Milivojevic, S. (2015) *Sexting and Young People*, p. 110.

⁴ *Ibid* at p. 110.

⁵ *Ibid* at p. 111.

Croft et al.'s analysis of the data they have collected offers interesting insights. They find that more males (72%) than females (64%) have ever received a sexual image or video⁶. *Figure 3* illustrates that gay men are the category of people to report the highest frequency of ever sending (81%) a sexual image or video⁷. Gay men also report the highest frequency of ever receiving (92%) a sexual image or video⁸.

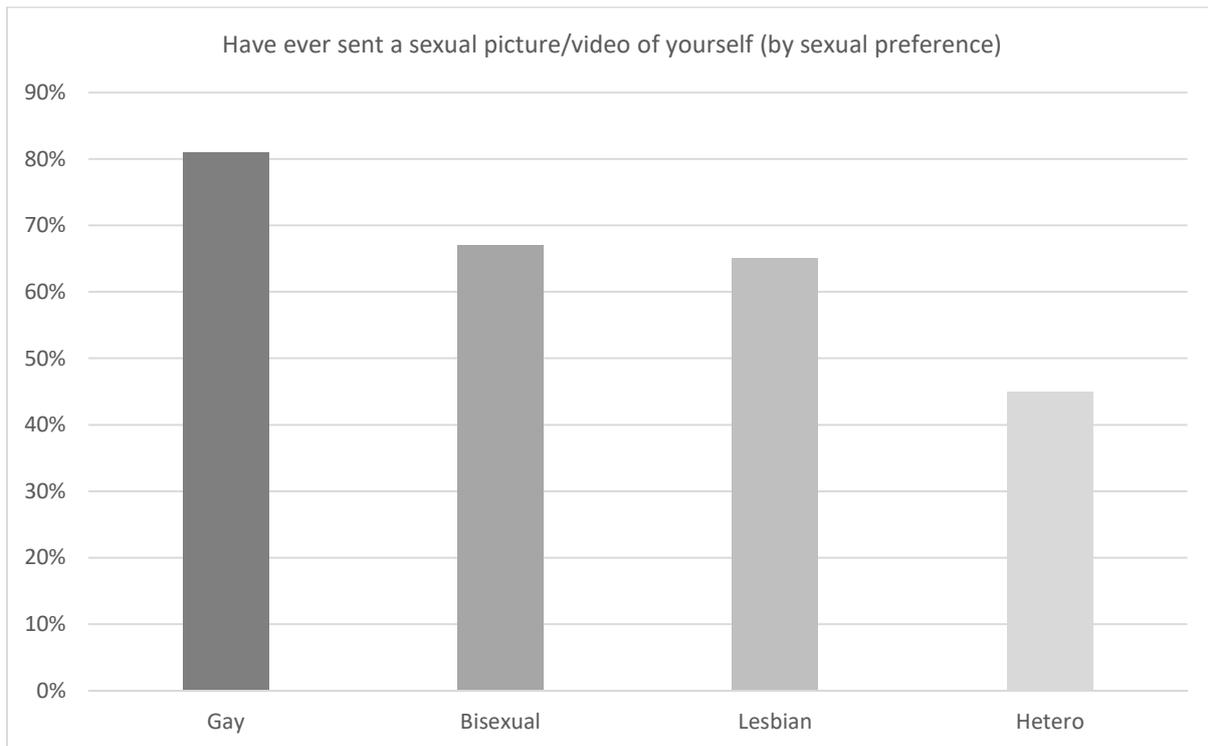


Figure 3

What is the prevalence rate of disseminating sexts, with and without consent, in Australia?

Powell and Henry's⁹ online survey asked respondents whether, during the course of their life, they had ever experienced: having a nude or semi-nude image being taken without their permission, posted online or sent to others without their permission, being threatened to be posted online or sent to others without their permission. They found that 10.7% of respondents reported that someone had taken a nude or semi-nude image without their permission during their life; male respondents (12.2%) were more likely than female respondents (9.1%) to report

⁶ Ibid at p. 111.

⁷ Ibid at p. 113.

⁸ Ibid at p. 113.

⁹ Powell, A. & Henry, N. (2016) *Technology-Facilitated Sexual Violence Victimization: Results From an Online Survey of Australian Adults*.

this experience¹⁰. Their results indicate that 9.3% of respondents had experienced a nude or semi-nude image being posted online/sent onto others without their permission during their life. *Figure 4* illustrates that male respondents (11%) were more likely than female respondents (7.4%), to report this experience¹¹. Furthermore, they found that 9.6% of respondents reported having experienced the threat of having a nude or semi-nude image posted online/sent onto others during their life. Male respondents (10.9%) were more likely than female respondents (8.1%) to report this experience¹², as illustrated in *Figure 5*.

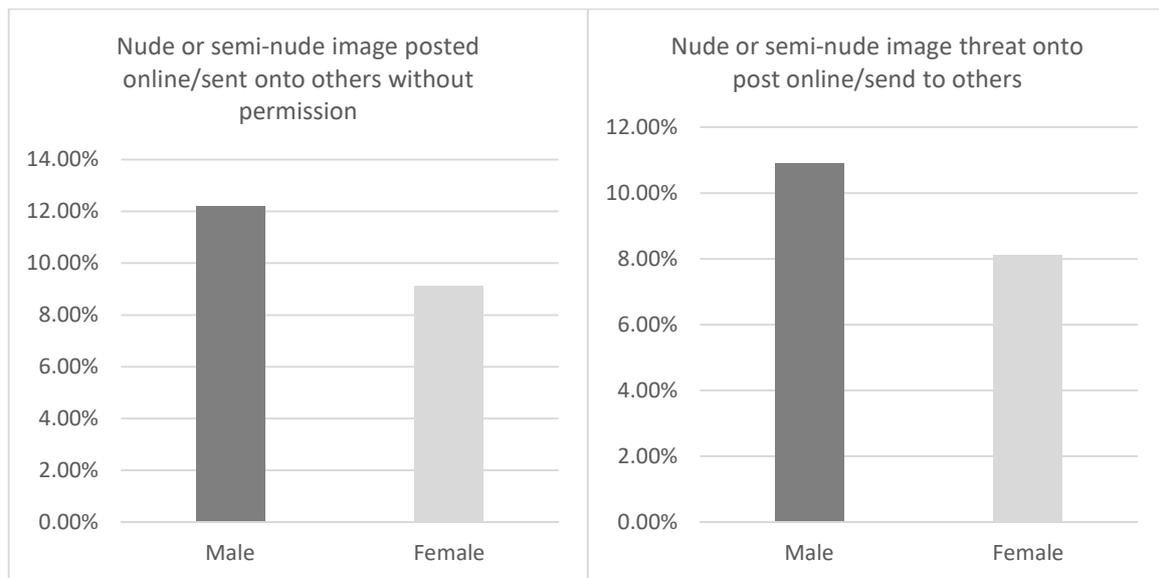


Figure 4

Figure 5

When Powell and Henry analysed the data they collected on sexual aggression and/or coercing, they found that 8.5% of respondents reported experiencing an image/video of an unwanted sexual experience being taken during their life; male respondents (12.2%) were more likely than female respondents (9.1%) to have this experience¹³. Their findings indicate that 8.6% of respondents had experienced an image/video of an unwanted sexual experience being posted online/sent to others during their life; male respondents (9.8%) were more likely than female respondents (7.2%) to report this experience¹⁴. Furthermore, their results indicate that 8.7% of respondents had experienced the threat of an image/video of an unwanted sexual experience being posted online/sent to others during their life; male respondents (9.8%) were more likely

¹⁰ Ibid at p. 12.

¹¹ Ibid at p. 12.

¹² Ibid at p. 12.

¹³ Ibid at p. 12.

¹⁴ Ibid at p. 12.

than female respondents (7.3%) to experience such a threat¹⁵. These studies provide evidence that males report being more frequently victimised by ‘revenge porn’, compared to women.

Crofts et al.’s online survey asked respondents whether they had ever shared a sexual picture or video to a third party without consent¹⁶. Their data indicates how perpetrators behave. They report that 16% of 19+ year old respondents reported that they had ever shown someone a sext who wasn’t meant to see it ‘in person’. They found that 4% of 19+ year old respondents reported that that they had ever shared a sext with someone who wasn’t meant to see it ‘online’. Similarly, their findings indicate that 4% of 19+ year old respondents reported that they had ever forwarded a sext to someone who wasn’t meant to see it ‘by MMS or email’¹⁷.

Patrick, Heywood, Pitts, and Mitchell’s online, and pencil and paper surveys, asked respondents whether they had sent a sexually explicit nude or nearly nude photo or video of someone else¹⁸. Their data also indicates how perpetrators behave. They found that a total of 8.6% of respondents reported having sent a sexually explicit nude or nearly nude photo or video of someone else. Their data is reported according to gender; 13.9% of male and 5.3% of female respondents report this behaviour¹⁹ However, the question did not distinguish whether dissemination was with, or without, consent, and is drawn from a sample of Australian secondary school students.

What are Australians attitudes towards the non-consensual dissemination of a sexual image or video to third parties?

The Youth Advisory Group (YAG) to the Victorian Privacy Commissioner collected data in 2011-12 using an online survey which used a conveniences sample²⁰. Their instrument collected some qualitative insights. The YAG’s results were published in their Submission to the Victorian Parliament Law Reform Committee’s *Inquiry into Sexting*. A female 16-20 age group respondent wrote of her friend’s experience of having a sext disseminated to a third party without consent:

¹⁵ Ibid at p. 12.

¹⁶ Crofts, T., Lee, M., McGovern, A., & Milivojevic, S. (2015) *Sexting and Young People*.

¹⁷ Ibid at p. 126.

¹⁸ Patrick, K., Heywood, W., Pitts, M., & Mitchell, A. (2015) *Demographic and behavioural correlates of six sexting behaviours among Australian secondary school students*.

¹⁹ Ibid at p. 483.

²⁰ Youth Advisory Group to the Victorian Privacy Commissioner (2012) *Submission to the Victorian Parliament Law Reform Committee’s Inquiry into Sexting*.

“My friend who had the pictures taken laughed but she actually feels really scared and like someone has stolen something special to her. It’s so wrong”²¹.

A number of respondents wrote about their attitudes towards the legal regulation of sexting and how they thought the non-consensual dissemination of a sext ought to be regulated. A female aged 16-20 years old wrote:

“[T]he law should apply to the cases of non-consensual sexting, and not those who participate under a mutual agreement. Should it ever cross the line, the police should be involved and it should be taken further”²².

This delineation was repeated by a female aged 10-15 years old who wrote:

“I believe that sexting is fine, as long as the two parties/people involved keep the pictures/videos to themselves, and not forward/share them with their friends, schoolmates or anyone else. I think the forwarding/sharing of sexting pictures should be illegal, not sexting itself”²³.

Similarly, another 10-15-year-old female wrote:

“I don’t think that ‘sexting’ should be illegal. This is an activity that engages those two individuals. As long as the photo/document isn’t sent to other people, then I believe it is acceptable. If the photo is sent to another party, then that’s when I think a punishment should be enforced”²⁴.

Males also shared the attitude that the non-consensual act of dissemination of a sext is the element that ought to mark the transgression into unlawfulness: A 21-25-year-old male wrote:

“Sending and saving photos should not be illegal – forwarding photos without permission, however, should be”²⁵.

This was corroborated by another 21-25-year-old male:

²¹ Ibid at p. 4.

²² Ibid at p. 5.

²³ Ibid at p. 7.

²⁴ Ibid at p. 7.

²⁵ Ibid at p. 7.

“I don’t see a problem if a person is sending pictures of themselves, the problem is when these pictures are forwarded on without the consent of the person in the picture. That is the part that should be illegal”²⁶.

The nature of consent was addressed by a female respondent aged 10-15 years:

“I do not think that it should be illegal to take or save such photos, however I DO think that it should be illegal to forward them on to other people without the original sender’s explicit consent”²⁷.

These quotes provide an in-depth understanding attitudes of the young people in this study towards the non-consensual dissemination of a sext. Walker, Sancu, and Temple-Smith’s²⁸ qualitative study focussed on the views of experts. They used focus group and individual interviews to collect data. One sexual violence prevention expert said:

“I think it would generally be more males sending it on ... and so there’s a lot of pressure on other boys I think to kind of go along with it too”²⁹.

A sexual violence prevention research academic highlighted the issue of dissemination to third parties without consent when they said:

“Where there is pressure ... [or] coercion ... those are harassing, potentially aggressive behaviours, even if that image is sent consensually ... the risk then of it being sent on without consent is of concern”³⁰.

Research Gaps

There are presently gaps in the research. I could not locate any studies that collect a representative sample. The prevalence and attitudes of non-heterosexual and non-binary gender identifying Australians towards the consensual and non-consensual dissemination of sexual images to third parties is also under-explored.

²⁶ Ibid at p. 7.

²⁷ Ibid at p. 7.

²⁸ Walker, S., Sancu, L., and Temple-Smith, M. (2011) *Sexting and young people: Experts' views*.

²⁹ Ibid at p. 12.

³⁰ Ibid at p. 13.

Discussion Question 1:

a) What images should be captured by the new offence/s?

I am not sure that ‘images’ should be the only thing that is captured by the new offence/s. Using the framework of an ‘image’ reproduces the problem. The ‘problem’ is that the ways which people communicate their sexuality have adapted to changes in ICT faster than the law in NSW. Some people use ICT to create a document that communicates their sexuality. Another person may use the document to cause harm to a person. Some official texts define³¹ the document as a photograph or video. Defining an intimate or invasive image as “*a moving or still image*”³²³³ reproduces the problem of the law not responding to changes in technology. I propose that we ought to re-consider the technologies, beyond those that produce a mere ‘image’, that are presently available to produce a document that one can use to communicate one’s sexuality³⁴.

b) Should the definition include images which are ‘intimate’ but not sexual, including by reference to cultural context?

A nexus between the document and harm must necessarily exist to justify criminalisation. The distribution should be “*contrary to community standards of acceptable conduct*”³⁵ (the community standards test). The context standard should be located in the context of the place and time that the offence occurred and drawn from a fair-minded group of people who possess characteristics of the parties. The standard should not be the standard of people whose characteristics are not similar to the parties, who are located in a different place or time, or are not fair-minded.

Discussion Question 2:

a) How should ‘distribution’ be defined in the new offence/s?

I think that ‘distribution’ should mean the document becomes observable. The distribution should be contrary to the community standards test.

b) Should ‘distribution’ include the sharing and showing of images?

³¹ For example: Law Reform Committee (2013) *Report of the Law Reform Committee for the Inquiry into Sexting*, and the Legal and Constitutional Affairs References Committee (2015) *Report of the Legal and Constitutional Affairs Committee for the Inquiry into the Phenomenon Colloquially referred to as ‘Revenge Porn’*.

³² Section 40 *Summary Offences Act 1966* (Vic).

³³ Section 26A *Summary Offences Act 1953* (SA).

³⁴ For example, 3D printing technology is presently available but not captured by existing legislation. Disseminating a statue of a person’s genitalia to third parties without consent, may cause a person harm.

³⁵ *s. 41 DA Summary Offences Act (1966)* (Vic)

Yes. If this definition was adopted, I think it should read “*sharing and/or showing*”. In any case, distribution must be contrary to the community standards test.

Discussion Question 3:

- a) Should the new offence/s include not only the sharing but also the taking/recording of an intimate image without consent?

Yes. However, I propose that “*taking/recording an intimate image without consent*” should be replaced with “*creating a document that causes harm and is contrary to community standards*”.

Discussion Question 4:

- a) How should the fault element be defined in a new offence of sharing an intimate image without consent?

I think that the fault element should be to intentionally or recklessly make observable, an intimate sexual document, without consent. Where a person intentionally acts to harm another person the full penalty should apply.

- b) Should the offence include an element of recklessness as to whether consent was given?

Yes, I think that you should need affirmative positive consent before you show someone’s intimate sexual document to someone else. I think that for intimate sexual documents, the accused should bear the onus of proving that they had consent to show it to someone else. A half penalty should apply where a person acts recklessly as to either consent or harm. I think the onus of proof should be on the accused, and the standard set at the balance of probabilities.

Discussion Question 5:

- a) Should consent be defined for the purposes of the new offence/s?

I think that affirmative positive consent should be an essential consideration when we are communicating through ICT. What is made explicit must be taken into consideration. There ought to be factors that make a person less capable of consenting.

We should consider what constitutes consent by both what consent is and what consent is not. A person who sells their sexual image to a third party should, by that act, delineate their consent. The model contained in s. 33(5) (a) of the *Criminal Justice and Courts Act (2015)* (UK) may be an informative model to consider.

- b) Should there be a requirement for consent to the sharing of intimate images to be explicit?

Yes.

Discussion Question 6:

- a) Should the new offence include threats to share intimate images?

Yes.

- c) Should 'threats' be defined to include both explicit and implicit threats made by any conduct?

Yes.

- d) Should the offence apply irrespective of whether the intimate images actually exist?

Yes.

Discussion Question 7:

- b) How should the issue of consent be dealt with in relation to images of children?

The issue of consent in relation to images of children should be dealt with by taking the relationship of the parties into account. The 'two calendar year' principle adopted in Victoria that regulates age-appropriate peer-to-peer sexual relations may be an appropriate model to follow. The actual capacity of the party should be a relevant factor to be taken into account. The community standards of acceptable conduct should be taken into account.

- c) Should the legislation distinguish between cases where both parties are minors and cases where the offender is over 18 years and the victim is not?

The Victorian 'two calendar year' principle that regulates age-appropriate peer-to-peer sexual relations may be an appropriate model to follow. The actual capacity of the party should be a relevant factor to be taken into account. The community standards of acceptable conduct should be taken into account.

- d) Should a conviction for the new offence/s be considered relevant for obtaining a working with children check?

Yes.

Discussion Question 8:

- a) What penalty should the new offence/s carry?

I submit that a maximum punishment of imprisonment for 2 years is appropriate for a person convicted of non-consensually distributing an intimate sexual document to a third party. The other offences should use this as a benchmark.

- b) Should the Court be able to order an individual convicted of an offence to take down/remove the images in question? Should a breach of such an order amount to a further offence? What penalty should a breach offence carry?

Yes, a Court should be able to order an individual convicted of an offence to ensure that the document is no longer observable, available, and ceases to be distributed in a timely manner. The breach of such an order should constitute a further offence. I think that the ordinary penalty for breaching a court order should apply. There may be utility in creating a class of injunction applicable to social media organisations that functions on a similar principle.

Discussion Question 9:

- a) Should the new offence include one or more statutory defences?

Yes. The defence contained in s. 33(5) (a) of the *Criminal Justice and Courts Act (2015)* (UK) may be an informative model to consider. ICT firms may also justifiably require a defence be created. An excuse for law enforcement, medical, legal, or scientific purposes may be justifiably required.

Conclusion

I think that the core issues that need to be addressed through law reform are to connect the intimate sexual document produced with the harm that a person suffers when a person makes an intimate sexual document observable to someone else, without affirmative positive consent, in a way that is contrary to the standards of your community. Thank you for the opportunity to contribute.

References

Texts and articles

Crofts, T., Lee, M., McGovern, A., & Milivojevic, S. (2015) *Sexting and Young People*, Palgrave Macmillan, Houndmills, U.K.

Hasinoff, A. (2015) *Sexting Panic: Rethinking Criminalization, Privacy, and Consent*, University of Illinois Press, Chicago, U.S.A.

Patrick, K., Heywood, W., Pitts, M., & Mitchell, A. (2015) *Demographic and behavioural correlates of sexting behaviours among Australian secondary school students*, Sexual Health, Vol 12, pp. 480-487.

Powell, A. & Henry, N. (2016) *Technology-Facilitated Sexual Violence Victimization: Results From an Online Survey of Australian Adults*, Journal of Interpersonal Violence, Vol.1, Iss. 29, pp 1 – 29.

Walker, S., Sanci, L., & Temple-Smith, M. (2011) *Sexting and young people: Experts' views*, Youth Studies Australia, Vol. 30, No. 4, pp. 8-16.

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Official Documents

Law Reform Committee (2013) *Report of the Law Reform Committee for the Inquiry into Sexting*.

Legal and Constitutional Affairs References Committee (2015) *Report of the Legal and Constitutional Affairs Committee for the Inquiry into the Phenomenon Colloquially referred to as 'Revenge Porn'*.

Legislation

Summary Offences Act 1953 (SA)

Summary Offences Act 1966 (Vic)

Criminal Justice and Courts Act (2015) (UK)