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Feminist Interventions in Law Reform: Criminalising Image-Based Sexual Abuse in New South Wales

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Abstract: Feminist legal theorists have had something of an uneasy relationship with law reform. Although feminist academics and lawyers have contributed much to law reform efforts that have sought to improve women's lives, feminists have nonetheless taken divergent positions regarding the extent to which these efforts can truly dismantle the masculinist character of law through law reform projects. This article revisits these tensions and, in so doing, seeks to better understand the extent to which feminists can meaningfully contribute to law reform projects. The criminalisation of image-based sexual abuse in New South Wales (Australia) serves as a case study to examine and re-examine these tensions. In September 2016, the New South Wales government announced that it was proposing to criminalise the distribution of certain images without consent. Following a public consultation process, the government legislated for a new offense directed at the distribution of these images. Although there is certainly not one all-encompassing feminist understanding of image-based sexual abuse, the importance of understanding this practice as abuse and as existing within a culture that normalises and sustains nonconsensual activity nonetheless has been a key feminist concern in agitating for law reform in this area. This article examines the extent to which the legislative response took seriously the harms engendered by image-based sexual abuse.

Keywords: feminist; law reform; image-based sexual abuse; gendered harms

1. Introduction

Feminist interventions in the law have made significant contributions to law reform in a range of areas where the law has historically denied or diminished the reality of women's lived experiences. For instance, feminist agitations have been instrumental in reforming the law around sexual violence—reconfiguring legal notions of consent and understandings of who might plausibly be a victim of sexual violence. Technological advancements regarding the capabilities of mobile phones and similar devices have not only altered and expanded the possibilities for perpetuating sexual violence—these advancements have also necessitated legislative reform to combat what is colloquially[1] understood as 'revenge porn'. Although various jurisdictions have enacted legislation criminalising image-based sexual abuse[2], the appropriate legal response to this behaviour has nonetheless posed

[1] See Senate Legal and Constitutional Affairs References Committee. "Phenomenon Colloquially Referred to as 'Revenge Porn'". Available online: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Reven geporn/Report.

[2] See, e.g., *Criminal Justice and Courts Act 2015* (UK) s 33; *Criminal Code* (Canada) (R.S.C., 1985, c. C-46) s 162.1; *Crimes Act 1961* (NZ) Pt 9A; *Criminal Code* (Qld) s 223; *Summary Offences Act 1966* (Vic) Pt 1, Div 4A; *Summary Offences Act 1953* (SA) Pt 5A; *Criminal Code* (WA) Ch XXVA; *Criminal Code* (NT) Pt VI, Div 7A; *Crimes Act 1900* (ACT) Pt 3A. Tasmania is the only Australian state that has not enacted legislation specifically addressing image-based sexual abuse. At the Federal level, in February

something of a challenge for lawmakers. Acknowledging "the growth in social movements demanding changes to the law to challenge and combat this form of sexual abuse", McGlynn and Rackley have argued that "while many of these new legislative initiatives are broadly welcome, more often than not they represent ad hoc, piecemeal or misplaced interventions that largely fail to understand the problem and, as such, are unable to tackle its root causes" (McGlynn and Rackley 2017, p. 535).

Before we proceed, it is important to make a note about terminology. In this article, we adopt the terminology developed by feminist academics McGlynn and Rackley, who describe this conduct as 'image-based sexual abuse' as opposed to 'revenge porn' (McGlynn and Rackley 2016). As McGlynn and Rackley argue, the conduct is not necessarily motivated by 'revenge' nor is it necessarily 'porn', and it is therefore better described as image-based abuse. What exactly does image-based sexual abuse involve? Definitions vary across jurisdictions and between academics, and this lack of consensus can lead to disparities in the operation of laws (see, e.g., Walker and Sleath 2017, p. 9; Salter and Thomas 2015; Henry and Powell 2015, pp. 401–2). Broadly construed, it encompasses sharing intimate images without consent and includes activities such as 'up skirting' and 'down-blousing' and photoshopping and sharing images. As Henry and Powell explain, this conduct is a gendered phenomenon—research indicates that women and girls are disproportionally victims of offline and online sexual abuse; second, "the impacts of these behaviours are gendered because women and girls may experience adverse impacts due the persistence of outdated myths and expectations surrounding sexual norms" (Henry and Powell 2016, p. 399). As will be discussed in more detail later in the article, understanding this conduct as a gendered, sexualised form of abuse that occurs on a continuum of sexual violence[3] has important consequences in terms of strategising an appropriate legislative response.

In September 2016, the New South Wales (NSW) government announced that it was proposing to criminalise the distribution of certain images without consent. The Department of Justice published a discussion paper that identified particular issues around developing a new offense directed at the distribution of these images[4]. As part of its public consultation process, the Justice Department called for submissions regarding the offence[5]. It received 30 submissions. The submissions were overwhelmingly in favour of legislating to criminalise these kinds of offences, with some notable exceptions that instead made the case that these offences were more appropriately dealt with by the civil law.

In response, the *Crimes Amendment (Intimate Images) Act 2017* (NSW) was enacted as Division 15C of the *Crimes Act 1900* (NSW). The Act introduced three new offence provisions: 1. recording an intimate image without consent (s 91P); 2. distributing an intimate image without consent (s 91Q); and 3. threatening to record or distribute an intimate image (s 91R). Importantly, it also defined consent with regard to these offences. In our view, what is especially significant is the extent to which Nicola Henry, Anastasia Powell and Asher Flynn's[6] joint submission (and that of English academic Clare McGlynn[7]) was instrumental in determining, not only the substance, but also the form, the law

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2016, the Senate Legal and Constitutional Affairs References Committee recommended that the Commonwealth government legislate, in conjunction with state and territory legislation, offences for knowingly or recklessly recording or sharing an intimate image without consent and threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist. In August 2018, the *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018* (Cth) was passed. It amended the *Enhancing Online Safety Act 2015* (Cth), enacting, relevantly, a civil penalty provision in s 44B whereby it is unlawful for a person to post, or make a threat to post, an intimate image of another person.

3 (McGlynn et al. 2017, p. 26).

4 Department of Justice (NSW). "Discussion Paper: The Sharing of Intimate Images without Consent—'Revenge Porn'" (September 2016) Available online: https://www.justice.nsw.gov.au/justicepolicy/Documents/discussion-paper-sharing-intimate-images-14092016.pdf. See also Gotis (2015) account of the legal landscape in New South Wales regarding "revenge porn" and privacy prior to the amendments.

5 See the relevant media release here: https://www.justice.nsw.gov.au/Documents/Media%20Releases/2016/Have-your-say-on-revenge-porn-offence.pdf.

6 Nicola Henry, Anastasia Powell and Asher Flynn. Submission to New South Wales Department of Justice, The Sharing of Images without Consent—"Revenge Porn". 21 October 2016.

7 Clare McGlynn. Submission to New South Wales Department of Justice, *The Sharing of Images without Consent—'Revenge Porn'* (20 October 2016).

took. It has avoided some of the pitfalls of similar legislation in other jurisdictions by providing a reasonably broad definition of 'intimate images' (which includes photoshopped images), 'private parts', 'distribution' and 'consent'.

In this article, we examine the extent to which the legislative response in New South Wales takes seriously the gendered harms engendered by image-based sexual abuse. More broadly, and perhaps ambitiously, we seek to better understand the extent to which feminists are able to meaningfully contribute to law reform projects. Although feminists have done much to uncover the gender biases of the law, feminists' relationship with law has sometimes been an uneasy one—with many feminists taking divergent positions regarding the extent to which we can dismantle the masculinist character of law through law reform projects. This paper seeks to revisit some of these debates, making use of the law reform process regarding criminalising image-based sexual violence in New South Wales as a case study.

We are interested in how the legislature 'speaks' to feminist law reform. For example, how does it respond to gendered concerns and how does it engage with feminist expertise? To explore these concerns, we begin with a discussion about philosophical and practical dimensions (and concerns) regarding feminist interventions[8] in law reform, before examining the specific law reform process in NSW. We consider the scope of the law reform process, the various submissions to the inquiry, parliamentary debates and, of course, finally, the ultimate legislative result. Certainly, the legislative result was praised by those who had engaged with the process (and who had undertaken extensive research regarding image-based sexual abuse informed by *a* feminist perspective)[9]. This praise was in turn deployed by political actors to bolster their law reform efforts. For example, in Attorney-General Mark Speakman's media release, he pointed out that one of "Australia's leading experts in sexual violence, Dr Nicola Henry of RMIT University had given the proposed legislation a tick of approval", describing it as "an excellent model that can serve as an inspiration for other jurisdictions both in Australia and internationally"[10]. Although more space will be devoted to mapping the extent to which certain feminist concerns informed the ultimate legislative response later in the paper, the point here is to emphasise that the legislative response has been well received by feminist academics who participated in the process. This raises important questions that will be salutary for feminist interventions in the future: What are the preconditions for successful engagement with law reform? How were feminist knowledges appropriated by lawmakers? What is it about image-based violence that has captured the attention of lawmakers?

2. Feminist Engagement with Law Reform—Utilising the Master's Tools?

Feminist legal theorists of various persuasions have expressed reservations about the extent to which a masculinist legal system designed by men to the exclusion of women can ever be fully re-appropriated to achieve equality for women (the literature is vast but see for example: MacKinnon 1983, pp. 635–58; Smart 1989; Mossman 1987, pp. 147–68). To say that the law is masculinist is to acknowledge the extent to which legal rules and institutions were made *by* and *for* men in ways that have ignored or diminished women's experiences, agency and authority. Feminist scholars have

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[8] Empirical research tells us that a "strong, autonomous feminist movement is both *substantively* and *statistically* significant as a predictor of government action to redress violence against women". See, e.g., Weldon and Htun's research (Weldon and Htun 2013), in which they analysed policies on violence against women in 70 countries from 1975 to 2005 and which revealed "that countries with the strongest feminist movements tend, other things being equal, to have more comprehensive policies on violence against women than those with weaker or non-existent movements": pp. 235–36. (Emphasis in original).

[9] There will be further space to unpack the differences between and among feminist theorists later in the paper. Our intention here is certainly not to suggest that feminists speak with one voice about this or any other issue. Rather, our intention is to illuminate the extent to which feminists' knowledges and perspectives are taken seriously by those seeking to reform the law. They describe themselves as feminist criminologist and given their conceptualisation of the gendered nature of these offences and the harm engendered by image-based sexual abuse, it seems uncontroversial to describe their perspective as feminist. See (Powell et al. 2018).

[10] (Speakman 2017).

sought to re-imagine and reform the law, exposing myriad ways that purportedly gender-neutral legal concepts were in fact gendered (see e.g., Graycar and Morgan 1990). Formal law reform—understood here[11] as the process of amending legislation "to improve and modernise the law, simplify and consolidate the law, remove inefficiencies and defects in the law repeal laws that are unnecessary and obsolete, and provide improved access to justice"[12]—is one of the means by which feminists academics and activists have sought to disrupt law and legal processes. Yet, as (Thornton 2003, p. 6) observed, feminist scholars have nonetheless sometimes evinced "ambivalence about law for, while it has the potential for liberation, on the one hand, it has been the primary mechanism for legitimating and perpetuating oppressive regimes against women, on the other".

This tension is aptly conveyed by Audre Lorde's now-famous declaration that "the master's tools will never dismantle the master's house" (Lorde 1984, p. 112). Although not writing explicitly about legal formalism (indeed, Lorde's arguments speak to the extent to which feminist theory is exclusionary on the grounds of race, class and sexuality), her argument nonetheless conjures powerful imagery of the unease between law and feminism. Her caution that the master's tools "may allow us to temporarily beat him at his own game, but they will never enable us to bring about genuine change" questions the efficacy of using the tools of the oppressor to challenge, transform and disrupt the status quo. Importantly, for Lorde this perspective is only "threatening to those women who still define the master's house as their only source of support". This gets to the nub of the tensions in feminist engagement in law reform—how much faith should feminists put in law and legal institutions?

For critical theorists, the potential for the law to be utilised for women's advancement is undermined by its complicity in the patriarchal power structure "where legal institutions are seen to participate in marginalising or completely excluding significant social groups" (Davies 2003, p. 168). Davies' article "Legal Theory and Law Reform" provides a useful examination of these tensions, noting the view, on the one hand, famously espoused by (Smart 1989) to "decentre law" (or to not heed law so much power) and acknowledging, on the other hand, the extent which feminists have successfully engaged with the law. (Davies 2003, p. 170) concludes that "it is not possible simply to reject or accept engagement with law", but instead, we should work to "achieve change along at least two fronts, one 'internal' to law and accepting (however conditionally) its power to define and redefine; the second from a position of skepticism and critique of law". Asking how "law promote [sic] feminist change, when it is so universal and total in its expression of patriarchy?", (Davies 2003, p. 170) suggests that what Matsuda's two-pronged strategy illustrates "very powerfully is the tension between theories critical of law's institutionalised power, and the demand for practical legal solutions to social problems":

> There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail as long as privilege rules in the courtroom'. There are times to stand inside the courtroom and say 'this is a nation of laws, laws recognizing fundamental values of rights equality and personhood'.
>
> (Matsuda 1989, p. 8)

Davies therefore brokers something of a compromise, arguing that although "law reform should not be rejected as an emancipatory strategy", it is essential that we "continue to reflect (as feminists have been doing for some time) about the context and broader meanings of law reform, and be pragmatic in

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[11] We note that law reform might be understood as encompassing more than the process of changing law through formal government processes. For example, (Graycar and Morgan 2005, pp. 393–94) acknowledge that litigation (through test cases) represents a possible approach to laws reform, although they note that feminist litigation strategies have been more prevalent in North America than they have been in Australia. Although law reform might take on different forms, it is sufficient for present purposes to acknowledge the extent to which feminists have grappled with contradictions and challenges associated with engaging with the law.

[12] This description is taken from the NSW Law Reform Commission, but we note that the work of law reform agencies is generally similar across jurisdictions. See https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_aboutus/What_we_do.aspx.

our engagements with law as well as idealistic in our imaginings of alternative legal regimes" (2003, p. 171). For Davies then, it is not simply about changing the law through law reform, but also about continuing to interrogate how and what we understand law to be.

While Davies' review of the literature points to philosophical dilemmas about the efficacy of law reform, it also speaks to practical and strategic restraints of law reform projects. Extending this critical work, (Graycar and Morgan 2005), in their article "Law Reform: What's in it for Women?", pondered that vexing and complex question, interrogating the role of research in law reform and the nature (and significance) of the kinds of questions posed by law reform agencies. They argue that these questions matter, because they set the parameters, not only for the problem posed, but also the possible solutions, because, "typically, a law reform commission, or a parliamentary inquiry, will be asked to look at a particular subject in accordance with a defined set of 'terms of reference'" (2005, p. 409). They further (2005, p. 409) explain how law reform processes might themselves reproduce existing legal concepts or categories of evidence and an overdependence on recommendations for legislative change, arguing that "if law reform agencies narrowly circumscribe their work, their considerations might be more inclined to exclude the interests of women". They reason that "the more narrow the terms of reference, the more likely that the existing legal framework will be retained" and that narrow terms of reference "may preclude the possibility of developing new and perhaps more appropriate ways of responding to a legal problem than how the problem or issue was defined in the past when women and other disadvantaged groups had no input into the parameters within which an issue or problem was placed" (2005, p. 409).

The narrative about feminist engagement with law reform is sometimes framed in positive terms, pointing to many gains, notwithstanding the ongoing battlegrounds regarding reproductive freedoms, pay, working conditions, sexual harassment, domestic violence and sexual violence, with respect to which the latter part of the last century saw considerable reforms. Noting "liberalism's much-touted claim of equal treatment before the law", Thornton posits that "it is probably unsurprising that overt inequalities within the law, particularly the criminal law, were the focus of many of the initial campaigns" (2003, p. 6). These reforms, particularly in the law relating to sexual offences were, according to the Australian Law Reform Commission report on the legal response to Family Violence, brought about by a number of factors, including community awareness, not only about the extent of sexual violence, but also the paucity of the legal system's response to it, growing awareness of the "particular problems faced by child sexual assault complainants in the legal system and activism from the women's movement"[13].

A relevant, perhaps more recent, precursor to effective law reform has been acknowledging that, although there may be a 'common character' to the various forms of image-based sexual abuse (McGlynn et al. 2017, pp. 28–29)[14], not all women's experiences of it will be the same. In their paper on image-based sexual abuse, McGlynn, Rackley and Houghton make two arguments: "first, that there is a continuum of practices that together form our concept of image-based sexual abuse; and, secondly, that image-based sexual abuse is on a continuum with other forms of sexual violence" (2017, p. 28). In doing so, they write that "identifying 'common characteristics' must not be at the expense of recognising, and acting on, the differential experience of differently situated women" (2017, p. 27).

This brings us to an important dimension to feminist engagement with law reform—the relationship between theory and practice. More specifically, how is feminist knowledge received and understood by law reform processes? These are important questions to ponder as we consider the preconditions upon which successful feminist interventions in law reform are based. As (Graycar and Morgan 2005, p. 411) note, the law reform processes might plausibly engage with research in myriad ways—"some eschew research altogether and rely instead on a set of assumptions, while others use empirical research as an

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[13] (Australian Law Reform Commission 2010). Note that, like in many of the submissions in relation to image-based sexual abuse, there is a parallel concern: "the particular problems faced by child sexual assault complainants".

[14] (McGlynn et al. 2017, pp. 28–29).

integral part of their work". Drawing on experiences (especially in the reform of family law systems in various jurisdictions), they note the complex (and gendered) ways that such processes might engage with research. Specifically, they note that where law reform bodies rely on empirical research, "they are more likely to reach results responsive to the needs of women" (p. 416), but they do further caution against oversimplifying the role of research. To give context to this caution, they recount that the 1976 example, where the Victorian Law Reform Commission surveyed police to understand how they responded to complaints of rape. The survey found that 50–60% of reported rapes were not accepted as being well-founded—a point Graycar and Morgan (p. 417) argue was perhaps more reflective of police behaviour (and biases) than about the veracity of complainants' accounts.

As we will examine in more detail later in this article, law reform on image-based sexual abuse builds on the legacy of law reform relating to marital rape immunity—a law reform project where there was considerable resistance. The women who sought to reform the laws allowing husbands immunity from being prosecuted for raping their wives also had to address coercion, control and violence perpetrated within the context of pre-existing, intimate relationships. Accordingly, it is relevant to consider how the laws relating to the immunity were changed—especially insofar as that history speaks to the law's relationship with the public and private spheres. Lisa Featherstone's paper "'That's What Being A Woman Is For': Opposition to Marital Rape Law Reform in Late Twentieth-Century Australia" is particularly useful on this topic. Featherstone writes that opposition to law reform was steeped in a "range of divergent ideological viewpoints", including those who claimed that rape law reform "opened up possibilities for 'vindictive wives' to charge unsuspecting husbands" and, on the other hand, "feminists [who] argued that rape law reform could not and would not fix the problems of familial violence" (Featherstone 2017, pp. 87–88). Pointing to the extent to which these reform agendas really demanded a radical reconfiguring of accepted understandings of the harms engendered by sexual violence, Featherstone emphasised that "criminalising rape within marriage offered a fundamental challenge to the way both masculine and familial authority was conceptualised, established and policed", and more pointedly, it "was confronting because it questioned the relationship between protection, the state and the family" (p. 88). She explains that the immunity only began to unravel in the twentieth century with cases of separated spouses, which raised the question: "at what point of a separation would a wife no longer be legally committed to her sexual duties"?

In addition to a report commissioned by the South Australian government, the Mitchell Report, which Featherstone describes as expressing a "moderate feminist agenda" (recommending that cases of sexual violence should be handled in the Family Court rather than in criminal courts), "feminist lawyers were engaged in numerous energetic campaigns for law reform" (p. 90). "Many of the emerging discussions centred on the lack of 'logic' in the law", she writes: "this was a debate based in ideas of reason, logic and rationality" (p. 90). Eventually, in 1980, Victoria criminalised rape in marriage, but only when a separation had occurred (p. 92). Following a 1985 case, known as *Re C*, in which an ex-husband was immune from prosecution on the basis that separation was not fully established, public pressure forced the parliament to abolish the immunity soon thereafter (p. 92).

In their paper on marital rape immunity and sexual assault by male partners more generally, Patricia Easteal and Christine Feerick write that "any [future] reform will be ineffective unless accompanied by widespread education and efforts to increase community perceptions that partner sexual assault is of equal (if not more) seriousness to sexual assault by a stranger, and should be treated by the legal system in the same way" (Easteal and Feerick 2005, p. 207). Smart presciently argued that "any feminist engagement with the law" (1989, p. 164) will require the acknowledgment that "judicial decisions and trials often contravene the hard-won statutory reforms of feminists" (Hunter 2006, p. 737). In the submissions made concerning image-based sexual abuse, similar calls were made for the reforms to initiate—and not merely avoid the need for—appropriate education campaigns on the harms caused by image-based sexual abuse. As we will consider in more detail later in the paper, the history of reforming the law regarding rape in marriage provides an illuminating counterpoint to the experience regarding criminalising image-based sexual abuse. Although there are significant parallels (most

notably that it is the lack of consent that transforms the conduct), the disparate responses reflect the extent to which the harm is *visible* in the public sphere and is quite marked.

Notwithstanding myriad concerns about the limitations and challenges associated with law reform, it of course remains but one strategy feminists have in their toolkit. These observations give us some clues about the circumstances in which feminist engagement with law reform might be more successful. That is, wider terms of reference (and openness to nontraditional legal responses) and input from those impacted by deficiencies in the current legal framework are factors that are seen as having positive implications for ensuring that women's interests are front in centre in law reform projects. Moreover, we know that how feminist knowledge and research might inform law reform processes is neither simple nor linear. While there is evidence to suggest that reform processes that draw on empirical knowledge will be more likely to respond to women's needs and lived experiences, we also know that hierarchies of knowledge are, of course, themselves gendered. We now turn specifically to efforts to criminalise image-based sexual abuse in New South Wales. This examination allows us to consider anew the relationship between theory and practice and to examine it. It remains necessary to interrogate how and what we understand law to be: How do political and legal institutions respond to feminist concerns and demands? What are the necessary preconditions upon which successful feminist intervention in law reform is based? Perhaps, more pointedly, what does this tell us about what the law values and thus seeks to protect?

3. Image-Based Sexual Abuse—A Law Reform Success Story?

In 2016, the NSW government published a discussion paper seeking "feedback on the form of new criminal offences to specifically address the non-consensual sharing of intimate images in NSW"[15]. The purpose of the discussion paper was to "define the scope and form of a new offence (or offences) directed at this behaviour". This came about at a time when there had been widespread attention to law reform in this area—a number of jurisdictions in Australia and elsewhere had engaged in law reform processes. The discussion paper followed an inquiry about remedies for serious invasion of privacy in NSW. The report, *Remedies for the Serious Invasion of Privacy in NSW*, was released on 3 March 2016, and it had expressed concern about the "failure of the criminal law to cover the sharing of intimate images without the subject's consent"[16]. This failure was attributed to the fact that no specific offense existed in NSW, and a number of inquiry participants expressed support for a new criminal offence for distributing intimate images without consent or threatening to do so. The discussion paper sought information to assist it in framing new offences—specifically definition matters, such as the definition of 'intimate image', 'distribution' and 'taking or sharing images without consent' and other matters, such as the taking or sharing images without consent, fault element, consent threats to share intimate images, application of the offence/s to children and young people and appropriate penalties and defences.

There were 30 submissions in all, with submissions from academics, private individuals, Children's Court of NSW, Bar Association of NSW, NSW Department of Family and Community Services, Eastern Suburbs Domestic Violence Network, Gay and Lesbian Rights Lobby (NSW), Juvenile Justice NSW, Kingsford Legal Centre, Law Society of NSW, Legal Aid NSW, Office of the Children's Guardian, Office of the Director of Public Prosecution, Victims services NSW Justice and Western NSW Community Legal Centre, Inc.

Some clear themes emerge from these submissions—they were overwhelmingly in favour of eschewing the language of 'revenge porn' and overwhelmingly in favour of criminalization of these kinds of behaviours. There were two notable exceptions—the Law Society and a joint submission from two criminal law academics, Dr Tyrone Kirchengast and Professor Thomas Crofts, who argued *against*

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[15] Above n 5.
[16] (DP 2016, p. 4).

criminalisation largely on the basis that civil provisions were a more appropriate legislative response in the circumstances[17]. It is perhaps useful here to explain the case *for* criminalisation, or put another way, why feminist scholars[18] have generally argued for criminal rather than civil sanctions in response to image-based sexual abuse. In their submission, Henry, Powell and Flynn (p. 4) argued that civil sanctions are "inherently limited", because they are "ill-suited in their applicability and language", "there are significant costs associated with civil litigation for ordinary Australians who may not have the financial means to bring civil action" and finally, "civil laws arguably privatise the issue and do not serve as an effective deterrent against future behaviours".

As might be expected, the submissions reflected the concerns, experiences and expertise of the individuals and organisations. Here, we are most interested in what Henry et al. proposed, mainly because it so clearly shaped the ultimate legislative response. In his second reading speech for the Crimes Amendment (Intimate Images) Bill 2017 (NSW), the Hon Mark Speakman, Attorney-General, said:

> These offences have been carefully drafted, after a detailed consultation process, to strike the right balance between criminalising unacceptable behaviour and ensuring that innocent activities are not captured.

The resulting law took up many of the 'best practice' suggestions for reform that had been set out in the submissions put forward by feminist academics. In the Legislative Council second reading speech, MP Bronnie Taylor cited Henry, Powell and Flynn's research to demonstrate the prevalence of this abuse:

> A recent report by Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn from RMIT found that one in five survey respondents reported being victims of some kind of image-based abuse. Non-consensual sharing of intimate images is a serious invasion and violation of a person's privacy. It can have severe impacts on the victim, causing the victim shame, embarrassment and humiliation and potentially having adverse consequences for the victim's reputation, family, friends and employment[19].

Taylor further outlined the law reform process and made specific mention to how women's groups, academics and victims had meaningfully informed the process, noting that the bill was "the product of detailed consultation with stakeholders on the appropriate form and scope for the new offences. Consultation included the release of a public discussion paper in late 2016 and submissions from members of the community, government, non-government and legal stakeholders". Almost all submissions expressed strong support for new offences to ensure that victims are protected. Dr Nicola Henry of RMIT University, an expert in image-based abuse, commented that the government's bill 'is an excellent model that can serve as an inspiration for other jurisdictions both in Australia and internationally'. Women's Legal Service NSW commented: "By introducing these laws the New South Wales Government is showing its commitment to addressing domestic and family violence and sexual violence in all its forms". Maria Le Breton, the director of the Women's Domestic Violence Court Advocacy Service NSW, Inc. commented: "This bill identifies the very damaging and criminal nature of these acts and provides greater protection to victims of domestic violence and our community as a whole. This bill enables the justice system to better keep astride of and respond to the evolving techniques employed by perpetrators of violence".

Henry, Powell and Flynn advocated for the law to capture the following conduct[20]:

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[17] Dr Tyrone Kirchengast, Professor Thomas Crofts, Submission to New South Wales Department of Justice, The Sharing of Images without Consent—"Revenge Porn". 21 October 2016.

[18] This is not to suggest that there is *one* essential feminist position about the appropriate response to image-based abuse, but rather to explain the arguments generally mounted by feminists eschewing civil sanctions in favour of criminal sanctions.

[19] New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 21 June 2017, p. 51.

[20] Their suggestions were generally adopted, as we explain in more detail the footnotes that follow.

> ... images created or distributed of sexual assault[21]; images created or distributed that have been obtained from the use of a hidden device to record another person[22]; the distribution of stolen or hacked images from a person's computer or other device[23]; the distribution of photo-shopped images[24]; and the distribution of images obtained consensually in the context of a relationship with another person[25]. We also believe that the threat of distribution of intimate images should be made a criminal offence[26].

Henry et al. were concerned that the law capture, not only wrongs "perpetrated by jilted lovers who distribute or threaten to distribute images to get 'revenge' on their partner", but also "acquaintances or strangers who distribute images in order to coerce, blackmail, humiliate or embarrass another person, or who distribute images for sexual gratification, fun, social notoriety or financial gain". Accordingly, they advocated for the umbrella term "image-based sexual abuse" to be used, as the term "sexual images" is too narrow and ambiguous as to what would constitute a sexual offence (pp. 4–5). This argument was made, the authors being careful to avoid stigmatising the images themselves, rather than their creation.

As to how the proposed legislation ought to be worded, Henry et al. advocated for the following terminology:

> '[I]ntimate' images over 'invasive' or 'sexual' or 'private' images when defined as including nude, semi-nude or sexually explicit images, taking into consideration cultural and community standards not from an ordinary member of the Australian community, but from the perspective of an ordinary member of the victim's community (p. 6).

They argued that the term 'distribution' should "clearly state that distribution can mean sharing and showing and that it is irrelevant whether it is distributed to one person or millions of people" (p. 6). In s 91N(b), the definition is appropriately as wide as they proposed, extending to circumstances where a person makes an intimate image available for viewing or access by another person whether in person or by electronic, digital or any other means.

Another issue Henry et al. addressed was the relevant fault element. In their opinion, "sexual arousal or gratification is very problematic since perpetrators may have a wide diversity of

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[21] Formerly, this conduct would, arguably, only have been captured by the broad offence under s 578C of the *Crimes Act*, namely, publishing an indecent article. Henry, Powell and Flynn (at 4) made the submission that the definition of "indecent" as being "contrary to ordinary standard of respectable people in this community" implies "that it is the image itself that is indecent, not the actual act of distributing the image without consent". An offence for filming and distributing images of sexual assault is still not expressly provided for in Div 15C. Rather, the conduct is captured by the general language of consent including the definitions in s 91O(7)(b) and (c) that a person does not consent if the person consents because the person either "does not have the opportunity to consent because the person is unconscious or asleep" or due to "threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person)". The lack of express reference to sexual assault is troubling for a number of reasons, including that the circumstances must be those "in which a reasonable person would reasonably expect to be afforded privacy". Sexual assault seems incongruous merely with expectations of "privacy" when the crime violates so many other expectations (such as the right to autonomy, inviolability, etc.) While the recording or distribution of images of a sexual assault is a circumstance that would be taken into account in sentencing for offences under Div 10, Sub-div 2, it was not proposed that it be made a "circumstance of aggravation", which would allow a sexual assault (s 61I) to be charged as an aggravated sexual assault (s 61J).

[22] This was, arguably, already criminalised in 2008 by the passage of the *Crimes Amendment (Sexual Offences) Act 2008*, which created Div 15B of the *Crimes Act* ("Voyeurism and related offences"). At p. 4 of their submissions, Henry, Powell and Flynn argue, however, that these laws failed to address circumstances where the Crown could not prove that the images were recorded, inter alia, "for the purposes of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification".

[23] Adopted in s 91Q.

[24] The relevant definition of "intimate image" is "(b) an image that has been altered to appear to show a person's private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy".

[25] Section 91O(4): "A person who consents to the recording or distribution of an image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the recording or distribution of that image or any other image on another occasion".

[26] Section 91R.

motivations and will escape punishment under these circumstances, for instance, if the motivation was to make fun of the victim, or to humiliate them etc." (p. 7). They supported legislation that did "not require that the perpetrator intended to cause harm or distress, as is the case in a variety of international jurisdictions (including New Zealand, the UK and a number of US states)". Consistent with their submissions on these points, the fault element in ss 91P(b) and 91Q(b) is knowledge or recklessness that the person did not consent to the recording or distribution of the image or recklessness as to those facts. Consistent with Henry et al.'s submissions, the legislation extends to cases where the accused was "reckless as to whether consent was given"[27].

4. What Assumptions Underpinned the Parliamentary Debates?

A key concern in the parliamentary debates over the Intimate Images Bill was the increasing concern that children were creating and sharing sexual imagery[28]. "All these offences are subject to a proviso that the prosecution of a person under 16 years of age cannot be commenced without the approval of the Director of Public Prosecutions", the shadow Attorney-General noted: "This reflects the issue of how these laws intersect with the behaviour of children and young people".

Ms Melanie Gibbons, Chair of the Committee on Children and Young People, referred to a recent parliamentary inquiry that considered that "the interests of children and young people must be a significant consideration in relation to policy responses to sexualisation". She said that "[t]he inquiry found that children and young people are engaging in a practice known as sexting and therefore creating and sharing content between themselves perhaps without appreciating the full scope and impact of their actions". A number of parliamentarians raised the concern that children were engaged in 'sexting' and 'cyber bullying'. Ms Hodgkinson, for example, described that the Bill was very important to her 17-year-old daughter's generation where social media could quickly "turn to disaster through an awkward relationship or someone wanting to take revenge against her in some way". Mr Andrew Constance, from the government, also spoke of his children: "As the parent of a 10-year-old girl, I worry about the way she is educated and how the community operates. It is very different now from when I was brought up". Mr Ward said that "[w]ith the use of social media we now see a new medium by which people can pour evil and hatred upon their victims. Once upon a time bullying stopped at the school gate; today any student with a phone can continue to confront harassment and worse". Mr David Mehan, from the opposition, raised the importance of education in schools about "respectful relationships and the safety of sharing content online". He noted, however, that "[e]ducation will not solve the problem and sometimes it is necessary to regulate, and that is why this bill is so important"[29].

The shadow Attorney-General, Mr Lynch's, speech is curious, in that his concern for children's conduct appears to overshadow a key point of the legislation from a feminist perspective, which was to target abuse by prohibiting the *nonconsensual* sharing of intimate images. In his view, "the *most* problematic area concerning sharing intimate images is the practice by children and young people of sexting—that is, the *consensual* creating and sharing of sexually explicit messages or images (emphasis added)". He continued:

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[27] Cf ibid.

[28] At the time the Intimate Images Bill was being debated, the Department of Justice's Joint Select Committee on Sentencing of Child Sexual Assault Offenders was reviewing legislation that would become the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) ("Child Sexual Abuse Act"). The Child Sexual Abuse Act amended, inter alia, s 61HE of the *Crimes Act*, being the definition of consent in relation to sexual offences. It also amended the definitions of "sexual act" relating to children. Relevantly, the Child Sexual Abuse Act also created the exception to the offence in s 91H, providing that a person does not commit an offence of possessing child abuse material if "(a) the possession of the material occurred when the accused person was under the age of 18 years and "(b) a reasonable person would consider the possession of the material by the accused person as acceptable" having regard to a range of factors including "(i) the nature and content of the material".

[29] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 24 May 2017, p. 17.

> The black-letter law approach to this part of the issue in this debate is to say that because such sexting is consensual it is not caught by this bill. I do not think it is quite as simple as that. If the recipient of a sexting image shows it to someone else without consent that certainly is going to be caught by this bill. Additionally, child abuse material offences continue to apply to consensual sexting. In turn, that might have implications for sex offenders registration and Working With Children Checks.

It seems that at least part of what captured lawmaker's attention was a paternalistic concern about the consequences of children 'sexting'—see, for instance, MP Mick Veitch's contributions to the parliamentary debate about the new bill stressing how important this issue is for children:

> This is a very big issue for teenagers, among who the use of social media and smart phones is prevalent. Those of us who have had or still have teenage children, and those of us who are about to have teenage grandchildren, are quite concerned about the way that teenagers in our society use the technology that is available to them. More importantly, I am concerned about their lack of understanding of the repercussions of their actions[30].

This is not to say that all parliamentarians understood this as an issue primarily or only affecting children or teenagers. For example, Ms Aitchison appropriately noted, by contrast, that "[y]oung and older women across New South Wales are in the same situation" concerning intimate-image sexual abuse. However, it does give some insight into how these harms were conceptualised and understood by lawmakers.

The parliamentary debates point to the high level of support for reform and the sense that the reforms were necessary and drawing on academic expertise (most notably Henry et al.'s submission) and the experience in other jurisdictions. The Parliamentary Secretary for Education and the Illawarra and South Coast, Mr Gareth Ward, noted that the "reforms are based on thorough public inquiries at both State and Federal levels that have highlighted the deficiencies in the existing law in this area and the severe impact that this behaviour can have on victims"[31]. The Bill was supported, most clearly, on the advice of the submissions received by the Standing Committee on Law and Justice's inquiry into remedies for the serious invasion of privacy in New South Wales, with many MPs referring to the submissions. As Mr Ward summarised the tenor of the submissions:

> The committee noted that technological advancements have contributed to a rise in this type of invasion of privacy. In particular, the committee heard evidence about the problem of image-based abuse in domestic violence contexts, where distribution or threatened distribution of intimate images is used to harass and control the victim, and may even be used to stop them from seeking help from family, friends or police due to embarrassment and the nature of the images. The committee noted the widespread view among stakeholders that the criminal law in New South Wales was not adequate to respond to the non-consensual sharing of intimate images, and the support for new offences to target this behaviour. There was some law in this area but it did not go as far as necessary or . . . as far as other jurisdictions did.

He stated that the "bill reflects the Government's commitment to deterring and punishing perpetrators of this type of serious invasion of privacy. It also reflects the Government's commitment to strengthen this area of the law and to provide a clear remedy for such a serious invasion of privacy to provide a clear remedy for such a serious invasion of privacy". Furthermore, he addressed what was at stake for victims, in particular victims within abusive relationships:

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[30] New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 21 June 2017, p. 63.
[31] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 24 May 2017, p. 18.

> ... the perpetrator may use intimate images, whether recorded consensually or non-consensually, to harass the victim and punish them for leaving the relationship. The person may distribute the images to the victim's friends, family or even the victim's employer to try to damage the victim's reputation and destroy their credibility. The impact this can have on victims must not be underestimated. In the context of a controlling and abusive relationship and an uneven power dynamic, the effect on a victim's confidence and safety can be profound.

Ms Jenny Aitchison, shadow Minister for the Prevention of Domestic Violence and Sexual Assault, also referred to the submissions to the Standing Committee and noted that the parliament was required to "address criminal trends that are primarily online as quickly and responsively as we deal with other types of crime". She was "particularly concerned about the effect that revenge porn and sexual assault has more widely on our more vulnerable communities: Indigenous Australians, those with a disability and members of the lesbian, gay, bisexual, transgender, intersex and asexual [LGBTQIA] community."

It is also important here to acknowledge the extent to which parliamentarians engaged with this as *a gendered* issue. Many parliamentarians (e.g., Katrina Hodgkinson, Adam Crouch, Julia Finn, Andrew Constance, Tamara Smith, Eleni Petinos, Gareth Ward, Jo Haylen, Adam Searle, David Shoebridge, Natasha McLaren-Jones, Penny Sharpe, Mehreen Farqui) made reference to this as a domestic violence issue. Ms Prue Car, from the opposition, spoke to the gendered harms cause by image-based sexual abuse, saying that the Bill "will finally offer definitive legal recourse to victims of what is commonly known as revenge porn style attacks, *the majority of whom are women*"[32]. She continued: "A situation where a person—typically a man—shares explicit images of a woman without consent in order to humiliate, threaten or traumatise them is no longer acceptable in 2017. It is no longer acceptable that our legal system ignores the victims of this type of cowardly attack". Although there were many examples of parliamentarians reflecting on the gendered nature of this conduct, only one speaker explicitly acknowledged the work *feminists* had done in conceptualising the crime as one of sexual violence rather than of privacy. Ms Penny Sharpe said, "I acknowledge the feminist academics and lawyers who are working in this space every day and bringing to the attention of legislators the impact that this behaviour is having on women in their everyday lives".

5. How Might This Experience Be Salutary for Future Feminist Interventions in Law Reform?

As we have already discussed, the experience in NSW shows how feminist conceptualisations of harm might inform and shape law reform processes. Feminist knowledge was taken seriously—the legislature adopted the recommendations made by Henry, Powell and Flynn, and their "tick of approval" was referenced by parliamentarians. Crucially though, for the most part, this was done without explicitly describing the knowledge *as feminist knowledge*. As we explain in more detail in what follows, at least part of the success of this law reform project is the extent to which it demonstrated the importance of timely empirical research that might be persuasively deployed in law reform contexts. Moreover, the high level of support for these reforms can be contrasted to other law reform efforts that have been far less effective (at least in terms of generating widespread political support). We argue that although the lack of discernible resistance might be attributed to growing community and cultural awareness, it likely also reflects the *visibility* of the harm engendered by image-based abuse and the extent to which concerns about children and sexting meant that the issue avoided being cast as explicitly or only about protecting women or about their bodily autonomy.

During the parliamentary debates, Mr Ward noted that the Bill was an instance of both sides working together[33]. Why the *Crimes Amendment (Intimate Images) Act 2017* (NSW) passed with cross-party support is due to several factors, the first of which, we suggest, is that, while law reforms

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[32] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 30 May 2017, p. 9 (emphasis added).
[33] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 24 May 2017, p. 17.

that support feminist concerns are often opposed by the political and religious right (for example, legalising abortion), the right is ideologically opposed to pornography even before the issue of consent is addressed. Young girls are blamed prospectively for their abuse—told never to allow sexual images to be taken of them in the first place; they are advised not to *let* themselves be victimised. Simultaneously, whereas the political left often advocates for the position that society is over-criminalised, Aya Gruber has noted that "feminism has become increasingly identified with crime control and the prosecution of men who commit offenses against women" (Gruber 2009, p. 582). Accordingly, feminists increasingly seek law reform in the form of an expansion of the criminal calendar. Furthermore, many feminists have also taken a principled stance against pornography generally. Hänel and Mikkola explain that feminists do not oppose pornography because of its sexual content or putative offensiveness, however (Hänel and Mikkola 2017, p. 2)[34]:

> Championing the antipornography stance, Catharine MacKinnon and Andrea Dworkin advanced a well-known view of pornography as the violation of women's civil rights (Dworkin 1981; MacKinnon 1987, 1989, 1993). Specifically, pornography is the graphic sexually explicit subordination of women through pictures and words that also includes women, for example, dehumanized as sexual objects, enjoying humiliation or pain, physically hurt, presented in positions of sexual submission or degradation, or reduced to body parts. On such feminist views, pornography is about sexually explicit materials that harm women insofar as they play a crucial role in the exploitation and oppression of women (e.g., Itzin 1992; Lederer 1980; Saul 2003, chp. 3).

In the present case, both sides of the political spectrum were therefore aligned on the core issue of criminalising a new range of conduct—creating or distributing pornographic/sexual/abusive images—but approached the issue from different ideological perspectives. In fact, the parliamentary debates demonstrate the way in which parliamentarians were able to speak in support of the reform agenda, all the while framing the impetus for the law and the problems it sought to address in line with their own viewpoints.

Secondly, the issue of image-based sexual abuse is far-reaching within society. Henry, Howell and Flynn's survey of 3000 Australians found that one in 10 Australians had a nude or semi-nude image of them distributed online or sent to others without their permission (Henry et al. 2017, p. 5). While the reforms were urgently needed to address the psychological harm caused by image-based sexual abuse, the rapid development and ubiquity of mobile phones, cameras and social media created the kind of 'panic' that motivates parliaments into action on a supposedly 'new' issue. As Alyse Dickson explains (Dickson 2016, p. 45):

> In the past, distributing an intimate image required physical effort and considerable time. It involved physically developing films, photocopying, sending by post or distributing by hand to the public. Today, intimate images can be distributed easily and instantaneously by text messages, email or by uploading the images to social media, blogs or dedicated revenge pornography websites. The global nature of the internet means that there are potentially billions of people who can access, view and redistribute images made available online. These advances have given rise to the 'revenge porn' phenomenon.

These technological advancements mean that private images now enter the public sphere in ways that were once imaginable. This is significant because the harm is *visible* in the public sphere—it is tangible in a way that other forms of sexual abuse are not.

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[34] There is not space here to engage in these debates, but, for the present, it is sufficient to note that an antipornography stance is well established within feminist discourse.

Thirdly, the academic literature in this area following *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236 increasingly raised the prospect of using civil litigation to address the harms engendered by image-based sexual abuse. We would suggest that this discussion led the legislature to introduce criminal penalties for two, perhaps contradictory, reasons: (1) a realisation that the civil remedies were inadequate, but also (2) a desire to keep 'personal' litigation out of the civil courts, which are often seen as best designed to address commercial disputes[35].

Fourthly, the issue was much discussed in the media prior to the reforms being made, putting pressure on the legislature to respond. High-profile cases such as the hacking of Jennifer Lawrence, Rihanna and Kate Upton raised the issue internationally as one which parliaments needed to address quickly. As Henry, Powell and Flynn pointed out in their paper, two high-profile cases in particular helped to raise awareness of the nonconsensual distribution of nude or sexual images (2019, p. 1):

> In 2014, hundreds of private, intimate images of celebrities were posted to a US-based website in exchange for bitcoins, a digital currency used to facilitate online transactions. The'images had been stolen via a breach of Apple's iCloud (an online platform for backing up photos from Mac devices) and were later disseminated by traders and sellers through social media sites including Twitter, Tumblr and Reddit. Likewise, in June 2015, over 400 nude images of South Australian women and girls were published on a US-based noticeboard site, without the consent of those depicted. The images had been uploaded by partners, ex-partners or hackers and made available for download.

Finally, what would a principled opposition to the reforms have looked like? As far as we can tell it is limited to the *form*[36] of the offence, that is, how it is defined, its scope and other technical legal arguments such as the relevant fault element. However, there was little *substantive* opposition to the core issue: that recording and distributing intimate issues without someone's consent is abusive and that it is done to humiliate the subject of those images. We concede that, of course, the extent to which the resulting law took on board feminist understandings of autonomy, violence and dignity likely reflects significant cultural change in how the community responds to and understands sexual violence.

Certainly, the lack of discernible resistance[37] can be contrasted to the earlier noted example of the marital rape immunity, which demonstrates how deeply embedded notions of men's ownership of women's bodies were. Of course, it might be that this is explained by growing awareness of the realities of intimate partner violence over the intervening decades. Although this might tell part of the story, in our view, the lack of discernible resistance provides important insights about precursors for effective feminist interventions in the law. With marital rape immunity and image-based sexual abuse law reforms, the focus in each case is usually determined by what happens when a relationship breaks down. In each case, legislatures have been asked to state with authority that consent is not irrevocable and that men's cultural assumptions of their ownership over women are invalid. In this way, we can see that feminist theoretical knowledge was crucial to shifting accepted understandings of rape, contested as these understandings might be. Image-based abuse is reminiscent of this issue (given that legality hinges on consent) and that it is about existing interpersonal relationships, but the criminalisation of image-based sexual abuse does not seem to have been resisted in the same way. In each case, the offences play out in the public sphere in markedly different ways. In the case of rape in marriage, the conduct (usually) happens in private, and therefore, the state does not *see* the harm. Or, to put it more baldly, the state has not wanted to see the harm, whereas, with image-based abuse,

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[35] Consistent with the legislature's intention to limit tort claims generally: see the Ipp Report (Australia 2002).

[36] See for example the submission made by academics Dr Tyrone Kirchengast and Professor Thomas Crofts, who expressed significant concerns about the development of specific criminal offences (arguing that more research was needed regarding prosecution rates in jurisdictions that had already criminalised image-based abuse).

[37] Although it is beyond the scope of this article, the lack of discernible resistance might also be contrasted to recent and ongoing feminist law reform initiatives (in the same jurisdiction), such as legalising abortion and redefining consent in sexual assault cases, which have been much more contentious.

what are essentially private images are shared in the public domain. The harms of image-based abuse are therefore visible, because what is meant to be private is rendered visible by its (nonconsensual) entry into the public sphere.

In part then, the subject matter of this law reform project lends itself to widespread support as lawmakers were especially able to project their own concerns and ideological perspectives. Noting the general fiction about parliamentary intent—that is, that there is but one thread of intention to be discerned—we note that this issue is one where ideological adversaries might readily support law reform but for wildly disparate reasons. For example, some lawmakers sought to address (and were motivated by concerns about) children's "sexting", whereas other lawmakers sought to address concerns about nonconsensual photo sharing. Of course, understanding the issue as one of child protection (which of course is at least part of the issue), means that it is less disruptive than law reform that is explicitly about protecting women or about their bodily autonomy.

6. Conclusions

It is not especially surprising that existing legal frameworks either completely failed to provide legal redress for victims of these wrongs or failed to adequately capture the (gendered) nature of the harms engendered by distributing (or threatening to distribute) sexual imagery without consent. Nor is it surprising that feminist lawyers and academics have sought to contribute to law reform initiatives. What is perhaps more surprising is the extent to which feminist knowledges were privileged in this process and effectively provided a blueprint for reform. This area of law reform has, it seems, has been led by two groups that have worked together: first, victims who have spoken out against their abuse and, secondly, feminist lawyers and academics who have researched, reported on and/or described the experiences of victims. To put it bluntly—why did the feminist account of, not only the nature of the harms engendered by image-based sexual abuse, but also the appropriate legislative response ultimately hold sway in New South Wales? Certainly, this represents something of a success story when it comes to feminist engagement with law reform processes. Of course, a significant component of any law reform project (and this has been an area of particular concern for feminists[38]) comes about at the implementation stage. This, of course, speaks to what (Hunter 2006, p. 737). terms the "implementation problem", where she argued, quoting Betsy Stanko, "unfortunately, once legislation is passed, it is mistakenly credited with solving the problem". Certainly, this was an issue that some parliamentarians emphasized in the debates about this Bill, but it is perhaps too early to assess how effective the new laws have been.

What does this specific project of feminist law reform contribute to feminist legal scholarship globally? What are the lessons feminist legal scholars might take from project? We are mindful that contingencies of time, space and culture mean that what might be effective in one law reform initiative might not work in another reform project or another jurisdiction. However, interrogating why feminists were so effective in setting the legislative agenda will be salutary for future law reform projects. What we have is an issue that captured lawmakers attention—meaning that there was political will to engage in reform, and as we have argued, the particular subject matter created a certain kind of ideological malleability whereby parliamentarians were able to conceptualise the issue (and associated harms) in disparate ways while still supporting the reform agenda. That being said, this point should not diminish the reality that feminist scholars were able to set the reform agenda. This was possible, because feminist academics were very well placed to participate meaningfully in this process. Because reform had been afoot in other jurisdictions for some time this meant that feminist academics were able to provide evidence-based expertise about the path forward—in many cases pointing to the deficiencies in approaches in other jurisdictions, especially in defining consent. The fact that academics were able

[38] See for e.g., Hunter quoted earlier.

to point to *empirical* research that informed their submissions further substantiated the feminist case for reform as it demonstrated the prevalence of image-based sexual abuse.

Finally, it also bears emphasising that as much as an understanding and appreciation of the gendered nature of these offences (particularly in its connection to domestic violence) punctuated the parliamentary debates (and indeed was reflected in how notions of consent were framed in the resulting legislation), for the most part, this framing avoided explicit feminist labelling. That is, even where parliamentarians drew upon *feminist* conceptualisations of harm and the extent to which image-based sexual abuse exists on a continuum of sexual violence related to domestic violence, for the most part, they avoided explicitly describing it as such. Perhaps, this gets to the nub of the issue in seeking to better understand the preconditions necessary for successful engagement with law reform—the criminalisation of image-based abuse avoided being characterised and therefore derided as only *a* feminist issue. This tells us much about what the law values and thus seeks to protect, insofar as it demonstrates that the law appears to be more readily mobilised when the subject matter is not so explicitly about protecting women or about their bodily autonomy.

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Criminal Code (NT) Pt VI, Div 7A
Criminal Code (Qld) s 223

Criminal Code (WA) Ch XXVA
Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW)
Criminal Justice and Courts Act 2015 (UK) ch 2, ss 33-35
Enhancing Online Safety Act 2015 (Cth) s 44B
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Summary Offences (Filming Offences) Amendment Act 2013 (SA)
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Summary Offences Act 1966 (Vic) Pt 1, Div 4A