Sexual Violence and Harassment in the Digital Age

Nicola Henry (La Trobe University) and Anastasia Powell (RMIT University)
Funding for this project is from the Australian Research Council
Presentation to NSW Women’s Legal Services: 24 April 2015

Introduction

I’d first like to acknowledge the Aboriginal owners of the land on which we meet, and pay my respects to their Elders past and present, and also to all Aboriginal and Torres Strait Islander Peoples here today. I’d also like to thank the organisers of this event, Chloe Wyatt and Helen Campbell, for inviting me here today to talk about technology-facilitated abuse and harassment.

So let me start by briefly telling you about the Australian Research Council Discovery project that I am currently doing with my colleague Dr Anastasia Powell from RMIT University in Melbourne. We are investigating the scope, nature and prevalence of what we call “technology-facilitated sexual violence and harassment”. While of course we are very interested in the ways in which technologies can empower women to seek change or seek justice for violence, what we are focusing on in this project is the ways in which these technologies are being used as a tool for the perpetration of domestic violence and sexual violence – for example, the recording and/or distribution of intimate or sexual imagery without consent; cyberstalking and online sexual harassment; the use of online forums, websites and smart-phone apps to set-up a sexual assault or rape; and online forms of gender-based hate speech.

The project comprises of four stages:

(1) A comparative national and international legislative and policy analysis.
(2) Interviews with key stakeholders.
(3) A survey to determine the prevalence and nature of these behaviours and harms (the survey has now closed and we have over 3000 respondents from
the UK and over 3000 from Australia – unfortunately this data is not available yet for release).

(4) Interviews with victims (from June/July this year).

As many or most of you will know, in the past few years there has been growing public, legal and scholarly attention to the use of mobile and online technologies as tools to blackmail, control, manipulate, coerce, harass, humiliate and violate women. We think it’s useful to think about these behaviours on a continuum of violence.

A continuum of violence
According to Liz Kelly (1987: 1), the three themes that run through her book on surviving sexual violence are: “that most women have experienced sexual violence in their lives; that there is a range of male behaviour that women experience as abusive; and that sexual violence occurs in the context of men’s power and women’s resistance”. Kelly’s concept of a “continuum of violence” recognises the commonalities between different forms of violence and the causes and consequences of structural gender inequality. So when we speak of “sexual violence” – like Kelly, we are using this more broadly to capture a range of behaviours such as the threat of violence; sexual harassment; stalking; sexual assault and coercive sex; rape; domestic violence; hate speech and a range of other behaviours.

Although we have six categories in our typology, today due to time, I will only focus on two examples from our study – first, revenge porn and second, stalking.

“Revenge porn”: The unauthorised creation and/or distribution of intimate images without consent
Let’s start with what is currently referred to as “revenge porn” (also known as “non-consensual sexting” or “non-consensual pornography”). These behaviours include:

- Someone taking a image/video without the other person’s knowledge or consent,
- The distribution of sexual images where there was original consent to take the image, but not to distribute.
Revenge porn can include a diverse group of offenders:

- those who distribute (or threaten to distribute) the images to get “revenge” on a partner/ex-partner;
- those who distribute (or threaten to distribute) images in order to humiliate/embarrass another person;
- those who distribute images to gain social status among peers;
- those who distribute (or threaten to distribute) images to obtain monetary benefits.

The methods of distribution include: text message or email to family, friends, colleagues employers or strangers; uploads to revenge pornography or mainstream pornography websites; or the uploading of images onto Facebook, Twitter, YouTube and other social media sites.

DVRC/Women’s Legal Services NSW/WESNET Survey: 35% of respondents said their clients “often” mentioned perpetrators had threatened to distribute photos or videos of them.

Currently, Victoria is the only state or territory in Australia that has introduced a sexting or “revenge porn” offence that makes it illegal to maliciously distribute, or threaten to distribute, intimate images of another person without their consent (s. 41DA and s. 41DB of the Summary Offences Act 1966 (Vic)).1 The focus of this legislation is on the distribution, or the threat of distribution, of intimate images. For instance, where a person may have consented to the creation of the original image in the first place, but not its distribution, so a person in an intimate relationship might take a picture or video of themselves and send it to their partner who then later on distributes the image (or threatens to do so); or it can include when a person covertly

---

1 “Distribution” includes publishing, exhibiting, communicating, sending, supplying or transmitting to another person – so in other words, making available the images to others, regardless of whether it is a particular person or not. An “intimate” image includes photographs or videos that depict another person engaged in a sexual act or in a “sexual” manner or context, or the genital or anal region of a person (bare or covered by underwear), including female breasts. See Summary Offences Act 1966 (Vic): [http://www.austlii.edu.au/au/legis/vic/consol_act/soa1966189/](http://www.austlii.edu.au/au/legis/vic/consol_act/soa1966189/). Other Australia states and territories are considering introducing similar legislation. In early 2015, for instance, the Queensland Legal Affairs and Community Safety Committee recommended the Queensland government consider the introduction of a summary offence of intentionally distributing intimate images or video of a person without consent.
films themselves having sex with another person and then broadcasts this live to their friends in another room.

The Victorian legislation defines community standards of acceptable conduct in terms of having regard to:

- the nature and content of the image;
- the circumstances in which the image was captured and distributed;
- any circumstances of the person depicted in the image, such as their age or intellectual capacity; and
- the degree to which the distribution affects the privacy of that person (s. 40).

Although the accused must intentionally distribute or threaten to distribute an intimate image of another person, there is no requirement that they have the intent to cause distress or harm.

Internationally, a number of states have criminalised or propose to criminalise the non-consensual distribution of intimate images:

- 2009: Philippines: “photo and video voyeurism”; maximum sentence 7 years (and no less than 3 years).
- 2014: Israel: maximum sentence 5 years (and classification of perpetrator as a sex offender).
- 2014: Canada: maximum sentence 5 years.
- 2014: Japan: maximum sentence 3 years.
- 2014: UK (England and Wales – Scotland and Wales currently considering enacting similar laws): maximum sentence 2 years (perpetrators must have intention of causing distress; does not include threat to distribute).

In the United States, to date 17 states have passed some form of revenge porn legislation. In some states, the intent to harm, harass, coerce, threaten, intimidate or

---

2 States that have passed legislation include: Alaska, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Maryland, New Jersey, New Mexico, Pennsylvania, Texas, Utah, Virginia, and
cause emotional distress must be proved (as in the UK legislation). In other states, the laws only apply if the images were taken without the consent and/or knowledge of the person, which means “selfies” are not included.

There have of course been interesting developments beyond the legal realm. Many of you will be aware that in March 2015, Twitter became the latest online platform to ban the posting of sexually explicit images of a person without their consent. Reddit announced a similar ban some months earlier. These developments are further reminders of the importance of action beyond the law to address the growing problem of technology-facilitated sexual violence and harassment.

**Online sexual harassment and cyberstalking**

I now want to now focus on stalking as the second and final example of technology-facilitated sexual violence and harassment that I’ll be drawing on today. This category in our typology captures the abusive, manipulative and coercive behaviours of domestic or family violence type contexts, where a partner or ex-partner posts offensive comments on social media sites; or where there is a barrage of text messages or emails; or where GPS tracking has been installed onto mobile phones, or software downloaded that gives perpetrators access to computers and internet browser history.

DVRC/Women’s Legal Services NSW/WESNET Survey: 98% survey respondents had clients who had experienced technology-facilitated stalking and abuse.

In relation to stalking offences, the criminal law in most jurisdictions requires a “course of action” or repeated bullying behaviours. For example, in Victoria, the *Crimes Act 1958* defines stalking as a person “engaging in a course of conduct which causes apprehension or fear” and includes any of the following behaviours:

- contacting the victim by any means;
- publishing on the internet or by email, or other electronic communication to any person or statement or other material about the victim;

Wisconsin. There are a number of states that have bills pending in legislation. For an update on US legislation, see [http://www.cagoldberglaw.com/states-with-revenge-porn-laws](http://www.cagoldberglaw.com/states-with-revenge-porn-laws)
• tracing the victim through electronic communication;
• keeping the victim under surveillance; and
• a number of other acts.

The “course of conduct” requirement is problematic as it potentially excludes situations where there has been a “one-off” form of stalking. The perpetrator must intend to cause mental or physical harm or the conduct must cause apprehension or fear – but there may be some behaviours/impacts that are not captured by this legislation. There are also cross-jurisdictional issues, and instances where the perpetrator might not be personally known to the victim. In addition, there may be issues of proof – e.g. might be easier to do an intervention order or a breach of an intervention order rather than make a stalking charge.

DRVRC (2014) SmartSafe Report: some perpetrators have “almost constant access” to their victims.

Technology is rapidly changing – Cindy Southworth (US expert) calls this “high-tech” stalking.

Such behaviours reflect the failure of perpetrators and society to take women’s right to sexual autonomy and “digital citizenship” seriously.

**Conclusion**

As international jurisdictions introduce legislation to address technology-facilitated sexual violence and harassment, it will be interesting to see how other Australian states and territories tackle this issue. But there are continuing questions about other laws that might apply in such situations – for instance, using a carriage service to menace, harass or cause offence; indecency; blackmail; unlawful surveillance; anti-discrimination legislation, as well as privacy, copyright and defamation legislation under the civil law.

It is great to see that at the latest COAG meeting on 17 April, Australia’s political leaders have promised that by the end of 2015 we will have a national domestic
violence order scheme that recognises DVOs and enforces them in any state or territory, and that COAG will “consider strategies” to tackle the increased use of technology-facilitated abuse against women and to ensure women have adequate legal protections against this form of abuse.

I want to end on what I see are the key challenges in the violence against women space. The first is how to prevent violence before it occurs – so educational programs around respectful relationships or gender or sexuality must, in addition to tackling gender dichotomies and inequalities, also look at ethical digital interactions. The second most important issue after primary prevention is that we must think very carefully about how to respond to violence and injustice after it happens. Judith Butler (2005), for example, asks “how should justice be done?” and “what just do we owe to others?”. These two key challenges demand we implement fundamental structural changes.