

**Contact Details**

**Name**

Nicola Henry

**Address**

[REDACTED]

**Email address**

[REDACTED]

**Organisation Details**

**Is this submission presented on behalf of an organisation:**

Yes

**Name of organisation**

RMIT University

**Position in organisation**

Associate Professor & Vice-Chancellor's Principal Research Fellow

**Nature of submission: public or confidential**

**I have read the information about this Project concerning publication, confidentiality, and privacy obligations at**

Yes

**I would like my submission to be treated as confidential**

No

**Human rights and technology**

**1. What types of technology raise particular human rights concerns? Which human rights are particularly implicated?**

The use of digital technologies as a tool of harassment, abuse and degradation (or also known as "technology-facilitated abuse") raises a number of human rights concerns, including the right to privacy, freedom of expression, freedom from physical harm, discrimination and degrading treatment, the right to bodily integrity, and the right to sexual expression.

Technology-facilitated abuse (TFA) includes a diverse set of behaviours (some within the context of sexual violence, or domestic and family violence), including:

- Cyberstalking;
- Location monitoring and surveillance (including the use of drones);
- Computer hacking;
- Image-based abuse (including the non-consensual taking, distributing and threats to distribute nude or sexual images - including the use of artificial intelligence to create fake pornography or "deep fakes");
- Impersonation;
- Online sexual harassment;
- Image-based harassment (e.g. receiving unsolicited images);
- Online threats; and
- Gender-based hate speech (see Powell & Henry 2017; see also Citron 2014).

In particular, TFA raises concerns about the rights to gender equality and sexuality, since the targets of this abuse are often women, children or non-heterosexual men. According to the global non-governmental organisation, International Planned Parenthood Federation (IPPF) Declaration, sexual rights are a component of human rights: "Sexuality is a natural and precious aspect of life, an essential and fundamental part of our humanity. For people to attain the highest standard of health, they must first be empowered to exercise choice in their sexual and reproductive lives; they must feel confident and safe in expressing their own sexual identity... Sexual rights are ... an evolving set of entitlements related to sexuality that contribute to the freedom, equality and dignity of all people ..."

The right to bodily integrity as a fundamental element of human dignity and freedom, was recognised at the First World Conference on Women in Mexico City in 1975. It was further elaborated on at the Fourth World Conference on Women in Beijing in 1995 and the Platform for Action: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences (Article 96, emphasis added)".

What is important to note here is that gender-based violence, whether that be sexual violence or domestic violence, starts with the unequal treatment on the basis of a socially constructed gender hierarchy. There is consensus among multiple organisations, such as the United Nations, European Commission,

World Bank and World Health Organization, that gender inequality is one of the key drivers of violence against women (Our Watch, 2015). In fact, gender inequality is both a cause and an effect of technology-facilitated abuse. For example, in relation to image-based sexual abuse (the non-consensual taking or sharing, threats to share, nude or sexual images) It is a cause because the distribution of intimate images, particularly (although not exclusively) of both cis and trans women, has the power to evoke shame, humiliation and vulnerability on the basis of problematic norms, values and beliefs about gender and sexuality – which is essentially a double standard of sexuality. But more over, these societal attitudes are maintained and perpetuated through the victim blaming discourses that are further produced and reproduced by media, legal, and other institutional responses. Dignity then entails not only the right to privacy, but to sexuality and the enjoyment of full respect of sexual integrity and autonomy within an equitable and non-hierarchical social system.

**2. Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for these groups of people (such as children and young people; older people; women and girls; LGBTI people; people of culturally and linguistically diverse backgrounds; Aboriginal and Torres Strait Islander peoples)?**

Over the past decade, there has been growing attention to different forms of interpersonal violence through the use of digital communications technologies. In a Pew Research Center study (2014), 40% of US adult Internet users had experienced some kind of digital abuse and harassment. Although the rates were similar for men and women, rates were much higher for young adults, and women in particular reported significantly more online sexual harassment than men. In another study of over 5,000 Australian and UK respondents, Powell and Henry (2017) found that 60% of respondents reported at least one experience of digital harassment or abuse in their lifetime, with young women reporting significantly more online sexual harassment.

Overall, there is a growing body of empirical research on the role of technology in domestic violence (see e.g. Burke et al. 2011; Dimond, Fiesler & Bruckman 2011; Stonard et al. 2014; Woodlock 2016; Zweig et al. 2013); child exploitation (see e.g. Mitchell et al. 2012; Westlake & Bouchard 2016); cyberstalking (see e.g. Sheridan & Grant 2007; Spitzberg & Hoobler 2002); and sexual violence and harassment (see e.g. Bates 2016; Gámez-Guadix et al. 2015; Powell & Henry 2017). In particular, domestic violence service providers have noted a rapid

increase in the number of perpetrators using technology as a tool of abuse, control and harassment (Henry & Powell 2015). For instance, according to an Australian study on technology in the context of domestic violence, 98% of domestic violence caseworkers said that their clients had experienced at least one form of TFA by a partner or former partner (Woodlock 2015).

In research on image-based abuse with over 4,000 Australian participants (see Henry, Powell & Flynn 2017; OeSC 2017), we found victimisation to be much higher among women, young people, culturally and linguistically diverse (CALD) groups, Aboriginal and Torres Strait Islanders, people with disabilities, and lesbian, bisexual and gay people.

While more research needs to investigate the prevalence of other forms of technology-facilitated abuse among vulnerable or marginalised groups, qualitative research to date suggests that there are multiple barriers for seeking help and assistance, whether that is through the formal criminal justice system, or through victim support networks (see OeSC 2018). For example, CALD women face numerous barriers to reporting violence and seeking help owing to uncertain citizenship status, multi-perpetrator violence, social isolation, partner-dependency, language barriers, knowledge/understanding of norms and laws, and cultural norms (COAG 2016; Morgan & Chadwick 2009; Rees & Pease 2007; Vaughan et al 2015).

## **Reinventing regulation and oversight for new technologies**

### **a) What gaps, if any, are there in this area of Australian law?**

Australian law plays an important role in protecting human rights in the development, use and application of new technologies, however, there are gaps that need addressing.

In relation to receiving repeated or unwanted sexual requests and/or sexual images (e.g. unsolicited "d\*ck pics") - or "online sexual harassment" - there are limitations in both Australian civil and criminal laws in that only in some circumstances will it be either a criminal offence or an unlawful act; for example, if the act was an offence under "child pornography" laws, or if the act took place in the workplace or in some other specified area of public life (e.g. education) where it could be classified as sexual harassment, or if the act constituted a form of criminal harassment or stalking. While there is also the telecommunications law (using a carriage service to menace, harass or cause offence), it may have limited application in such cases.

Stalking laws in all Australian jurisdictions are also limited. For instance, stalking is a criminal offence but only in some situations because a course of conduct is required (that is, repeated behaviours over time) and the act or acts must be intrusive or unwanted and threatened harm or caused fear of harm to victims. The problem is that when a victim is unaware that she is being tracked or surveilled (e.g. GPS tracking, use of drone technology etc), then such laws might not apply if fear of harm or course of conduct cannot be established.

There are also gaps in protecting against hate speech on the basis of gender and sexuality under Australian civil and criminal laws. Gender-based hate speech is not a criminal offence unless it constitutes a form of criminal harassment or stalking. It is also not unlawful unless it can be made to fit within sexual harassment or defamation laws.

And finally, there are gaps in the laws relating to image-based sexual abuse. In August 2018, the Australian government introduced new criminal penalties and a civil penalty scheme at the federal level, however, some Australian jurisdictions do not have specific criminal offences to address this issue.

In addition to criminal and civil laws, in Australia there is no national charter of human rights and only very weak protections against human rights violations contained within the Australian Constitution. Compliance with international human rights treaties (such as the ICCPR and IESCR) remain limited in Australia because they are not enacted as part of Australian law.

Although law reform is important for addressing the problem of technology-facilitated abuse because new laws demonstrate that such behaviours are wrong and abhorrent, as well as holding perpetrators to account, the law is only one mechanism to address this issue. What is needed is attention and resources to preventing such acts from happening in the first place. Primary prevention efforts must include education, and changing problematic societal beliefs, attitudes and behaviours around gender and sexuality, and other markers of difference (race, class, ethnicity, age, ability etc).

#### **4. In addition to legislation, how should the Australian Government, the private sector and others protect and promote human rights in the development of new technology?**

Specific criminal offences are important to punishing perpetrators and providing justice to victims. Formal human rights protections are also very important for providing a benchmark. However, legal responses may not prevent the scourge of TFA, including the spread of images or information online or via mobile devices. There are also limitations relating to police apprehension, such as

scarce resources for forensic investigations, evidentiary limitations, as well as restrictions on prosecuting beyond geographical borders. It is therefore important that other tools and mechanisms be designed to tackle the problem of TFA.

There have been a number of initiatives at the state and non-state level recently among law reform bodies, government agencies, search engines, social media services and other Internet intermediaries which have, over the past few years, crafted creative justice approaches to addressing the problem of TFA. One example of a victim-support development is the Australian Office of the eSafety Commissioner's (OeSC) online image-based abuse reporting portal, which went live in October 2017. The portal provides assistance, support and advice for victims, such as helping them to get images removed from online sites, guidance on how to communicate with someone who has intimate images in their possession, advice on collecting evidence, and advice on the applicable laws in their jurisdiction. Victims are also able to report directly through the portal, prompting the OeSC to work directly with social media providers, websites and search engines to help facilitate the removal of those images.

Internet intermediaries also play an important role in responding to and preventing TFA. Currently there is growing attention to legal liability and social responsibility of Internet or digital intermediaries more broadly, such as social media services and search engines (see e.g. Gillespie 2015; 2016; forthcoming; Kreimer 2006; MacKinnon et al. 2014; Pasquale 2010). Many Internet companies, social media and other website providers have put policies and reporting mechanisms in place to combat TFA. For instance, in 2015, Microsoft and Google announced new reporting options so that victims can request to have intimate content involving them excluded from Bing or Google searches. Other platforms, such as Facebook, Twitter, Reddit, Tumblr, Pornhub, SnapChat, Instagram and Flickr (among many others) have introduced reporting mechanisms for victims of image-based abuse. But there have been several problems identified with these reporting mechanisms, such as requiring victims to prove they are the person in the image and that the image was non-consensually uploaded. These measures do not go far enough and are reactive rather than preventative, placing the onus on victims to make a request for content removal.

While states have clear obligations to ensure adherence to international human rights norms (e.g. the non-discrimination of women; the right to freedom of expression), we need more debate about the normative rights and responsibilities of Internet intermediaries. On the one hand, online platforms and services are often argued to be neutral conduits or proxies that link people together and which are not responsible for user-generated content. Yet, on the

other hand, there is growing attention to the complicity of online platforms in terms of their architecture and operations, with increasing acknowledgement that "... platforms, in their technical design, economic imperatives, regulatory frameworks, and public character, have distinct consequences for what users are able to do, and in fact do" (Gillespie 2015: 1). Furthermore, there has been growing attention to the obligations that Internet intermediaries have to ensure their infrastructure and operations are compliant with international human rights standards, and to respond adequately when harm does occur on their platform. Indeed, human rights law clearly bestows obligations on states to ensure private non-state actors respect and adhere to human rights principles and practices. However, the scope and nature of such obligations remains a subject of continued debate. Governments can do more to ensure the compliance of internet intermediaries with Australian and international human rights norms.