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# Regulating tech-sex and managing image-based sexual abuse: an Australian perspective

Anne-Maree Farrell <sup>a</sup>, Nicole Shackleton <sup>b</sup>, Elizabeth Agnew <sup>c</sup>,  
Samantha Hopkins <sup>c</sup> and Jennifer Power <sup>d</sup>

<sup>a</sup>Edinburgh Law School, Old College, South Bridge, Edinburgh, UK; <sup>b</sup>Law School, Latrobe University, Melbourne, Australia; <sup>c</sup>School of Law, Queen's University Belfast, Belfast, UK; <sup>d</sup>Australian Research Centre for Sex Health and Society, La Trobe University, Melbourne, Australia

## ABSTRACT

A range of technologies now exist to facilitate sexual desire, pleasure and intimacy. Colloquially known as tech-sex, the growth in the use of such technologies has created a range of new opportunities for sexual expression and connection. Alongside these benefits are harms arising out of their non-consensual use. Drawing on a case study examining management of image-based sexual abuse as part of Australia's recently reformed online safety laws, we argue for a regulatory approach that is both facilitative in showing due respect for adult sexual agency and protective in mitigating harm caused to affected individuals. Operating along a facilitative-protective regulatory axis, such an approach offers the potential to be suitably responsive to both the opportunities and challenges faced by adult individuals who engage with such technologies.

## KEYWORDS

Regulation; tech-sex; technologies; image-based sexual abuse; online safety; Australia

## Introduction

In recent years, a range of technologies have become available to facilitate or enhance sexual desire, intimacy and pleasure.<sup>1</sup> Colloquially known as tech-sex, the use of these technologies is growing exponentially in the context of a burgeoning global market for such products facilitated by a range of digital environments, including the internet, computers and smartphones. They have created previously unimaginable opportunities for intimate communication across time and place, transforming the ways in which people seek and engage with their own sexuality, as well as sexual partners.<sup>2</sup> Accompanying

**CONTACT** Anne-Maree Farrell  A.Farrell@ed.ac.uk

<sup>1</sup>Jennifer Power et al, 'Traversing Tech-Sex: Benefits and Risks in Digitally-Mediated Sex and Relationships' (2022) 19(1) *Sexual Health* 55.

<sup>2</sup>Examples include the production and dissemination of (intimate) images and videos, bluetooth-enabled teledildonics and other sex toys, as well as sexbot technology, enhanced by the use of artificial intelligence. For an overview, see Robert Sparrow, 'Robots, Rape, and Representation' (2017) 9(4) *International Journal of Social Robotics* 465; John Danaher, 'Robot Betrayal: A Guide to the Ethics of Robotic Deception' (2020) 22 *Ethics and Information Technology* 117; Emma Renold and Jessica Ringrose, 'Selfies, Relfies and Phallic Tagging: Posthuman Participations in Teen Digital Sexuality Assemblages' (2017) 49(11) *Educational Philosophy and Theory* 1066; James EB Elsey et al 'The Impact of Virtual Reality versus 2D Pornography on Sexual Arousal and Presence' (2019) 97 *Computers in Human Behavior* 35; Jennifer Power and Andrea Waling (eds), 'New Technologies are Changing Sex, Intimacy and Health' (2020) 29(3) *Health Sociology Review* 129.

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such developments has been an increase in identified harms arising from their non-consensual use, including dating and sextortion scams, and what has been described as image-based sexual abuse (IBSA).<sup>3</sup> Where such harms have occurred, it has disproportionately impacted women and people of colour, as well as sexual and ethnic minorities.<sup>4</sup>

Examination of the legal issues at stake in a range of common law jurisdictions has focused predominantly to date on the role of the criminal law in addressing the non-consensual use of tech-sex,<sup>5</sup> identifying existing shortcomings with potential civil remedies,<sup>6</sup> and recommending a strengthened role for regulators in addressing online harms.<sup>7</sup> In this article, we contribute to this literature by arguing for a state-sponsored regulatory approach to mitigating harm suffered by affected individuals in digital environments. By way of example, we focus on regulatory reform that has recently taken place in one common law jurisdiction, namely Australia, to address harms arising from non-consensual use of intimate images, such as IBSA. We argue for a regulatory approach which operates on a facilitative-protective axis to address such harms, and which is suitably responsive to the opportunities and challenges for adult individuals who engage with tech-sex. In this regard, the preferred regulatory approach should be facilitative in respecting adult sexual agency, accompanied by the need to balance the exercise of such agency with the risks of harm faced by individuals who engage with such technologies. The protective mode will make use of both prevention and remediation strategies as part of this approach. In relation to the former, this will involve education for digital sexual literacy, particularly for at-risk groups; with the latter, it will involve the provision of quick, low-cost redress for harms caused to affected individuals, such as IBSA.

To explore these arguments, the article first positions our approach to regulating tech-sex, as well as harms such as IBSA arising from their non-consensual use. It is an approach which draws on the regulatory theory on the grounds that it invites a holistic, as well as contextualised, approach to understanding the social, legal, market and cultural factors impacting on the design of regulation on both a national and trans-jurisdictional basis. We then examine the issue of consent, including how this is primarily understood in

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<sup>3</sup>Image-Based Sexual Abuse (IBSA) encompasses a variety of actions, including photographing or recording still or moving intimate images without consent, distributing intimate images without consent, or threatening to distribute intimate images. Intimate images include images of a person's private parts or a person engaged in a sexual act, including digitally altered images, which make it appear that a person is naked or that they are engaging in a sexual act. It covers three principal behaviours: first, the non-consensual taking of nude or sexual images, second, the non-consensual sharing of nude or sexual images, and third, threats to share nude or sexual images, see Nicola Henry et al, *Image-based Sexual Abuse: A Study in the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (Routledge, 2020) 4.

<sup>4</sup>Australian Government, 'Sextortion Email Campaign Impacting Australians', *Australian Cybersecurity Centre* (9 April 2020) <<https://www.cyber.gov.au/acsc/view-all-content/alerts/sextortion-email-campaign-impacting-australians>> accessed 12 August 2022; Maya Oppenheim, 'Tens of Thousands of Sextortion Attacks Blocked in the UK' (*The Independent*, 22 February 2021) <<https://www.independent.co.uk/news/uk/home-news/sextortion-attacks-block-lockdown-b1805816.html>> accessed 12 August 2022; Clare McGlynn et al, 'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse' (2021) 30(4) *Social & Legal Studies* 541, 543–5.

<sup>5</sup>See eg, Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37(2) *Oxford Journal of Legal Studies* 534; Robert Sparrow and Lauren Karas, 'Teledildonics and Rape by Deception' (2020) 12(1) *Law Innovation and Technology* 175.

<sup>6</sup>Nicholas Suzor, Bryony Seignior and Jennifer Singleton, 'Non-Consensual Porn and the Responsibilities of Online Intermediaries' (2017) 40 *Melbourne University Law Review* 1057; Daithí Mac Síthigh, 'The Road to Responsibilities: New Attitudes Towards Internet Intermediaries' (2020) 29(1) *Information & Communications Technology Law* 1.

<sup>7</sup>See eg, Commonwealth of Australia, Senate Standing Committee on Legal and Constitutional Affairs Reference Committee, *Phenomenon Colloquially Referred to as Revenge Porn*, 25 February 2016, ch 5, recs 4, 5; Suzor, Seignior and Singleton (n 6) 1083–7.

the context of sexual offences within the criminal law in common law jurisdictions. This provides important background context concerning the way in which non-consensual use of intimate images is understood in countries such as Australia, ahead of presenting our case study examining the management of IBSA as part of its current national online safety regime. In the final section, we assess this online safety regulatory model by reference to our proposed approach, before offering our concluding comments.

For present purposes, we focus solely on the non-consensual production and/or dissemination of intimate images by adult individuals aged 18 years and over. Although we recognise that specific legislative definitions of the term 'intimate image' exist and vary by jurisdiction, we adopt a broad definition of the term for present purposes. This includes images (and video) involving (partial) nude selfies, live-streaming, webcams and amateur pornography, whose use may be facilitated via a range of digital environments including the internet, computers or smartphones on a local or trans-jurisdictional basis. Our preference in this article is to use the terms 'individuals' and 'users' to refer to those harmed by non-consensual use of intimate images, given that our predominant focus is on the regulatory jurisdiction. In doing so, we nevertheless recognise and support the use of other descriptors, such as 'victim-survivors' for those who have suffered harm through IBSA.

## Regulating tech-sex

Our understanding of the role of regulation in mitigating harms arising out of the use of tech-sex, including IBSA, draws on insights from the regulatory studies literature. In this literature, the term 'regulation' is used to refer to a range of political, social and legal processes which impact behaviour, institutions and governance arrangements.<sup>8</sup> We consider this approach captures more fully the shifting nature of the state's relationship with actors, interests, markets and institutions in the context of increasing fluid and interdependent boundaries.<sup>9</sup> This can be exacerbated in the context of national political systems, where there are various constitutional arrangements, differing approaches to criminal, civil and regulatory laws, and separate institutional arrangements for regulating specific policy sectors. Within this literature, law – both hard and soft – is also viewed as one instrument amongst others, in facilitating regulatory governance.<sup>10</sup> Situating the role of law within the broader conceptual range offered by this analytical lens offers the opportunity to better understand its relationship with institutional, political, technological, human rights and public-private factors impacting regulatory processes.

Beyond the nation-state, regulatory processes are recognised as decentred, characterised by fragmentation, complexity and heterarchy.<sup>11</sup> Against this background, a dilemma that is particularly relevant for national online safety regulators is how best to manage non-consensual use of intimate images, where the business activities of the regulatees (e.g. webhosting services and social media platforms) are trans-jurisdictional in operation.

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<sup>8</sup>For an overview, see Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Canberra: ANU Press, 2017).

<sup>9</sup>Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' in Jacint Jordana, and David Levi-Faur (eds.), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 145–74; David Levi-Faur, 'Regulatory Capitalism' in Peter Drahos (ed) (n 8) 289–302.

<sup>10</sup>Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007).

<sup>11</sup>Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103.

This may involve corporate oversight of such activities being based in a different jurisdiction to where operational activities take place. These types of trans-jurisdictional arrangements may lead to situations where, for example, an intimate image is posted online in Russia, viewed instantaneously by someone in the UK, shared with someone in Australia and then commented on by a person based in South Korea. Depending on a country's constitutional arrangements, regulatory remit confined to national boundaries can hamper efforts to mitigate harm arising from the non-consensual use of such images.<sup>12</sup> In the circumstances, the need to take account of the complexities raised by these 'polycentric regulatory regimes' can make it difficult for online safety regulators to develop repeat regulator-regulatee interactions which may generate an ongoing commitment to adhere to the aims and objectives of the domestic regulatory regime,<sup>13</sup> in addition to implementing successful compliance and enforcement strategies.<sup>14</sup>

In this regard, differing approaches are offered within the regulatory studies literature as to how best to facilitate such strategies. The deterrence approach focuses on employing formal mechanisms of punishment to sanction poor behaviour by regulatees, as well signalling to other regulatees, actors and organised interests that this is the way in which breach of the regulatory regime will be dealt with.<sup>15</sup> Another option for a national regulator with bounded jurisdictional reach is an 'advise and persuade' compliance strategy, which focuses on preventing harm rather than on punishment. This strategy is focused on conciliation, rather than confrontation. This is done in order to realise the overarching aims of the regulatory regime, rather than focusing on imposing sanctions for breach.<sup>16</sup> In circumstances where neither strategy works, a responsive regulatory approach may be preferred.<sup>17</sup> This would involve employing a mix of compliance and enforcement strategies to ensure appropriate regulatee behaviour, which could escalate towards a more punitive approach in the event that such behaviour does not improve in line with the aims and objectives of the regulatory regime.<sup>18</sup> We consider this strategic mix in more detail later in the article, when we examine by way of case study the national regulatory approach to managing IBSA in Australia.

In the context of new technologies, such as tech-sex, as well as harms such as IBSA arising from their non-consensual use, further questions arise: will existing regulatory models facilitate compliance and enforcement, or will a new approach be required? In this regard, a perennial problem recognised in the regulatory theory literature has been how best to maintain 'regulatory connection' in the face of such technological

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<sup>12</sup>For specific concerns that have been raised in relation to IBSA, see Nicola Henry, Asher Flynn and Anastasia Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (2018) 19(6) *Police Practice and Research: An International Journal* 565; see generally Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137.

<sup>13</sup>See generally Christine Parker, 'The "Compliance Trap": The Moral Message in Responsible Regulatory Enforcement' (2006) 40(3) *Law & Society Review* 591.

<sup>14</sup>Black, 'Constructing and Contesting Legitimacy' (n 12).

<sup>15</sup>Kristina Murphy, 'Regulating More Effectively: The Relationship Between Procedural Justice, Legitimacy, and Tax Non-Compliance' (2005) 32(4) *Journal of Law and Society* 562, 564–5.

<sup>16</sup>Keith Hawkins, *Environment and Enforcement* (Oxford University Press, 1984); Brigid Hutter, 'Regulating Employers and Employees: Health and Safety in the Workplace' (1993) 20 *Journal of Law and Society* 452.

<sup>17</sup>Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>18</sup>For an overview, see Neil Gunningham, 'Enforcement and Compliance Strategies' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *Oxford Handbook of Regulation* (Oxford University Press, 2010) 120–45.

innovation.<sup>19</sup> One suggested option has been to focus on the new technology itself as the regulatory target, with a potential outcome being the use of ‘regulation by design’, in which restrictions or harm mitigation are built into the design of the technology itself.<sup>20</sup> However, academic commentators such as Bennett Moses have pointed out that we need to think more deeply about whether moral concerns exist regarding the new technology itself, the social conduct that it facilitates and how this impacts existing legal and institutional arrangements for managing sociotechnical change more generally.<sup>21</sup> Applying such considerations to the case of IBSA, we can ask: is regulation seeking to address concerns arising from first, the sexualised use of technologies that may facilitate this harm; or second, the technologisation of new ways of facilitating sexual expression, connection and intimacy? In the former case, the regulatory focus would be on addressing problematic social behaviour that results in IBSA; whereas in the latter case, it would be on managing the (un)intended consequences resulting from the newness of technologies that facilitate this type of harm.

In reflecting on the appropriate focus for national online safety regulators, it is important to take account of the social context in which new technologies, such as tech-sex, are used. While academic commentators have acknowledged that there is a role for regulation to play in managing risks and harms arising from the use of tech-sex,<sup>22</sup> it is also important to consider the complexities created by our hyper-connected, visual culture in which such regulation is situated.<sup>23</sup> As Henry et al. have observed, ‘contemporary digital culture can be characterised by a fixation on visibility – on both the technological artefact that captures or broadcasts the visual, and the material subject/object which can be “seen” and monitored’, examples of which include ‘reality television, “selfies”, live-streaming, webcams and amateur pornography’.<sup>24</sup> For many people, digital sex practices, such as sexting, produce pleasure or a sense of intimacy with another person despite, or in some cases *because of*, the risks. Such risks certainly exist, with potential negative outcomes (both short- and long-term) including poor mental health, loss of opportunities (e.g. jobs), loss of sexual agency and impact upon family/peer relationships.<sup>25</sup>

However, abstinence or ‘just say no’ approaches to educating people about the risks of practices such as sexting are unlikely to be effective given the ubiquity of such practices in modern sex and dating cultures.<sup>26</sup> Sexual cultures, relationships, desire and pleasure are not things that people consider in isolation from the risks associated with sexual

<sup>19</sup>See Roger Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford University Press, 2008) chapter 6.

<sup>20</sup>Lawrence Lessig, *Code: And Other Laws of Cyberspace* (Basic Books, 1999); Karen Yeung, ‘Towards an Understanding of Regulation by Design’ in Roger Brownsword and Karen Yeung (eds), *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (Hart, 2008) 79–108.

<sup>21</sup>Lessig (n 20) 5–6; see also Lyria Bennett Moses, ‘Regulating in the Face of Sociotechnical Change’ in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2017) 573–596.

<sup>22</sup>Suzor, Seignior and Singleton (n 6) 1069–73, drawing on the Manila Principles which highlight the use of harm mitigation strategies need to take account of freedom of speech and due process in line with tests of necessity and proportionality, see Global Civil Society, ‘Manila Principles on Intermediary Liability’ (24 March 2015) <<https://manilaprinciples.org/index.html>> accessed 12 August 2022; see also Nathan Hodson et al., ‘Editorial: Defining and Regulating the Boundaries of Sex and Sexuality’ (2019) 27(4) *Medical Law Review* 541, 542.

<sup>23</sup>Henry et al (n 3) 88.

<sup>24</sup>*ibid.*

<sup>25</sup>Henry et al (n 3); McGlynn et al (n 4).

<sup>26</sup>Kath Albury, ‘Just Because It’s Public Doesn’t Mean It’s Any of Your Business: Adults’ and Children’s Sexual Rights in Digitally Mediated Spaces’ (2017) 19(5) *New Media & Society* 713.

practices.<sup>27</sup> Indeed, the use of tech-sex offers opportunities to meet, or engage sexually, with others in ways that are not available to them in ‘real life’.<sup>28</sup> This includes the use of online platforms and digital technologies which have been used to initiate and maintain intimate relationships (including the sending of intimate images), establish and maintain friendships,<sup>29</sup> as well as operating as a safe place to express one’s sexuality.<sup>30</sup> All of these factors are relevant to any understanding of the choices and actions people take with respect to sex, including those that are mediated via digital environments.<sup>31</sup>

Therefore, any attempt at regulating the use of tech-sex must confront such complexities rather than relying on a harm mitigation approach that is grounded in stark, binary or prohibitory terms.<sup>32</sup> It requires a regulatory approach which takes account of how harm is contextualised by socio-cultural, economic and political forces which inform broader digital cultural practices, but that also recognises that such harm is disproportionately suffered on a gendered and intersectional basis. Indeed, feminist and intersectional scholars have long noted the dysfunctional and biased approach taken in regulating risk and dealing with harmful consequences for certain individuals and groups arising from long-standing social, economic, gender, racial or ethnic biases and other inequalities.<sup>33</sup> While it is beyond the remit of this paper to examine such critiques in detail, we nevertheless recognise the importance of taking this into account in seeking to address harms such as IBSA. We now turn in the next section of the article to consider the question of consent, given that much of the regulatory focus in common law jurisdictions regarding the dissemination of intimate images in digital environments has focused on harms suffered arising from their non-consensual use.

## A question of consent and image-based sexual abuse

Indeed, consent (and the lack thereof) has long been seen as an important control mechanism for individuals in the exercise of their sexual agency, informing whether and if so how they will enjoy embodied sexual experiences, as well as with whom they will engage in sexual relations. In general terms, consent can be characterised as both substantial and procedural in legal terms. It is substantial in that it refers to an individual evidencing autonomous choice and action; it is procedural in that it usually requires certain

<sup>27</sup>Sara McClelland and Michelle Fine, ‘Education and Desire: Still Missing After All These Years’ (2006) 76(3) *Harvard Educational Review* 297; Richard Parker, ‘Sexuality, Culture and Society: Shifting Paradigms in Sexuality Research’ (2009) 11(3) *Culture, Health & Sexuality* 251.

<sup>28</sup>Justin R Garcia et al, ‘Sexting Among Singles in the USA: Prevalence of Sending, Receiving, and Sharing Sexual Messages and Images’ (2016) 13(5) *Sexual Health* 428; Emily Setty, ‘Meanings of Bodily and Sexual expression in Youth Sexting Culture: Young Women’s Negotiation of Gendered Risks and Harms’ (2019) 80(9) *Sex Roles* 586.

<sup>29</sup>Joris Ouytsel, Michel Walrave and Koen Ponnet, ‘Sexting within Adolescents’ Romantic Relationships: How Is It Related to Perceptions of Love and Verbal Conflict’ (2019) 97 *Computers in Human Behaviour* 216–221.

<sup>30</sup>David Gudellunas, ‘There’s an App for That: The Uses and Gratifications of Online Social Networks for Gay Men’ (2012) 16 *Sexuality and Culture* 347.

<sup>31</sup>Kane Race, ‘Party and Play: Online Hook-Up Devices and the Emergence of PNP Practices Among Gay Men’ (2015) 18(3) *Sexualities* 253.

<sup>32</sup>Mary Jane Mossman, ‘Feminism and Legal Method: The Difference It Makes’ (1987) 3 *Wisconsin Women’s Law Journal* 147.

<sup>33</sup>See eg, Carol Smart, *Feminism and the Power of the Law* (Taylor & Francis, 1989) 32–34; Diane Kirkby (ed), *Sex, Power and Justice: Critical Perspectives on Law in Australia* (Oxford University Press, 1995) xiv–vi; Monique Mulholland, ‘Walking a Fine Line: Young People Negotiate Pornified Heterosex’ (2015) 18(5–6) *Sexualities* 731, 733; Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis’ (2013) 38(4) *Signs* 785; Danielle Citron ‘Sexual Privacy’ (2019) 128 *Yale Law Journal* 1870, 1890; Henry et al (n 3) 11, 124.



steps to be taken in order to verify consent before any potential infringement on the right to bodily integrity. Once consent is obtained, it legitimises certain activities and prohibits others as between the parties engaged in the process. In short, consent is employed as the proverbial red line determining what constitutes acceptable, or conversely unacceptable, interference with individuals' decision-making and their bodies.

Although we recognise that differing approaches exist in a range of jurisdictions,<sup>34</sup> the legal understanding of consent in common law jurisdictions such as Australia (and a lack of consent as it applies in the IBSA context), has been predominantly grounded in the criminal law.<sup>35</sup> Legal consent under the criminal law requires both the capacity to give consent and that such consent is given freely. A lack of consent therefore establishes whether a (sexual) offence has taken place and often features as a key element of the offence in common law jurisdictions.<sup>36</sup> In certain circumstances, a defence of reasonable belief in relation to the victim's consent may be available which, if established on the available evidence, can exonerate the accused.<sup>37</sup> This conceptualisation of consent appears to have in large part been translated into digital environments, particularly with respect to the non-consensual sharing of intimate images.

In considering the potential range of regulatory responses to non-consensual use of intimate images in digital environments, there has been a tendency in the relevant policy and academic literatures in common law jurisdictions to understand its scope and impact by reference to how it is understood within the criminal law.<sup>38</sup> In normative terms, this may be attributable to the (perceived) significance of the criminal law in controlling anti-social behaviour and for setting standards, as well as to the fact that their non-consensual use is often linked to sexual and family violence offending. While the criminal law clearly has its place in this regard, it operates as a slow, reactive and blunt instrument for addressing a range of harms caused to individuals, including persistent problems downstream with regard to enforcement.<sup>39</sup> Existing civil law options, including for breach of privacy, copyright, defamation, harassment or negligence, as well as broader questions of liability in relation to online intermediaries, also suffer from similar problems, as well as being costly and therefore out of reach for many individuals who suffer harms such as IBSA.<sup>40</sup>

<sup>34</sup>Amnesty International, 'Let's Talk About "Yes": Consent Laws in Europe' (17 December 2020) <<https://www.amnesty.org/en/latest/campaigns/2020/12/consent-based-rape-laws-in-europe/>> accessed 12 August 2022.

<sup>35</sup>Examples of common law jurisdictions include the United Kingdom, Ireland, Australia, Canada and New Zealand. For an overview, see McGlynn and Rackley (n 5); Henry et al (n 3).

<sup>36</sup>See Rachael Burgin and Asher Flynn, 'Women's Behaviour as Implied Consent: Male 'Reasonableness' in Australian Rape Law' (2019) 21(3) *Criminology and Criminal Justice* 334; Rachel Killean, Anne-Marie McAlinden and Eithne Dowds, 'Sexual Violence in the Digital Age: Replicating and Augmenting Harm, Victimhood and Blame' (2022) *Social & Legal Studies* 1–22 <<https://doi.org/10.1177/09646639221086592>> accessed 12 August 2022.

<sup>37</sup>See Burgin and Flynn (n 36); Ashlee Gore, 'It's All or Nothing: Consent, Reasonable Belief, and the Continuum of Sexual Violence' (2021) 30(4) *Social & Legal Studies* 522.

<sup>38</sup>McGlynn and Rackley (n 5); Tyrone Kirchengast and Thomas Crofts, 'The Legal and Policy Contexts of "Revenge Porn" Criminalisation: The Need for Multiple Approaches' (2019) 19(1) *Oxford University Commonwealth Law Journal* 1; Henry et al. (n 3).

<sup>39</sup>Sentencing Advisory Council, *Sentencing Image-Based Sexual Abuse Offences in Victoria* (27 October 2020) <<https://www.sentencingcouncil.vic.gov.au/publications/sentencing-image-based-sexual-abuse-offences-in-victoria>> accessed 12 August 2022; Erika Rackley et al., 'Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse' (2021) 29 *Feminist Legal Studies* 293.

<sup>40</sup>McGlynn and Rackley (n 5); Suzor, Seignior and Singleton (n 6); Mac Síthigh (n 6); Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press, 2020).

In the circumstances, this raises broader policy concerns with respect to access to, as well as equality of, justice for harmed individuals in the regulatory jurisdiction, particularly on a gendered and intersectional basis. It also means taking account of how consent may need to be understood in the context of a ‘continuum of coercion’<sup>41</sup> that can exist within sexual violence cases and which also can be linked to a broader range of socio-economic factors.<sup>42</sup> While there may be a prominent social media dating narrative involving the consensual sharing of such images, which is seen as an acceptable expression of adult sexual agency,<sup>43</sup> the disparate social reality in which women and minoritised groups find themselves results in their being held socially (if not legally) responsible for all harms caused as a result of IBSA, where such images are shared in digital environments with third parties without their consent. The difficulties faced by such individuals in terms of pursuing legal action in common law jurisdictions arising from IBSA has led to increased political interest and law reform activity in the area. This is explored in more detail in the next section, where we present a case study examining law reform involving Australia’s national online safety regulatory regime, and how it has sought to address the problem of IBSA.

## Regulating online safety in Australia

In recent years, much of the Australian political and legislative response to non-consensual use of intimate images has focused on addressing IBSA. Although not a new phenomenon,<sup>44</sup> internet and smartphone technology has caused an explosion in the capture of, distribution of, and threat to distribute intimate images. Australia’s legislative response to IBSA is among the most advanced globally,<sup>45</sup> the activity having been prohibited in various forms under the criminal law at federal, state and territorial levels in recent years.<sup>46</sup> While laws differ across Australian states and territories,<sup>47</sup> there is a good degree of commonality in approach. For example, there is no legal requirement for the prosecution to prove harm or to prove that the perpetrator intended to cause harm to the victim.<sup>48</sup> Instead, it is accepted that IBSA would be reasonably expected to cause harm or distress to the victim.<sup>49</sup> As such, the prosecution must only prove the accused’s intention to distribute, create or threaten to create or distribute a sexually explicit image.<sup>50</sup> Recognising the agency of adults to participate in certain intimate acts as

<sup>41</sup>Liz Kelly, *Surviving Sexual Violence* (Polity Press, 1988).

<sup>42</sup>Vanessa Munro, ‘An Unholy Trinity: Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual violence in England and Wales’ (2010) 63(1) *Current Legal Problems* 45.

<sup>43</sup>*ibid*, 118–9.

<sup>44</sup>Henry et al (n 3) 1.

<sup>45</sup>Asher Flynn and Nicole Henry, ‘Image-Based Sexual Abuse: An Australian Reflection’ (2021) 31(4) *Women & Criminal Justice* 313, 318.

<sup>46</sup>Within the Australian jurisdiction of the Australian Capital Territory (ACT), for example, intimate images include ‘a still or moving image, in any form – (ii) for a female or a transgender or intersex person who identifies as a female—of the person’s breasts’, making these laws more inclusive of trans and non-binary individuals. In addition, the visual capture – in photographic or video form of a person engaged in a sexual act, the distribution of these images, and threats to distribute these images, are also prohibited across all Australian jurisdictions; see also *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (Cth); *Criminal Code 1995* (Cth) s 474.17A.

<sup>47</sup>See, eg, upskirting laws in the Australian state jurisdiction of Victoria include ‘observation of genital or anal region’ (i.e. *Summary Offences Act 1966* (Vic) s 41A), whereas the same laws in NSW are incorporated into the revenge porn laws and include ‘record intimate images without consent’ (*Crimes Act 1900* (NSW) s 91P).

<sup>48</sup>See, eg, *Crimes Act 1900* (ACT) s 72C; Flynn and Henry (n 45) 7.

<sup>49</sup>Flynn and Henry (n 45) 320; McGlynn et al (n 4).

<sup>50</sup>See *Crimes Act 1900* (ACT) s 72C; Flynn and Henry (n 45) 320.

long as consent is provided,<sup>51</sup> all criminal laws include consent as a defence which has traditionally been understood as person- and situation-specific, and which is a process which can be subject to change and withdrawal at any time.<sup>52</sup> Given that issues of coercion, control and power impact consent across all sexual offences, academic commentators have argued that questions of sexual consent are often too focused on the victims, rather than the accused, underpinned by a range of myths and stereotypes, of which previous mention has been made. In the circumstances, it has been argued that consent should either be irrelevant, or that all Australian laws dealing with sexual consent should make it clear that the onus is on the accused to establish that the victim consented.<sup>53</sup>

Notwithstanding a shift in public, political and legal attitudes towards sexual consent in this context, a key issue of concern remains enforcement. In the Australian state of Victoria, a recent report examined sentencing practices following the prosecution of IBSA-related offences.<sup>54</sup> It found that there were very few cases where such offences were prosecuted on their own; rather, most prosecutions involved charges for a number of other non-IBSA offences.<sup>55</sup> The majority of cases were linked to family violence,<sup>56</sup> with the most common alleged offence pursued in these circumstances being the actual or threatened distribution of intimate images. Even in the very few cases where a prosecution took place, IBSA-related offending usually received low sentences, even in cases where serious harm was caused.<sup>57</sup> The report's findings on the types of and rates of prosecution for IBSA offences corresponds with academic research in the area,<sup>58</sup> against a background where the discretion to prosecute is infrequently exercised.

As noted previously, this reflects a wider social issue which is rooted in entrenched gender and intersectional inequalities.<sup>59</sup> This state of affairs remains despite technological innovation or engagement with digital environments.<sup>60</sup> In the circumstances, a regulatory approach which offers a quick, low-cost method for mitigating harm from IBSA represents a welcome additional or alternative redress option for affected individuals.<sup>61</sup> In Australia, this has been facilitated by the recent adoption of a new national regulatory regime for online safety, set out in the Online Safety Act 2021 (OSA 2021).<sup>62</sup> The regime is overseen

<sup>51</sup>See for example in the Australian state jurisdiction of New South Wales, *Hansard*, Legislative Assembly, 24 May 2017, 20 (Mark Speakman, Second Reading Speech, *Crimes Amendment (Intimate Images) Bill 2017*).

<sup>52</sup>Killean, McAlinden and Dowds (n 36) 11.

<sup>53</sup>Michelle Evans, 'Regulating the Non-Consensual Sharing of Intimate Images ('Revenge Pornography') via a Civil Penalty Scheme: A Sex Equality Analysis' (2019) 44(3) *Monash University Law Review* 602, 620. Note recent developments in certain Australian jurisdictions, which now require affirmative consent, see Tamsin Rose, 'NSW Affirmative Consent Laws: What Do They Mean and How Will They Work?' (*The Guardian New South Wales*, 1 June 2022) <<https://www.theguardian.com/australia-news/2022/jun/01/nsw-affirmative-consent-laws-what-do-they-mean-and-how-will-they-work>> accessed 12 August 2022.

<sup>54</sup>Sentencing Advisory Council (n 39).

<sup>55</sup>*ibid* xi.

<sup>56</sup>See also Flynn and Henry (n 45) 322.

<sup>57</sup>*ibid*.

<sup>58</sup>Henry et al (n 3); McGlynn et al (n 4).

<sup>59</sup>Henry et al (n 3) 420.

<sup>60</sup>See Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25(4) *Social & Legal Studies* 397; Tatjana Hörnle, '#MeToo - Implications for Criminal Law?' (2018) 6(2) *Bergen Journal of Criminal Law and Criminal Justice* 115; Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds), *Sexual Violence on Trial* (Routledge, 2021).

<sup>61</sup>See Henry et al (n 3) 148–50.

<sup>62</sup>See the Online Safety Act 2021 (Cth) (OSA 2021), which came into force on 23 January 2022. For background information on the Act, see Explanatory Memorandum, Online Safety Bill 2021 (Cth).

by a national independent regulatory body, known as the Office of the eSafety Commissioner (eSafety), which coordinates a whole-of-government approach on the issue, as well as having a broader policy remit to promote safer and more positive online experiences.<sup>63</sup> This includes the development of core principles setting out expectations regarding online safety, the conduct of research, as well as the promotion of educational and awareness activities that promote online safety.<sup>64</sup>

Originally established in 2015, eSafety's regulatory remit was initially focused on safeguarding children from online risks and harm. In support of such remit, it was provided with a range of enforcement powers to deal with cyberbullying and abusive online materials, which were targeted at children. Over time, its powers have been extended to include various aspects of online safety involving both children and adults. Following the adoption of the OSA 2021, its powers have now significantly expanded to include regulatory oversight of social media services,<sup>65</sup> relevant electronic services,<sup>66</sup> hosting service providers and designated internet services (services and providers),<sup>67</sup> as well as individual persons who post materials via these services and providers.<sup>68</sup>

eSafety also oversees a range of specific schemes designed to address specific areas of concern involving online safety.<sup>69</sup> This includes its image-based abuse scheme, with its regulatory powers in relation to administering the scheme set out under the OSA 2021.<sup>70</sup> It should be noted that the preference in legislative terms, as well as on the part of eSafety, is to use the term 'image-based abuse', rather than IBSA, which can be attributed to the desire to avoid association with colloquial terms such as 'revenge porn'.<sup>71</sup> As part of overseeing the scheme,<sup>72</sup> eSafety engages in education activities, which includes social

<sup>63</sup>eSafety Commissioner, 'Our Structure' (2022) <<https://www.esafety.gov.au/about-us/who-we-are/our-structure>> accessed 12 August 2022.

<sup>64</sup>eSafety Commissioner, 'Who We Are' (2022) <<https://www.esafety.gov.au/about-us/who-we-are>> accessed 12 August 2022.

<sup>65</sup>OSA 2021 (n 62) s 13.

<sup>66</sup>OSA 2021 (n 62) s 13A.

<sup>67</sup>OSA 2021 (n 62) s 14.

<sup>68</sup>See, eg, OSA 2021 (n 62) s 70.

<sup>69</sup>This now includes a world-first adult cyber abuse scheme for adults, where it has powers to require the removal of adult cyber abuse material if it meets the threshold criterion of having been posted with the likely intention of causing serious harm. An updated online content scheme has been established, which enables eSafety to take action against illegal or restricted online content that is likely to cause significant harm. This includes child sexual abuse material and 'abhorrent violent material', regardless of where such materials are hosted, see OSA 2021 (n 62) s 8, pt 9; see also for an overview, eSafety Commissioner, 'Abhorrent Violent Conduct Powers - Regulatory Guidance, eSC RG 5' (December 2021) <<https://www.esafety.gov.au/sites/default/files/2021-12/OSA-AVCP-Regulatory-Guidance.pdf>> accessed 12 August 2022; eSafety Commissioner, 'Online Content Scheme - Regulatory Guidance, eSC RG 4' (December 2021) <<https://www.esafety.gov.au/sites/default/files/2021-12/eSafety-Online-Content-Scheme.pdf>> accessed 12 August 2022.

<sup>70</sup>OSA 2021 (n 62) pt 6. Note that for the purposes of the application of Act to an intimate image or private sexual material, 'consent' means the following: 'consent that is express, voluntary and informed but does not include consent given by a child; or consent given by an adult who is in a mental or physical condition (whether temporary or permanent) that makes the adult incapable of giving consent or substantially impairs the capacity of the adult to give consent', see OSA 2021 (n 62) pt 1 s 21.

<sup>71</sup>Clare McGlynn, Erika Rackley and Ruth Houghton, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25 *Feminist Legal Studies* 25; Julie Inman Grant, '"Revenge Porn", By Another Name' (eSafety Commissioner, 27 February 2017) <<https://www.esafety.gov.au/newsroom/blogs/revenge-porn-another-name>> accessed 12 August 2022.

<sup>72</sup>In terms of how the scheme works in practice, see eSafety Commissioner, 'Image-based Abuse' (Australian Government, 2022) <<https://www.esafety.gov.au/key-issues/image-based-abuse/take-action/report-to-esafety-commissioner>> accessed 12 August 2022.

media campaigns to raise awareness about the scheme.<sup>73</sup> It hosts an online portal which provides comprehensive information regarding online safety, cyberbullying, online abuse targeting women, domestic violence, stalking and IBSA. The portal also contains information about how to communicate with online platforms hosting intimate images and persons who have intimate images in their possession, as well as how to collect and report evidence of IBSA to eSafety.<sup>74</sup>

For the purposes of initiating a regulatory response by eSafety under the scheme, an ‘intimate image’ includes a still or moving visual image, which (appears to) depict(s) a person’s genital area or anal area (whether bare or covered by underwear), or one or both breasts of a female, transgender or intersex person. What constitutes ‘intimate material’ includes a person in a state of undress, using a toilet, showering, having a bath, or engaged in a sexual act of a kind not ordinarily done in public, in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy. This is in addition to images that depict a person without religious attire, if they consistently wear that attire because of their religious or cultural background.<sup>75</sup> Originally established in 2018,<sup>76</sup> the key features of the eSafety scheme have been retained in the OSA 2021, albeit that eSafety now has enhanced powers to deal more rapidly with complaints by affected individuals against services and providers, as well as the person(s) responsible for posting the images.<sup>77</sup> This includes requiring services and providers to remove hosted intimate images within 24 h of receiving a removal notice issued by eSafety,<sup>78</sup> reduced from 48 h under the previous regime. eSafety can also now obtain basic subscriber account information from services and providers, thus making it easier to deal with the problem of anonymous accounts which post and share intimate images online.<sup>79</sup>

There are also a range of enforcement options under the scheme. In addition to informal removal action against services and providers, options include the issuing of formal warnings, remedial directions and infringement notices, as well as obtaining court orders for injunctive relief or the imposition of a (financial) civil penalty.<sup>80</sup> A review of data published in eSafety’s Annual Reports in the 2019–2021 period showed a substantial rise in the reporting of abuse across all schemes managed by eSafety, with women being disproportionately at risk of having suffered harm in digital environments. This included young women aged 13–17 years, who were identified as being the ‘primary targets’ of cyberbullying, with adult women making the majority of requests for assistance with cyberbullying. Similarity in both patterns of behaviour and platforms were noted in reports of

<sup>73</sup>This has included the issuing of digital packs to Australian Universities, which contain information designed to reduce the incidents of image-based abuse amongst students, see Australian Communications and Media Authority, eSafety Commissioner, ‘Annual Report 2020-21’, (Australian Communications and Media Authority, 2021) <[https://www.esafety.gov.au/sites/default/files/2021->10/ACMA%20and%20eSafety%20annual%20report%202020-21\\_0.pdf](https://www.esafety.gov.au/sites/default/files/2021->10/ACMA%20and%20eSafety%20annual%20report%202020-21_0.pdf)> accessed 12 August 2022.

<sup>74</sup>eSafety Commissioner, ‘How to Report Image-Based Abuse’ (Australian Government, 2022) <[www.esafety.gov.au/report/image-based-abuse](http://www.esafety.gov.au/report/image-based-abuse)> accessed 12 August 2022.

<sup>75</sup>OSA 2021 (n 62) s 15(4).

<sup>76</sup>See *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (Cth) (now repealed).

<sup>77</sup>OSA 2021 (n 62) pt 3, div 3, ss 34–5, pt 6, div 3, pt 10.

<sup>78</sup>OSA 2021 (n 62) ss 77–9.

<sup>79</sup>OSA 2021 (n 62) s 194. For an overview of the issues, see eSafety Commissioner, ‘Anonymity and Identity Shielding’ (Australian Government, 2022) <<https://www.esafety.gov.au/industry/tech-trends-and-challenges/anonymity>> accessed 12 August 2022.

<sup>80</sup>The civil penalty order would be sought by the eSafety Commissioner pursuant to powers granted pursuant to *Regulatory Powers (Standard Provisions) Act 2014* (Cth) pt 4. The Federal Court of Australia and the Federal Circuit Court of Australia are the relevant courts for the purposes of seeking such orders under the Act.

cyberbullying involving both young and older women.<sup>81</sup> Apart from sextortion scams impacting men which proliferated during the first wave of the Covid-19 pandemic in 2020,<sup>82</sup> women were overwhelmingly the victims of IBSA (75%). Such abuse included posting intimate images online without consent, threatening to share such images via private means and/or digital environments, peer group sharing, coercive control, the use of impersonation accounts, receipt of unsolicited intimate images and the creation of digitally altered images.<sup>83</sup> No further data was published regarding race, ethnicity, socio-economic status or sexual orientation of individuals reporting IBSA.

eSafety reported making use of three main remediation strategies, all of which involved the use of a 'soft' enforcement approach. First, 'alerting' social media services about accounts that were misused to elicit, share or threaten to share intimate content. Such notifications typically resulted in eSafety deleting such accounts (just under 2,000 in 2020-21; 970 in 2019-20).<sup>84</sup> Second, the taking of 'removal action', which involved contacting services and providers (most of which being overseas-hosted exposé or pornography sites), to request the removal of IBSA materials. Such removal action proved to be remarkably successful, with a success rate in the range of 82% to 90%.<sup>85</sup> Third, where this proved unsuccessful, steps were taken to 'limit the discoverability' of such materials, through having it removed from search engine results.<sup>86</sup>

Despite an increase in reports under the IBSA scheme, there was a noticeable and unexplained decrease in the use of the latter two strategies as between the reporting periods 2019-20 and 2020-21. There was also little, if any use, of what could be described as 'hard' enforcement powers under the scheme. In the 2019-21 period, eSafety issued a total of 8 removal notices (all to overseas-hosted sites); 2 remedial directions, 6 formal warnings to perpetrators; and 3 informal warnings issued where it was considered appropriate to adopt a remedial and educative approach to enforcement.<sup>87</sup> There were no reports of use being made of enforceable notices, injunctions or civil penalty orders. We now turn in the next section to assess the effectiveness of Australia's national online safety regulatory model for managing harms such as IBSA.

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<sup>81</sup> ACMA, eSafety Commissioner, *Annual Report 2020-21* (n 73) 209-12.

<sup>82</sup> *ibid* 213. As eSafety notes, 'Sexual extortion is a form of blackmail and involves threats to post intimate images of the victim unless demands are met, typically for money. It includes the use of fake accounts to threaten distribution of intimate content recorded via video chat, scam email campaigns where victims are threatened with the release of 'hacked' intimate content and dating/romance scams. Victims of sexual extortion were predominately male'.

<sup>83</sup> *ibid* 213-14. eSafety reported that the image-based abuse took the following forms in the 2020-21 period: sextortion (57%); online child sexual exploitation (11%); posting online without consent (8%); threatening to share (excluding sextortion) (4%); sharing via private means (3%); and 'other' (11%). The 'other' category covered harms such as 'peer group sharing among young people, coercive control, impersonation accounts, receipt of unsolicited intimate images and digitally altered images.' The majority of reports of IBSA related to adult victims, involving 73% of reports received. Age-related data included adults aged 18-24 years comprising the highest percentage of victims (40%), followed by those aged 25 years and over (33%). Apart from 1% where age was not known, 26% of victims were children.

<sup>84</sup> *ibid* 215; see ACMA, Office of the eSafety Commissioner, 'Annual Report, 2019-20' (September 2020) <<https://www.esafety.gov.au/sites/default/files/2020-10/ACMA%20and%20eSafety%20Annual%20report%202019-20.pdf>> accessed 12 August 2022.

<sup>85</sup> In 2019-20, this involved over 4,000 locations, across 248 different platforms, with a success rate of 82%. In 2020-21, this decreased significantly with notices issued to only 2,500 locations (generally URLs) across 141 different platforms, with a 90% success rate, see ACMA, Office of the eSafety Commissioner, 'Annual Report 2019-20' (n 84); ACMA, Office of the eSafety Commissioner, 'Annual Report 2020-21' (n 73).

<sup>86</sup> ACMA, Office of the eSafety Commissioner, 'Annual Report 2019-20' (n 73) 216.

<sup>87</sup> *ibid* 214; ACMA, Office of the eSafety Commissioner, 'Annual Report 2020-21' (n 73) 212-3.

## Assessing Australia's regulatory model for managing image-based sexual abuse

In the previous section, we examined key aspects of Australia's regulatory model for online safety, focusing on education activities by eSafety, the national regulator. This was in addition to reviewing threshold criteria for initiating a regulatory response to IBSA, as well as the approach taken to mitigating harm. In terms of its response, eSafety clearly focuses on both prevention and remediation strategies, which we have argued are important aspects of the protective mode of our proposed regulatory approach. In relation to the use of preventive strategies, eSafety pursues a range of education activities to increase IBSA awareness and to highlight how to report instances of such abuse for follow-up with respect to mitigating harm. This is largely in line with a regulatory focus on managing risk as a matter of ensuring safety from harm in online environments. It is narrowly prescribed in line with eSafety's legislatively mandated powers which, in turn, have their origins in longstanding political and public concerns around protecting children in such contexts. This has operated in practice to create 'path dependencies'<sup>88</sup> which continue to influence the way risk is framed in policy and legal terms in relation to regulating online safety involving both children *and* adults.

As we have previously identified, it is a framing which we consider to be insufficiently nuanced to take account of both opportunities and challenges that arise for adults with respect to engaging in current digital sexual cultures. This requires a regulatory approach that is designed to facilitate digital sexual literacy against a background where engagement with such cultures has become central to the mediation of social relations, as well as to how sexual connection and intimacy are enacted, developed, and maintained.<sup>89</sup> Alongside regulatory initiatives to manage harms arising out of IBSA, for example, it is vital that concerns about risk and danger involved in the sharing of intimate images take place in a broader context of education initiatives regarding sexual cultures, relationships and pleasure.<sup>90</sup> Focusing predominantly on risky, problematic or dangerous aspects of sex or relationships which are facilitated in digital environments, does not engage with the reality of most people's sexual relationships or the type of relationship (safe, healthy, pleasurable) they may aim to achieve.<sup>91</sup>

Understanding what people perceive to be the benefits of online sexual engagement, including the risks people take, how these risks are perceived in relation to pleasure and desire, and the choices people make in online environments, is necessary for developing a comprehensive regulatory approach to education about digital sexual health. In the circumstances, a nuanced approach needs to be taken by regulators in developing prevention strategies, which should focus on education initiatives which explore the risks and

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<sup>88</sup>The 'path dependencies' is used to describe how previous or established ideas, ways of thinking, procedures and processes can influence the way in which a current policy problem is viewed which in turn may impact the design of laws, see Paul Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics' (2000) 94(2) *American Political Science Review* 252.

<sup>89</sup>Rachel Scott et al, 'What and How: Doing Good Research with Young People, Digital Intimacies, and Relationships and Sex Education' (2020) 20(6) *Sex Education* 675, 676.

<sup>90</sup>Kath Albury, Amy Adele Hasinoff and Theresa Senft, 'From Media Abstinence to Media Production: Sexting, Young People and Education' in Louisa Allen and Mary Lou Rasmussen (eds), *The Palgrave Handbook of Sexuality Education* (Palgrave Macmillan, 2017) 527–545.

<sup>91</sup>Louisa Allen, Mary Lou Rasmussen and Kathleen Quinlivan (eds), *The Politics of Pleasure in Sexuality Education: Pleasure Bound* (Routledge, 2013); Allison Carter et al, 'Sexual Health Promotion' in Jacqueline Gahagan and Mary K. Bryson (eds), *Sex-and Gender-Based Analysis in Public Health* (Springer, 2021) 113–121.

benefits associated with the use of tech-sex, highlighting both positive and negative experiences for users. Given the range of motivations influencing sexual engagement online and/or via such technologies, this involves educational promotion which is centred on keeping individuals safe from (potential) harms while also respecting their sexual agency and capacity to make their own decisions in this regard.<sup>92</sup>

Specifically in the case of harm such as IBSA, which may materialise arising from non-consensual sharing of intimate images, there is a need for national regulators, such as eSafety, to be mindful of the way in which they present education initiatives which are within their remit. While this may involve the giving of practical tips such as ensuring that when sending such images, they are anonymised or do not include any identifying features,<sup>93</sup> this may lead to a risk assessment model that not only fails to fully capture the complexity of online sexual encounters and engagements, including consensual sharing of intimate images. It may also minimise the harms caused – within a non-consensual context – by placing a level of blame on the person captured in the image.<sup>94</sup> In the case of women, for example, sexual agency is consequently diminished via the chastisement of sexual expression and the normalisation of a highly gendered blame culture.<sup>95</sup> Overcoming these persistent challenges requires a social and cultural shift in how we understand sexual violence, female sexuality, sexual agency and issues of consent. While educational initiatives which promote positive discussions on sexuality are important,<sup>96</sup> this must be accompanied by an appreciation of situated vulnerabilities experienced on a gendered and intersectional basis. While eSafety clearly recognises the gendered aspect of harm in the context of IBSA, it has only recently begun to pay more attention to the intersectional aspects of such harm.<sup>97</sup> An appreciation of the intersectionality of both risk and harm is vital in relation to such initiatives, supported by a comprehensive approach to harm mitigation. This requires a pro-active approach, which should be informed by accurate data collection which is published and evaluated on an annual basis.

In terms of the current approach to managing IBSA, eSafety acknowledges that a wrongful act has been committed, and harm caused to affected individuals, as a result of IBSA. In doing so, it employs a range of remediation strategies which facilitate the rapid removal of intimate images where possible.<sup>98</sup> In this way, eSafety is able to initiate removal action, predominantly through making direct contact with services and providers, which demonstrates it is responsive to the need for quick, no-cost redress on the part of affected individuals.<sup>99</sup> Although eSafety clearly has a wide range of enforcement

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<sup>92</sup>Power et al (n 1).

<sup>93</sup>See for example, University of Toronto, 'Intimate Images and Privacy' (*Community Safety Office*) <<https://www.communitysafety.utoronto.ca/safety-tip/intimate-images-and-privacy/>> accessed 17 Aug 2022.

<sup>94</sup>Diana T Sanchez, Amy K Kiefer and Oscar Ybarra, (2006) 'Sexual Submissiveness in Women: Costs for Sexual Autonomy and Arousal' (2006) 32(4) *Personality and Social Psychology Bulletin* 512; Julia Zauner, 'The Continuum of Symbolic Violence: How Sexting Education Neglects Image-Based Sexual Abuse, Dismisses Perpetrators Responsibility, and Violates Rights to Sexual Autonomy' (2021) 5(3) *Journal of Gender-Based Violence* 483.

<sup>95</sup>Henry et al (n 3); Killean, Dowds and McAlinden (n 60).

<sup>96</sup>Elizabeth Agnew, 'Sexting Among Young People: Towards a Gender Sensitive Approach' (2021) 29 *International Journal of Children's Rights* 3.

<sup>97</sup>eSafety Commissioner, 'Protecting Voices at Risk Online' (2022) <<https://www.esafety.gov.au/diverse-groups/protecting-voices-risk-online>> accessed 12 August 2022.

<sup>98</sup>eSafety Commissioner, 'Civil Penalties Scheme' (2022) <[https://www.esafety.gov.au/key-issues/image-based-abuse/take-action/civil-penalties-scheme#:~:text=The%20Enhancing%20Online%20Safety%20Act,notice\)%20to%20the%20eSafety%20Commissioner](https://www.esafety.gov.au/key-issues/image-based-abuse/take-action/civil-penalties-scheme#:~:text=The%20Enhancing%20Online%20Safety%20Act,notice)%20to%20the%20eSafety%20Commissioner)> accessed 12 August 2022.

<sup>99</sup>See Henry et al (n 3).



powers under the IBSA scheme,<sup>100</sup> the available data from its recent Annual Reports points to a marked preference for a ‘soft’ rather than ‘hard’ enforcement approach. While a remediation strategy may involve the successful removal of IBSA materials from digital environments, it is not clear that this constitutes an effective prevention strategy on its own vis-à-vis persons that post such materials, or services and providers that host and/or share such materials.<sup>101</sup> Indeed, we would suggest that enhanced effectiveness of such prevention strategies would result from a greater preparedness on the part of national online safety regulators, such as eSafety, to make use of the full range of enforcement powers in the event of (persistent) non-compliance.

As the designated national regulator for online safety, eSafety must necessarily weigh up which approach, or combination of approaches, is likely to strike the right balance in the context of facilitating optimum regulator-regulatee relations, as well as ensuring that suitable remediation is provided to individuals harmed by IBSA. This may be made more complex by the fact that the regulatees with which national online safety regulators engage may operate on a trans-jurisdictional basis. In the circumstances, this may make it much more difficult to develop the sort of regular regulator-regulatee interactions which could generate a sense of corporate social responsibility in seeking to minimise the occurrence of IBSA on hosting services or platforms. Against this background, one option, of which previous mention has been made, is to adopt a deterrence approach which focuses on employing formal mechanisms of punishment to sanction poor behaviour, as well as signalling to other regulatees that this is the way in which breaches of the online safety regulatory regime will be dealt with.<sup>102</sup>

In the case of eSafety, the choice to employ a deterrence approach in seeking to manage IBSA may turn on a number of factors: type of regulatees (i.e. small, medium or large entities);<sup>103</sup> whether the dynamic of the regulated sector is such that regulators consider regulatees to be ‘amoral calculators’ with respect to the cost of compliance;<sup>104</sup> and with which regulatory cultures regulatees may be most familiar. In the case of services and providers that host and share intimate images, they may be incorporated or managed in overseas jurisdictions, a feature which has been highlighted in eSafety’s own data on enforcement activity in relation to the scheme. Where services and providers are based in the U.S., for example, they operate in a regulatory culture which offers immunity from liability based on ‘safe harbour’ laws,<sup>105</sup> in the context of a more legally contested approach to challenging regulatory decision-making.<sup>106</sup>

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<sup>100</sup>eSafety Commissioner, ‘Civil Penalties Scheme’ (n 98).

<sup>101</sup>eSafety’s under-utilisation of the full range of enforcement powers pursuant to the civil penalty scheme has already been the subject of adverse commentary, see Henry et al (n 3) 148.

<sup>102</sup>Murphy (n 15) 564–5; see generally Gunningham, ‘Enforcing Environmental Regulation’ (2011) 23(2) *Journal of Environmental Law* 169.

<sup>103</sup>Fiona Haines, *Corporate Regulation: Beyond ‘Punish or Persuade’* (Clarendon Press, 1997).

<sup>104</sup>Robert Kagan and John T Scholz, ‘The “Criminology of the Corporation” and Regulatory Enforcement Strategies’ in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff, 1984) 67.

<sup>105</sup>Note that U.S. law is likely to give ‘safe harbour’ to online intermediaries which ‘knowingly host cyber stalking or revenge porn’, for example, although this has been limited somewhat for websites that facilitate sex trafficking (see § 230 Communications Decency Act 1996, U.S.C. § 230). For an overview, see Natalia Homchick, ‘Reaching Through the “Ghost Doxxer”: An Argument for Imposing Secondary Liability on Online Intermediaries’ (2019) 76(3) *Washington and Lee Law Review* 1307, 1329. As Henry et al (n 3) notes at 158, these ‘safe harbour’ laws present difficulties for victim-survivors of IBSA to hold online intermediaries to account.

<sup>106</sup>Robert Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2003).

Taking account of how regulatory cultures operate in a given jurisdictional setting where services and providers are based, may also be an important consideration to be taken into account by regulators, such as eSafety, in relation to the choice of enforcement strategies. In the circumstances, an 'advise and persuade' compliance strategy, which focuses on conciliation, rather than confrontation, to facilitate the overarching aims of the regulatory regime, rather than on imposing sanctions for breach,<sup>107</sup> would appear to be the current preferred approach by eSafety. The danger with such an approach is that it can lead to what has been described as the 'compliance trap', with a more cooperative approach to facilitating compliance which on the one hand is likely to assist with developing and maintaining regulator-regulatee relations, but may operate in practice to discourage improved behaviour, particularly where it is observed that poor behaviour goes unpunished.<sup>108</sup>

As noted previously, an alternative approach would be to navigate a middle line between the two approaches based on a responsive regulatory approach, which employs a mix of compliance and enforcement strategies to ensure appropriate behaviour on the part of those subject to the regulatory regime.<sup>109</sup> This would involve escalating towards a more punitive approach in the event that such behaviour does not improve in line with the aims and objectives of the regulatory regime.<sup>110</sup> Indeed, a more responsive regulatory position may be preferred in terms of its relations with the technology industry as eSafety develops into a more mature online safety regulator over time.<sup>111</sup> Although it remains to be seen, this may also be facilitated as a result of eSafety's expanded regulatory remit under the OSA 2021, which now requires that it reviews and registers industry codes and standards, with the objective of achieving responsible industry processes and procedures for dealing with online safety and content issues.<sup>112</sup> Where this objective is not achieved, then eSafety is then better placed to escalate its compliance strategy to impose industry-wide standards in place of agreed codes, investigate complaints arising from alleged breaches of such codes, and impose civil penalties and obtain injunctive orders.<sup>113</sup>

In seeking to strike the right balance in the use of compliance and enforcement strategies against a well-resourced technology industry with global reach, it is also vital that national online safety regulators, such as eSafety, are able to mobilise political and social support to encourage industry commitment to the online safety regulatory regime.<sup>114</sup> In the absence of political support, it is likely to prove difficult to pursue compliance enforcement activities successfully, particularly where it may involve influential

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<sup>107</sup>Hawkins (n 16); Hutter (n 16).

<sup>108</sup>Sidney A Shapiro and Randy S Rabinowitz, 'Punishment versus Cooperation in Regulatory Enforcement: A Case Study of OHSA' (1997) 49(4) *Administrative Law Review* 713; Parker (n 13).

<sup>109</sup>Ayres and Braithwaite (n 17).

<sup>110</sup>Gunningham (n 18) 120.

<sup>111</sup>An example of industry collaboration is highlighted by the Safety by Design initiative which involves industry collaboration with eSafety to promote safety, rights and ethics in design processes for online products and services, see eSafety Commissioner, 'Safety by Design' (2022) <<https://www.esafety.gov.au/industry/safety-by-design>> accessed 12 August 2022.

<sup>112</sup>OSA 2021 (n 62) pt 4.

<sup>113</sup>See OSA 2021 (n 62) ss 48, 50, 53, 57, 60. eSafety Commissioner, 'Learn About the Online Safety Act' (2022) <<https://www.esafety.gov.au/whats-on/online-safety-act>> accessed 12 August 2022. Industry compliance is also likely to be incentivised through the need to meet the Australian government's Basic Online Safety Expectations (BOSE) Direction 2022, overseen by eSafety, For an overview, see eSafety Commissioner, 'Basic Online Safety Expectations' (2022) <<https://www.esafety.gov.au/about-us/who-we-are/basic-online-safety-expectations>> accessed 12 August 2022.

<sup>114</sup>Parker (n 13) 593; Gunningham (n 102) 201.

transnational corporate actors.<sup>115</sup> However, where there is a political will, there is clearly a political way through, with the Australian government showing a greater preparedness in recent times to take on ‘tech giants’ in relation to the hosting and/or sharing of (defamatory) material on their platforms.<sup>116</sup> It is therefore important to keep in mind that politics matters in the national and international regulation of online intermediaries, as well as digital environments more generally. This includes whether, and if so how, harms such as IBSA are to be addressed in such environments, in addition to who is prioritised for redress in the circumstances.

## Conclusion

The use of tech-sex in offering a range of opportunities for the pursuit of sexual desire, pleasure and intimacy is to be welcomed. While such developments should be celebrated as a positive step in support of adult sexual agency, we also need to be mindful of the fact that harm may arise from their non-consensual use. The preferred approach in regulatory terms should involve showing due respect for adult sexual agency while also seeking to mitigate harm through the use of prevention and remediation strategies, which are sensitive to the differential impact of harm on a gendered and intersectional basis. Operating along a facilitative-protective axis, this is a regulatory approach that recognises the need for a more nuanced understanding of both the opportunities and challenges involved in managing risk and benefits arising from the use of tech-sex.

While recent regulatory reforms for enhancing online safety are to be welcomed in common law jurisdictions, such as Australia, there is a need to be cautious about framing regulatory design predominantly, or solely, around questions of safety which may promote a top-down regulatory response to managing risk which is overly narrow, prescriptive and largely prohibitory in approach. In the case of tech-sex, we consider it vital that a suitable balance be struck between facilitation and protection in regulatory design and implementation, which recognises the importance that sex and relationships have in individuals’ lives and, by extension, the technologies that are now commonly used to facilitate this in our current digital cultures. This involves recognising that managing risk is part of engaging with such technologies. However, such recognition should be accompanied by education activities by national online safety regulators which seek to enhance digital sexual literacy, as well as offering quick, low-cost remediation strategies in order to mitigate harms such as IBSA, where appropriate.

## Disclosure statement

No potential conflict of interest was reported by the author(s).

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<sup>115</sup>Matías Dewey and Donato Di Carlo, ‘Governing Through Non-Enforcement: Regulatory Forbearance as Industrial Policy in Advanced Economies’ (2021) *Regulation & Governance* <<https://doi.org/10.1111/rego.12382>> accessed 12 August 2022, 1–22.

<sup>116</sup>Michelle Meagher, ‘Australia’s Move to Tame Facebook and Google Is Just the Start of a Global Battle’ (*The Guardian* 24 February 2021) <<https://www.theguardian.com/commentisfree/2021/feb/24/australia-facebook-google-global-battle-governments-journalism>> accessed 12 August 2022; Rob Harris, ‘New Australian Laws to Unmask Anonymous Online Trolls and Make Tech Giants Pay’ (*Sydney Morning Herald* 28 November 2021) <<https://www.smh.com.au/politics/federal/new-australian-laws-to-unmask-anonymous-online-trolls-and-make-tech-giants-pay-20211128-p59csb.html>> accessed 12 August 2022.

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## ORCID

*Anne-Maree Farrell*  <http://orcid.org/0000-0001-9522-6528>

*Nicole Shackleton*  <http://orcid.org/0000-0002-1236-2346>

*Elizabeth Agnew*  <http://orcid.org/0000-0001-5855-5744>

*Samantha Hopkins*  <http://orcid.org/0000-0002-9609-224X>

*Jennifer Power*  <http://orcid.org/0000-0002-6566-3214>