

# Sentencing Image-Based Sexual Abuse Offences in Victoria

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# Sentencing Image-Based Sexual Abuse Offences in Victoria

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# Reporting image-based sexual abuse

If you would like to report image-based sexual abuse in Victoria or discuss having the material removed, you can contact one or more of the following organisations.

If an intimate image or recording has been posted online and you wish to have it **removed**, or the person who posted it lives overseas, contact:

- the website or hosting provider; and/or
- the Office of the eSafety Commissioner at <https://www.esafety.gov.au/report/image-based-abuse>.

To report the behaviour to **law enforcement** for a criminal justice response, contact:

- the Australian Cyber Security Centre at <https://www.cyber.gov.au/acsc/report>; and/or
- your local police station, which can be found at <https://www.police.vic.gov.au/location>.

You can contact the eSafety Commissioner to have the material removed even if you have already made a report to police, and you can contact police even if you have already made a report to the eSafety Commissioner. The eSafety Commissioner has further guidance at <https://www.esafety.gov.au/key-issues/image-based-abuse/take-action>.



# Executive summary

The non-consensual creation and sharing of intimate and sexual images and recordings, and threats to create and share such images and recordings, are behaviours collectively known as image-based sexual abuse (IBSA). This report presents the first empirical analysis of how people are sentenced for those behaviours in Victoria. To better understand the IBSA behaviours for which people are sentenced, this report examines research on the serious harms associated with IBSA. It also presents information on the rate of IBSA offences recorded by police, how many of those offences are ultimately sentenced (attrition), the demographics of offenders and victims, the relationships between them – especially whether the offending occurred in the context of family violence – and the types of offences typically co-sentenced alongside IBSA.

## Understanding image-based sexual abuse

Understandings of the nature of IBSA, along with the technology that facilitates it, have evolved quickly. IBSA has variously been understood as a technological crime, a behaviour consisting solely of sexting, a sexual crime and a means of exerting coercive control. It can be all of these and more. A recent proliferation of research in this area reveals that there are a number of types of IBSA, each of which has different motivations and effects on victim survivors. IBSA is used to exert coercive control through threats to distribute intimate images, to improve social status through sharing images with peers, for sexually deviant motivations (most prominently the sense of power related to surreptitiously capturing intimate images of others) and to gain a concrete or material benefit, particularly through threats to distribute (sextortion).

Research now shows that, while reporting to police is low, in part because victims often blame themselves or minimise the offending, between 10% and 23% of Australians have experienced some form of IBSA. It is a highly prevalent behaviour. Most perpetrators are male; women, lesbian, gay and bisexual people, disabled people and Aboriginal and Torres Strait Islander people are more likely to be victimised and to experience more severe harms. Threats to distribute intimate images, which victims often experience as ongoing if not endless, are associated with the highest level of reported harm.

## IBSA offences in Victoria

Victoria has two sets of offences, enacted in 2007 and 2014, that specifically criminalise IBSA behaviour. The offences enacted in 2007 were in response to a series of incidents involving photographs taken up women's skirts. They criminalise:

- using a device to intentionally observe another person's genital or anal region when that person would have a reasonable expectation that that region could not be observed (the *observe* offence, with a maximum penalty of three months' imprisonment);
- intentionally capturing a moving or still image or recording of another person's genital or anal region in such circumstances (the *capture* offence, with a maximum penalty of two years' imprisonment); and
- distributing, without consent, an image or recording of another person's genital or anal region (the *distribute genital image* offence, with a maximum penalty of two years' imprisonment).

The offences enacted in 2014 followed the Victorian Parliament's *Inquiry into Sexting*. They criminalise:

- intentionally distributing intimate images of another person, contrary to community standards of acceptable conduct (the *distribute intimate image* offence, with a maximum penalty of two years' imprisonment); and
- threatening, whether explicitly or implicitly, to so distribute such intimate images (the *threat to distribute* offence, with a maximum penalty of one year's imprisonment).

There is also a Commonwealth telecommunications offence of using a carriage service to menace, harass or cause offence that is capable of capturing IBSA behaviour; in those circumstances, the offence carries a maximum penalty of five years' imprisonment. Finally, the Office of the eSafety Commissioner operates a civil penalties scheme in parallel with other enforcement mechanisms. This scheme focuses on having IBSA content removed, as a priority.

## Prevalence of image-based sexual abuse in Victoria

Compared with the reported prevalence of IBSA in the general population, few IBSA offences (2,055) were recorded by police in the four-year study period of this report (2015–16 to 2018–19). In that same timeframe, 478 IBSA charges were sentenced. While this is only a rough proxy for attrition rates between recorded and sentenced offences, it suggests that approximately one-quarter of recorded offences are ultimately sentenced. Of course, based on the estimated prevalence of IBSA in Australia, this only represents a small fraction of IBSA offending, suggesting very low reporting rates.

Of instances that were recorded, most victims were female and most perpetrators were male. Indeed, the proportion of female victim survivors was higher than that which has previously been observed in Australian research. This is most likely due to the greater harms experienced by women, which in turn would make a criminal justice response more likely. Where a relationship between an offender and a victim was known, a substantial and increasing proportion of recorded and sentenced offences were perpetrated by a current or former partner. The prevalence of sentenced IBSA offences will no doubt have increased even more in 2020 given the significant growth in such behaviours reported to the Office of the eSafety Commissioner during COVID-19 lockdowns.

## Sentenced IBSA offending

Overall, sentenced IBSA offences in Victoria during the study period demonstrated low penalties relative to the harm caused, a high incidence of family violence and high numbers of co-sentenced offences.

The most common sentencing outcomes for cases involving IBSA offending in Victoria were community correction orders (27%), imprisonment (22%) and fines (19%). Imprisonment was imposed in respect of 112 charges in 67 cases; 64% of these 112 sentences were aggregate sentences (sentences of imprisonment imposed on multiple offences). Most of the 40 non-aggregate sentences of imprisonment were less than six months in duration, and almost all were either wholly or partially concurrent. Only three sentences of imprisonment imposed for IBSA offences during the study period were to be served in full. The average fine, where one was imposed, was \$1,500.

During the study period, the number of sentenced cases involving an IBSA offence climbed gradually. This was largely due to increases in the number of cases involving actual or threatened distribution of an intimate image (offences introduced in 2014), which by 2018–19 made up 80% of all IBSA offences sentenced in Victoria.

More than half of cases involving IBSA offending were linked to family violence, especially where the offender was an adult (58%) or the offence was actual or threatened distribution of an intimate image (64%). The IBSA offence most strongly linked to family violence was threatening to distribute an intimate image (71%). The upskirting offences were not strongly linked to family violence, but they were commonly sentenced alongside sexual offences against children, often related to child pornography. Family violence cases were associated with higher rates of fines and imprisonment as sentencing outcomes, and lower rates of community correction orders, than other cases involving IBSA offending.

In most cases (74%), IBSA offences were sentenced alongside other (non-IBSA) offending. The most common co-sentenced offences were breaches of intervention orders, present in 26% of cases. The number and type of offences co-sentenced with IBSA offences in family violence cases indicate that IBSA offenders whose behaviour occurs in the context of family violence tend to commit more offences, often of multiple types, in comparison to IBSA offenders whose behaviour does not.

## Implications

IBSA is usually not recorded or sentenced unless it is associated with other offending, and it tends to receive low sentences relative to the harm it can cause in serious cases. When it does attract imprisonment, that sentence is often an aggregate sentence imposed on multiple offences or a concurrent sentence that does not require any actual time in custody. These penalties will be appropriate for some IBSA offences, especially those involving young perpetrators and those outside the context of family violence or other serious offending. However, low reporting rates and the availability of non-criminal responses suggest that much of the IBSA offending that does reach the courts for sentencing is relatively serious.

Three key implications arose from the data in this report and stakeholder feedback received during consultation:

- **Limits on investigative powers.** In Victoria, unlike in other Australian jurisdictions (apart from South Australia), IBSA offences are summary offences located in the *Summary Offences Act 1966* (Vic). Where a case involves no indictable offences, this limits police search powers, particularly in accessing computer systems to obtain evidence. In turn, this inhibits police's ability to gather sufficient evidence to lay charges and contributes to at least some of the attrition between recorded and sentenced offences.
- **Low maximum penalties.** The maximum penalties for IBSA offences in Victoria are low compared with most other Australian jurisdictions, and the maximum penalty for threatening to distribute an intimate image is half (one year's imprisonment) the maximum penalty for actual distribution (two years' imprisonment). While most threat offences in criminal law carry lower maximum penalties than their substantive counterparts, IBSA offending is unusual in that victim survivors report *more* harm arising from threats than from actual distribution. Given that courts must have regard to maximum penalties in sentencing criminal offending, Victoria's maximum penalties, especially for the threat to distribute offence, must contribute to what seem to be relatively low sentences overall.
- **Limited community awareness.** Stakeholders consulted by the Council unanimously agreed that the low numbers of recorded and sentenced IBSA offences, compared with the prevalence in the general community, were primarily attributable to low reporting. This is linked in turn to a widespread perception, particularly among victim survivors, that the behaviour is not criminal. As a result, IBSA tends to be reported and prosecuted only where there is a long course of conduct and/or where there are other types of offending that lead victim survivors to report the matter to police.

Outside possible legislative amendments that might enhance police investigative powers and sentencing practices for IBSA offending, perhaps the most useful next step is to improve awareness. This includes awareness of the prevalence, associated harms and criminality of these behaviours – and avenues for dealing with them – among the general community, those responsible for investigating and prosecuting IBSA offending, and victim survivors and offenders themselves. Such awareness could help discourage offending, improve reporting rates, encourage criminal justice actors to become more sensitive to the harms that victim survivors experience, and encourage criminal justice responses to become more commensurate with those harms.

# 1. Introduction

- I.1 Gendered abuse, especially family violence, has received increasing recognition in recent years. One aspect of gendered abuse that has recently begun to receive attention is image-based sexual abuse (IBSA). IBSA is a catch-all term that describes the non-consensual creation and/or distribution of private nude or sexual imagery.<sup>1</sup> This behaviour is by no means limited to male perpetrators engaging in IBSA against female victim survivors. But a substantial proportion of the harm associated with IBSA arises from its gendered nature, often linked to coercive control. IBSA is also becoming increasingly prevalent in 2020: as social and sexual relationships moved online in response to COVID-19, reports of image-based abuse in Australia increased by 600% over the Easter weekend alone, and between March and May, reports increased by 200% on average.<sup>2</sup>
- I.2 Smartphones, tablets and cameras have become increasingly ubiquitous in recent years, making it much easier to create and share images and video. As a result, along with increases in online dating and communication, the recording and distribution of intimate imagery have become more prevalent. While much of this creation and sharing of intimate imagery is consensual, some is not. Non-consensual creation and sharing of intimate imagery can be perpetrated by people unknown to the victim survivor (for example, 'upskirting', which involves using phones or cameras to take intimate images under others' clothing in a public place) or by people known to the victim survivor (for example, 'revenge porn', which involves a current or former intimate partner distributing or threatening to distribute an intimate image).<sup>3</sup> Threatening to distribute an intimate image, in particular, is a common means of establishing or maintaining coercive control over an intimate partner, causing substantial harm and dissuading them from ending the relationship.<sup>4</sup>
- I.3 IBSA is not easily dealt with by the criminal law. It comprises a wide range of behaviours, including observing or capturing imagery in public settings, and pre-existing laws governing voyeurism, stalking and privacy sometimes struggle to capture the behaviour involved.<sup>5</sup> In order to address this gap, many jurisdictions have introduced specific laws, with new provisions being enacted as new forms of IBSA have emerged. Victoria was one of the first Australian jurisdictions to introduce specific IBSA offences, the most recent of which came into effect in November 2014.<sup>6</sup> Each Australian jurisdiction, other than Tasmania, now has similar offences, though they vary in terms of the offence labels, elements and maximum penalties.<sup>7</sup>

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1. Clare McGlynn et al., 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25(1) *Feminist Legal Studies* 25, 38–40; Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37(3) *Oxford Journal of Legal Studies* 534, 544. Other labels for this category of behaviour include image-based abuse, non-consensual pornography, image-based sexual exploitation, technology-facilitated sexual violence and digital rape.
  2. Claudia Long, 'Coronavirus Shutdown Prompts Spike in Reports of Sextortion to eSafety Commissioner', ABC News (Australia) 3 June 2020 <<https://www.abc.net.au/news/2020-06-03/spike-reports-esafety-commissioner-coronavirus-shutdown/12314442>> at 22 September 2020.
  3. McGlynn et al. (2017), above n 1, 29–33; Majid Yar and Jacqueline Drew, 'Image-Based Abuse, Non-Consensual Pornography, Revenge Porn: A Study of Criminalization and Crime Prevention in Australia and England & Wales' (2019) 13(2) *International Journal of Cyber Criminology* 578, 580–581.
  4. Victoria, Royal Commission into Family Violence, *Report and Recommendations*, vol. I (2016) 28–30; Nicola Henry et al., *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts, Report to the Criminology Research Advisory Council* (2019) 79–87; Paul McGorrey and Marilyn McMahon, 'Prosecuting Controlling or Coercive Behaviour in England and Wales: Media Reports of a Novel Offence' (2019) *Criminology and Criminal Justice* (DOI 10.1177/1748895819880947) 8–9.
  5. McGlynn et al. (2017), above n 1, 29–36.
  6. *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) ss 23–27.
  7. *Crimes Act 1900* (ACT) ss 61B, 72A–72H; *Crimes Act 1900* (NSW) ss 91K–91T; *Criminal Code Act 1983* (NT) ss 208AA–208AE; *Criminal Code Act 1899* (Qld) sch 1 ss 223, 227A–B, 229A–229AA; *Summary Offences Act 1953* (SA) ss 26A–26E; *Criminal Code Act Compilation Act 1913* (WA) app B sch 1 ('Criminal Code') ss 221BA–221BF, 338A–338C. In appropriate cases, the Commonwealth offence of using a carriage service to menace, harass or offend may be used to capture IBSA offending in Tasmania: see for example, *State of Tasmania v Andrew David Gilley* (Unreported, Supreme Court of Tasmania, Pearce J, 26 June 2018).

- I.4 There is currently a dearth of research on how these relatively new offences are applied in practice, which offences are commonly co-sentenced alongside IBSA, and how the sentencing factors applicable in such cases align with research and public opinion on the typology and harms of IBSA offending. This report addresses that lack of research by reviewing the literature on IBSA and providing an overview of sentencing for IBSA offences in Victoria in the four financial years to 2018–19.

## Scope and aims of this report

- I.5 Chapter 2 of this report begins by reviewing criminological and other relevant literature on the prevalence, motivation and harms of IBSA offending. The analysis of prior research focuses on Australian material, particularly Victorian material where available, but it also uses international material on IBSA in order to contextualise local information. Chapter 3 explains the relevant legal framework, including Victoria's specific IBSA offences, Commonwealth offences and other enforcement mechanisms, and general offences that may be relevant in IBSA cases.
- I.6 This report then analyses data on sentencing trends for IBSA offences in Victoria in the four years to 30 June 2019, including:
- the prevalence of recorded and sentenced IBSA offences, based on police data and cases sentenced in the Magistrates' Court, Children's Court and higher courts (the County and Supreme Courts);
  - the sentencing outcomes associated with IBSA offending;
  - the proportion of IBSA cases flagged as involving family violence; and
  - the offences most commonly co-sentenced with IBSA offences.
- I.7 Child pornography offences are not included in the analysis as they are substantively different from IBSA offending in terms of typology and harms, and they are most likely subject to different trends in terms of reporting, prosecution and sentence type and duration.<sup>8</sup>

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8. Previous research suggests that child pornography offending is more likely to be viewed as a 'true crime', be pursued by enforcement agencies and receive greater investigative resources, resulting in a higher chance of prosecution and more likely higher sentences: Nicola Henry et al., 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (2018) 19(6) *Police Practice and Research* 565, 572–573; Anastasia Powell and Nicola Henry, 'Policing Technology-Facilitated Sexual Violence Against Adult Victims: Police and Service Sector Perspectives' (2018) 28(3) *Policing and Society* 291, 301–303.

## 2. Literature review

- 2.1 This chapter examines the available literature on the prevalence of image-based sexual abuse (IBSA), including the different behaviour patterns associated with IBSA offending, the nature and severity of harm experienced in relation to those patterns, and the motivations and characteristics of perpetrators of IBSA.

### What is image-based sexual abuse?

- 2.2 IBSA – also sometimes known as non-consensual pornography or image-based abuse – refers to three main behaviours:
- creating nude or sexual images or videos;
  - sharing or distributing nude or sexual images or videos; and
  - threatening to share nude or sexual images or videos.<sup>9</sup>
- 2.3 In some situations, pre-existing laws (for example, stalking, harassment and offensive behaviour laws) could theoretically be used to deal with IBSA.<sup>10</sup> Though possible, this occurs comparatively rarely in jurisdictions where IBSA is not specifically criminalised, perhaps partly because there is a lack of clear community consensus that the behaviour is unacceptable and criminal, and perhaps partly because IBSA offending may not neatly fit within those offence labels.<sup>11</sup> Further, in many jurisdictions without specific provisions:
- imagery taken in public is not otherwise covered by privacy or voyeurism legislation even if it focuses on an area of the body that would usually be covered by clothing and not expected to be visible;<sup>12</sup>
  - an additional element to non-IBSA offences, such as lewdness or an intent to cause harm, may be required, and this requirement may cause difficulties in proving the offence;<sup>13</sup> and
  - it is illegal to take nude or sexual imagery without the consent of the subject of that imagery, but it is not sufficiently clear that it is illegal for the creator or recipient of legally created or shared imagery to distribute it further.<sup>14</sup>
- 2.4 Specific laws are therefore an important means of signalling to offenders, the community at large, and authorities and enforcement agencies that IBSA is criminal and will not be tolerated.

9. McGlynn et al. (2017), above n 1, 38–40; McGlynn and Rackley (2017), above n 1, 544.

10. See for example, *DPP v Kavanagh* [2019] VCC 736 (23 May 2019) [24]–[25]. In this case, a course of conduct that included repeated IBSA offending was dealt with using stalking charges.

11. This includes Australian jurisdictions before their specific laws were enacted. See for example, Powell and Henry (2018), above n 8, 303–305; Henry et al. (2018), above n 8, 569–571. In the Second Reading Speech for the Bill that introduced upskirting offences for Victoria, the then Attorney-General commented: 'This bill will make it clear that taking unauthorised photos of a person's intimate body parts ... is unacceptable to the community and will not be tolerated': Victoria, 'Summary Offences (Upskirting) Bill', *Parliamentary Debates*, Legislative Assembly, 21 June 2007, 2146 (Rob Hulls, Attorney-General). On the importance of offence labels accurately describing the prohibited behaviour, see James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.

12. McGlynn and Rackley (2017), above n 1, 539.

13. For example, the United Kingdom has a relevant telecommunications offence, but it requires the electronic communication to be indecent or grossly offensive, and the offender to intend to cause distress or anxiety: *Malicious Communications Act 1988* (UK) s 1. Another offence requires intent to cause distress: *Criminal Justice and Courts Act 2015* (UK) s 33. Similarly, the common law offence of outraging public decency could be used, but it requires the offence to be of a 'lewd' character, which does not align with the coercive harms of IBSA discussed at [12]–[15]: *R v Hamilton* [2007] EWCA Crim 2062 [21]; see also McGlynn and Rackley (2017), above n 1, 553–555.

14. See for example, Powell and Henry (2018), above n 8, 303; Victoria, 'Crimes Amendment (Sexual Offences and Other Matters) Bill', *Parliamentary Debates*, Legislative Assembly, 21 August 2014, 2935 (Robert Clark, Attorney-General). The 2007 legislation explicitly made it a separate offence for upskirting images to be distributed as well as to be taken.

- 2.5 New behaviours of concern also continue to emerge, which may or may not be covered by existing laws against IBSA. For example, advances in image and video manipulation have led to 'morph porn' or 'deepfake porn', in which software and/or artificial intelligence are used to splice imagery of an individual with nude or sexual material obtained elsewhere, digitally generating nude or sexual images or video.<sup>15</sup> Receiving unwanted nude or sexual images has also been gaining increasing attention as an experience of image-based harassment – for example, 'dick pics' sent without warning, often to strangers through messages on dating apps or proximity-based transmission methods such as Bluetooth – and is sometimes now referred to as 'cyber-flashing'.<sup>16</sup> Emerging IBSA behaviours may be substantially different in motivation, prevalence, medium and harm from other forms of IBSA; this report therefore focuses on the behaviours described at [2.2], which are specifically captured by Victorian legislation.

## Victim survivors of image-based sexual abuse

### Overall prevalence

- 2.6 IBSA is very common. A large, recent study found that almost one-quarter of Australians aged 16 to 49 have experienced IBSA.<sup>17</sup> In addition, an unknown proportion of respondents would have had their imagery distributed, or non-consensually created, but they would have been unaware that this took place.<sup>18</sup>
- 2.7 The most common type of IBSA victimisation was the creation of nude or sexual imagery, reported by 20% of respondents.<sup>19</sup> Distribution of nude or sexual imagery was also common, at 11%.<sup>20</sup> There was substantial overlap between these groups,<sup>21</sup> perhaps because where imagery is shared without consent, the person sharing it is often the same person who created it.<sup>22</sup>

15. McGlynn et al. (2017), above n 1, 33–34; Clare McGlynn et al., *Shattering Lives and Myths: A Report on Image-Based Sexual Abuse* (2019) 2; Henry et al. (2019), above n 4, 93–94. This type of offending is explicitly captured by the Australian Capital Territory and New South Wales legislation: *Crimes Act 1900* (ACT) s 72A (definition of 'intimate image'); *Crimes Act 1900* (NSW) s 91N (definition of 'intimate image').

16. Asher Flynn, 'Cyberflashing: Old-Style Sexual Harassment for the Digital Age', *Monash Lens* (Melbourne) 6 September 2019 <<https://lens.monash.edu/@politics-society/2019/09/06/1376441/cyberflashing-the-latest-form-of-digital-sexual-harassment>> at 7 September 2020. The United Kingdom's Law Commission is currently reviewing UK IBSA legislation, including addressing deepfake/morph porn and cyberflashing: United Kingdom Law Commission, 'Taking, Making and Sharing Intimate Images Without Consent' (lawcom.gov.uk, 2020) <<http://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/>> at 9 September 2020.

17. In that study, IBSA is defined as a person having their nude or sexual images taken or distributed, or experiencing threats to take or distribute their nude or sexual images, without consent: Henry et al. (2019), above n 4, 28–30, 34. This rate is high compared with other jurisdictions. For example, a New Zealand study of 1,001 adults with no maximum age found that 5% had been threatened and/or had had private sexual content shared without consent: Edgar Pacheco et al., *Image-Based Sexual Abuse: A Snapshot of New Zealand Adults' Experiences* (2019) 4. A United States study found that 6% of respondents aged 15 and over had been targeted: Amanda Lenhart et al., *Online Harassment, Digital Abuse, and Cyberstalking in America* (2016) 40. The difference may be explained by the age range of participants and the definition of IBSA used: Lenhart et al. referred to 'sexual harassment', while Pacheco et al. asked about 'distribution or threat to distribute any intimate or sexual digital communication (for example, picture or video) online without consent'. Neither study had an upper age limit. In contrast, Henry et al. referred to 'creation, distribution, or threatened distribution of photos or videos where a person was nude, where their breasts or genitals were visible, where they were engaged in a sex act, where they were showering or bathing', and "'upskirting'" and "downblousing" images': Henry et al. (2019), above n 4, 34. This is a more inclusive definition, and the upper age bound of their sample was 49, excluding a large proportion of older people unlikely to have been victimised due to their technology use patterns.

18. Henry et al. (2019), above n 4, 34.

19. *Ibid* 35. Approximately 10% of women report having had imagery of their cleavage taken without their consent, and approximately 5% report imagery taken from under their skirts: *ibid* 36.

20. *Ibid* 35. This is also consistent with other research that found that 11% of Australians aged 16 and over have had a nude or sexual photo or video posted online or sent on without their consent: Office of the eSafety Commissioner, *Image-Based Abuse National Survey: Summary Report* (2017) 3.

21. Of those who had an image or video taken without their consent, 45% were also aware that they had had an image or video shared without their consent: Henry et al. (2019), above n 4, 35.

22. Office of the eSafety Commissioner (2017), above n 20, 5. Most (62%) of adults who had experienced imagery being shared without consent indicated that the person who had shared the imagery was the same person who had taken it, although secondary sharing that the victim survivor is unaware of may alter the overall proportions.



Threats were the least common reported form of IBSA victimisation, at 9%.<sup>23</sup> It is common for victim survivors of IBSA to be recognisable in imagery that is distributed and to have personal information shared as well.<sup>24</sup>

### Risk factors for victimisation

- 2.8 IBSA victimisation appears to be more common among vulnerable groups. In particular, younger Australians and lesbian, gay and bisexual Australians are more likely to be victim survivors of IBSA.<sup>25</sup> People aged 18–24 are approximately three times more likely than those aged 46–55 to have had imagery distributed without consent.<sup>26</sup> Aboriginal and Torres Strait Islander people and people with disabilities reported even higher rates of victimisation: more than half of respondents in these categories experienced some form of IBSA.<sup>27</sup>
- 2.9 The research on the relative prevalence of IBSA victimisation according to gender suggests that women are at elevated risk of harm compared to men. Some research suggests that men and women experience IBSA at similar rates.<sup>28</sup> Other research, based on a sample representative of the Australian adult population, suggests that women are up to twice as likely as men to be the victim survivors of IBSA,<sup>29</sup> and that perpetrators tend to target women,<sup>30</sup> who are affected particularly severely by this type of offending. In consultation, stakeholders commented that women tended to experience both more extreme behaviour and more severe harm (due to social double standards) even where the behaviour involved was comparable.<sup>31</sup> Most imagery on websites dedicated to sharing 'non-consensual pornography' also depicts women,<sup>32</sup> although it is unlikely that sharing on these websites represents a substantial numerical proportion of IBSA. On the other hand, men appear more likely to experience 'sextortion' scams, where threats are made to distribute private sexual imagery unless the victim pays money.<sup>33</sup>

**20%**  
have had nude/sexual  
imagery created

**11%**  
have had nude/sexual  
imagery distributed

**9%**  
have received threats  
to distribute nude/  
sexual imagery

23. Henry et al. (2019), above n 4, 35.

24. Office of the eSafety Commissioner (2017), above n 20, 9.

25. Henry et al. (2019), above n 4, 36–37.

26. Ibid 37.

27. Ibid 36–37. New Zealand research found similar results, with younger, Maori and non-heterosexual people reporting higher rates of victimisation: Pacheco et al. (2019), above n 17, 5–6.

28. Henry et al. (2019), above n 4, 35–37; Pacheco et al. (2019), above n 17, 5.

29. Office of the eSafety Commissioner (2017), above n 20, 4. The eSafety Commissioner disclosed that, among those who reported IBSA in 2018–19, 70% of those who were not reporting sextortion were female, and the overwhelming majority of those who experienced sextortion were male: Australian Communications and Media Authority and Office of the eSafety Commissioner, *Annual Report 2018–19* (2019) 208.

30. Anastasia Powell et al., 'Image-Based Sexual Abuse: The Extent, Nature, and Predictors of Perpetration in a Community Sample of Australian Residents' (2019) 92 *Computers in Human Behaviour* 393, 397; Office of the eSafety Commissioner (2017), above n 20, 6.

31. Roundtable 2 (29 July 2020). On gendered perpetration and harms, see further [2.14]–[2.15].

32. Matthew Hall and Jeff Hearn, 'Revenge Pornography and Manhood Acts: A Discourse Analysis of Perpetrators' Accounts' (2019) 28(2) *Journal of Gender Studies* 158, 161; Carolyn Uhl et al., 'An Examination of Nonconsensual Pornography Websites' (2018) 28(1) *Feminism and Psychology* 50, 61.

33. Pacheco et al. (2019), above n 17, 5; Australian Communications and Media Authority and Office of the eSafety Commissioner (2019), above n 29, 208.

- 2.10 There is an association between whether people have taken nude or sexual images or video of themselves and whether they have experienced IBSA, particularly where the self-images were taken following pressure or coercion. Almost half of those who felt pressured into taking nude imagery also experienced IBSA.<sup>34</sup> Nonetheless, even among the group who had never taken a nude or sexual image or video of themselves, 10% had experienced IBSA,<sup>35</sup> and rates of both IBSA victimisation and IBSA perpetration are far lower than rates of nude or sexual image-taking.<sup>36</sup> The association is more likely to be related to the sexual and technological landscape within which IBSA most commonly occurs than to any direct causal link.<sup>37</sup> However, there may be a relationship between nude or sexual image-taking and victim-blaming attitudes: more than one in four young Australians surveyed in 2017 believed that if a woman sends a nude image to her partner, she is partly responsible if that image is shared without consent.<sup>38</sup>

“ There’s a lot of stigma and shame and concern around it. The fear of retribution from the perpetrator, the fear of retribution from your family, the victim blaming that goes along with particularly this type of offending, especially if the photo is something that was created consensually... There’s also the fear of who gets access to those photos ... as someone who is experiencing a sexual harm, to then go and have that photo become part of evidence can itself be another form of quite traumatising victimisation. ”

Participant at Roundtable 2 (29 July 2020)

## Harms

- 2.11 The harms associated with IBSA vary substantially, with a wide range of severity and different impacts for each behaviour type. Like the harms of many sexual and relationship crimes, the harms of IBSA can vary depending on victim survivors’ cultural and social situations, with IBSA sometimes combining with discrimination or other disadvantage to create particularly severe harm.<sup>39</sup>
- 2.12 Victim survivors of threats are most likely to report feeling fearful for their safety. Around half of Australians aged 16–49 who experienced threats to distribute their private nude or sexual imagery reported feeling ‘very’ or ‘extremely’ fearful for their (impliedly physical) safety.<sup>40</sup> This proportion is lower where imagery is actually distributed, and much lower for image creation.
- 2.13 Even so, more than one-quarter of those who had imagery non-consensually created were ‘very’ or ‘extremely’ fearful for their safety.<sup>41</sup> Psychological illness and distress are also common, with most victim survivors reporting psychological distress consistent with moderate to severe anxiety or depression.

34. Henry et al. (2019), above n 4, 38; Office of the eSafety Commissioner (2017), above n 20, 5.

35. Henry et al. (2019), above n 4, 38.

36. Powell et al. (2019), above n 30, 400; Henry et al. (2019), above n 4, 34.

37. Similarly, having been a victim survivor of IBSA is correlated with perpetrating IBSA, but this is also likely to be linked to the broader context rather than there being a direct causal relationship: Powell et al. (2019), above n 30, 400.

38. Australia’s National Research Organisation for Women’s Safety (ANROWS), *Young Australians’ Attitudes to Violence Against Women and Gender Equality: Findings from the 2017 National Community Attitudes Towards Violence Against Women Survey (NCAS)*, ANROWS Insights, Issue 01/2019 (2017) 27.

39. McGlynn et al. (2019), above n 15, 7.

40. Henry et al. (2019), above n 4, 41. Participants were asked whether they felt that the IBSA was funny, okay, annoying, humiliating, depressing or frustrating, or if they feared for their safety, and whether the IBSA had had personal impacts, such as on intimate, family, social and professional relationships: *ibid* 30.

41. *Ibid* 41; see also Office of the eSafety Commissioner (2017), above n 20, 9–10.

Rates ranged from 80% for those affected by threats to distribute to 67% for those affected by non-consensual image creation.<sup>42</sup>

- 2.14 IBSA is also linked to stalking and harassment. One-quarter of those whose imagery was non-consensually distributed reported being stalked or threatened by the perpetrator after the sharing occurred.<sup>43</sup> Research has also suggested links to other types of victimisation, which may or may not be criminal. For example, there is a correlation between coerced sexual image creation<sup>44</sup> and IBSA,<sup>45</sup> and there may be a further link from these to coerced sexual behaviour.<sup>46</sup> At the most serious end of the spectrum, IBSA sometimes occurs as a part of serious contact sexual offending, for example, filming and distributing video of a sexual assault.<sup>47</sup> Where this occurs, victim survivors may be seriously retraumatised by further threats or distribution, or by the knowledge that the offender still holds footage of their assault.<sup>48</sup>
- 2.15 The harms associated with IBSA victimisation vary by gender. In particular, for every category of IBSA, women are more likely than men to report feeling fearful for their safety.<sup>49</sup> There is also a stronger link between IBSA and threatening and stalking behaviour for female victim survivors than for male victim survivors.<sup>50</sup> Women are particularly likely to experience IBSA, especially threats, at the hands of a partner or an ex-partner.<sup>51</sup> The combination of the comparatively high incidence of fearfulness, threats and partner perpetrators in relation to female victim survivors suggests a potential connection with family and relationship violence.<sup>52</sup> The difference in reported harm between threatened and actual distribution, along with these surrounding factors, may indicate harm linked to coercive control.
- 2.16 It is worth noting that threats to share intimate imagery differ from other criminal threats because the credibility of the threat is not subject to limitations such as physical proximity, and it may not be limited in time. A threat to distribute intimate imagery can be 'as powerful as actually doing it'.<sup>53</sup> Further, threats may be credible even where no imagery actually exists, for example, if the person being threatened believes the perpetrator may have secretly created an image or recording. Similarly, the mere fact that a perpetrator deletes imagery to which a threat relates may not put a victim survivor's mind at ease because it is near impossible to prove that the imagery has not been copied or published elsewhere. As a result, victim survivors may experience threats to distribute as omnipresent and endless.<sup>54</sup>

42. Henry et al. (2019), above n 4, 41. In another Australian survey, 41% said experiencing non-consensual image distribution had directly impacted their mental health: Office of the eSafety Commissioner (2017), above n 20, 10.

43. Office of the eSafety Commissioner (2017), above n 20, 6.

44. Coercive control laws have been enacted in England and Wales, Scotland and Ireland. With the exception of Tasmania, Australian jurisdictions have yet to enact similar legislation: see Marilyn McMahon and Paul McGorrery, 'Criminalising Coercive Control: An Introduction', in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (2020) 3–32.

45. Henry et al. (2019), above n 4, 38.

46. Hyejeong Choi et al., 'Association Between Sexting and Sexual Coercion Among Female Adolescents' (2016) 53 *Journal of Adolescence* 164, 266–267; Powell and Henry (2018), above n 8, 295–296.

47. Powell and Henry (2018), above n 8, 295.

48. McGlynn et al. (2019), above n 15, 2, 7–9; Henry et al. (2019), above n 4, 95–97.

49. Henry et al. (2019), above n 4, 41.

50. Office of the eSafety Commissioner (2017), above n 20, 6.

51. Henry et al. (2019), above n 4, 39–41: Women also appear to experience higher rates of non-consensual image creation (including upskirting and downblousing) perpetrated by strangers.

52. See McGlynn et al. (2019), above n 15, 4–5.

53. Henry et al. (2019), above n 4, 75.

54. This parallels the experience of victim survivors of digital coercive control and technology-facilitated abuse more generally; they often experience that abuse as spaceless and omnipresent: see Delanie Woodlock et al., 'Technology as a Weapon in Domestic Violence: Responding to Digital Coercive Control' (2019) *Australian Social Work* (DOI 10.1080/0312407X.2019.1607510) 5–6 <<https://www.tandfonline.com/doi/full/10.1080/0312407X.2019.1607510>> at 5 June 2020; Bridget Harris and Delanie Woodlock, 'Digital Coercive Control: Insights from Two Landmark Domestic Violence Studies' (2019) 59 *British Journal of Criminology* 530, 537.

## Reporting

- 2.17 Victim survivors of IBSA are more likely than non-victim survivors to minimise the harm associated with their victimisation or to excuse the conduct of the perpetrator.<sup>55</sup> This is common among victim survivors of sexual and gendered violence, including family violence offending.<sup>56</sup> Such minimisation may affect the likelihood that victim survivors will report their experience, especially as IBSA involves no physical contact. Qualitative research has suggested that low awareness among police of the harms and illegality of IBSA may contribute to 'victim blaming and harm minimisation attitudes'. This can present obstacles to reporting, particularly where victim survivors already tend to minimise their experiences and to blame themselves.<sup>57</sup> In addition, harm may ensue if a report is perceived as not being well-handled by police.<sup>58</sup> Reporting may also involve a degree of inherent retraumatisation; for example, for people who experience threats to distribute intimate imagery, it may be difficult to willingly distribute those images or videos to police during an investigation.<sup>59</sup>
- 2.18 Research and consultation suggest that overall reporting rates for IBSA are low compared with other types of crime.<sup>60</sup> Contributing factors include victim blaming and harm minimisation attitudes, a lack of awareness that the behaviour is illegal, a lack of awareness about the options available to respond to it,<sup>61</sup> and sometimes a lack of knowledge that IBSA has occurred.<sup>62</sup> People who receive images are also unlikely to report IBSA to the relevant authorities.<sup>63</sup>

## Perpetrators of image-based sexual abuse

- 2.19 Like victimisation, perpetration of IBSA is common. Approximately 10% of Australians aged 16–49 surveyed admitted having engaged in at least one IBSA behaviour. Image creation (9%) was the most common, followed by distribution (7%). Threats to distribute were the least common (5%).<sup>64</sup>
- 2.20 According to both victim survivor reports and self-reports, perpetrators tend to be male. More than half of victim survivors who participated in a recent Australian survey identified a male perpetrator; one-third identified a female perpetrator and the remainder (13%) reported being victimised by an unknown perpetrator or a mixed-gender group.<sup>65</sup>

55. Henry et al. (2019), above n 4, 44–45.

56. See for example, Victoria, Royal Commission into Family Violence (2016), above n 4, 24–25, 47–48. Cultural and psychological barriers to reporting offending and accessing services may be particularly pronounced in certain communities, such as in Aboriginal communities and culturally and linguistically diverse communities: *ibid* 59. See also VicHealth, *Australians' Attitude to Violence Against Women: Findings from the 2013 Community Attitudes Towards Violence Against Women Survey (NCAS)* (2018) 55–56; Australian Bureau of Statistics, *Personal Safety*, cat. no. 4906.0 (2016) Table 10.3 ('Most Recent Incident of Sexual Assault by a Male').

57. Henry et al. (2018), above n 8, 574–575. Reporting rates for sexual assault, which is affected by many similar difficulties, are also low: 87% of people who experience sexual assault do not go to police, often because they 'felt ashamed or embarrassed' (25%) or 'did not regard the incident as a serious offence' (34%). For comparison, reporting rates for assault sit at around 50% and for threatened assault around 36%: Australian Bureau of Statistics (2016), above n 56, Table 10.3.

58. McGlynn et al. (2019), above n 15, 10.

59. Henry et al. (2018), above n 8, 574.

60. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020); Office of the eSafety Commissioner (2017), above n 20, 10. In this Australian survey, 24% of victim survivors took some form of action in response; of those, 35% (around 9% overall) formally or informally reported the IBSA. Common reasons for not taking action included embarrassment, shame, not knowing what to do, and feeling that taking action would not change anything. See further [4.2]–[4.3] and above n 56.

61. Office of the eSafety Commissioner (2017), above n 20, 10–11.

62. Henry et al. (2019), above n 4, 34; Office of the eSafety Commissioner (2017), above n 20, 8.

63. Office of the eSafety Commissioner (2017), above n 20, 13. Research into bystander perceptions of IBSA suggests that this may be because people do not know what to do, it may not be immediately obvious that distribution occurred without consent, they do not perceive IBSA as serious, or they feel or become complicit: see also Henry et al. (2019), above n 4, 46.

64. Henry et al. (2019), above n 4, 38–39.

65. *Ibid* 38.

Males (13.7%) were almost twice as likely as females (7.4%) to self-report having engaged in IBSA behaviour, and lesbian, gay and bisexual people were more likely than heterosexual people to report having engaged in IBSA behaviour.<sup>66</sup>

- 2.21 Victim survivor reports of perpetrator characteristics vary by gender and age. Female victim survivors were more likely than male victim survivors to report having been victimised by a partner or ex-partner, especially where the conduct was a threat to distribute.<sup>67</sup> Qualitative research and consultation with stakeholders similarly suggest that, in a relationship context, women more commonly experience IBSA and men more commonly perpetrate IBSA.<sup>68</sup> Older victim survivors were also more likely than younger ones to report being victimised by a partner or ex-partner, while younger victim survivors are more often victimised by people they know but who are not their intimate partners.<sup>69</sup> This may be related to characteristics of younger people's relationships, such as shorter duration,<sup>70</sup> and/or the ways in which they use technology.<sup>71</sup>

## Motivations for image-based sexual abuse

- 2.22 There is substantial evidence that perpetration of IBSA is related to attitudes about sex and sexuality (including the creation and sharing of sexual imagery), which minimise the impact of perpetrators' behaviour on victim survivors, blame the victim survivors, and make excuses for their own behaviour. Perpetrators of IBSA tend to adhere to these attitudes more than the general population.<sup>72</sup> Minimising, excusing and victim-blaming attitudes are also common among perpetrators and in social environments that implicitly condone or facilitate other forms of sexual and gendered violence.<sup>73</sup>
- 2.23 Perhaps relatedly, traditional attitudes towards gender roles and themes of 'misogyny and entitlement' – where male offenders are more motivated by others' perceptions of them than by the harm they may be doing to victim survivors – may be associated with men's IBSA offending,<sup>74</sup> as well as with family violence.<sup>75</sup> Perpetrators tend to target women more than men,<sup>76</sup> and most perpetrators report knowing their targets, most often as a current or previous intimate partner.<sup>77</sup>

66. Ibid 39, 45.

67. Ibid 40.

68. Social Research Centre, *Understanding the Attitudes and Motivations of Adults who Engage in Image-Based Abuse* (2019) 20; Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

69. Henry et al. (2019), above n 4, 40–41.

70. Social Research Centre (2019), above n 68, 20.

71. Roundtable 1 (28 July 2020).

72. Henry et al. (2019), above n 4, 41–45. This is tested by having survey participants rate their agreement with exemplar statements such as 'Women should be flattered if a partner or ex-partner shows nude pics of her to some close friends'; 'It's only natural for a guy to brag to his mates by showing them a nude or sexual image of his partner'; and 'If a person sends a nude or sexual image to someone else, then they are at least partly responsible if the image ends up online'. When they occur in the context of sexual behaviour or offending, these victim-blaming attitudes are sometimes referred to as rape myths.

73. Australia's National Research Organisation for Women's Safety (ANROWS), *Are We There Yet? Australians' Attitudes Towards Violence Against Women & Gender Equality: Summary Findings from the 2017 National Community Attitudes Towards Violence Against Women Survey (NCAS)*, Research to Policy and Practice, 03/2018 (2017) 8. See also Diana L. Payne et al., 'Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale' (1999) 33(1) *Journal of Research in Personality* 27; Anastasia Powell and Kim Webster, 'Cultures of Gendered Violence: An Integrative Review of Measures of Attitudinal Support for Violence Against Women' (2018) 51(1) *Australian and New Zealand Journal of Criminology* 40.

74. McGlynn et al. (2019), above n 15, 4–5; Mara Morelli et al., 'Not-Allowed Sharing of Sexts and Dating Violence from the Perpetrator's Perspective: The Moderation Role of Sexism' (2016) 56 *Computers and Human Behaviour* 163, 167.

75. VicHealth (2018), above n 56, 34–36.

76. Powell et al. (2019), above n 30, 397. A minority targeted both women and men or people whose gender they did not know. Non-heterosexual respondents were more likely than heterosexual respondents to have engaged in IBSA with a male victim and less likely to have engaged in IBSA against women.

77. Powell et al. (2019), above n 30, 397.

2.24 Evidence suggests that there are distinct types of IBSA offending, each with different motivations. Common patterns include:

- relationship-based motivations, such as control within a relationship<sup>78</sup> or revenge following the end of a relationship;<sup>79</sup>
- motivations linked to social status, such as demonstrating to third parties the possession of intimate imagery (either to gain prestige directly or as proof of a sexual encounter);<sup>80</sup>
- sexual/deviant motivations, such as a thrill or sense of power related to taking an image;<sup>81</sup>
- motivations linked to gaining a concrete or material benefit, particularly in cases involving blackmail of strangers (sextortion);<sup>82</sup> and
- other motivations, such as entertainment, seeking advice on what to do with a picture, or sharing images as a response to harassment that uses unsolicited images.<sup>83</sup>

“ What we often do see is that the threats are being made once the offender’s starting to fear that the victim might actually report ... I think the tactics used by the offender are probably littered throughout the offending, but it becomes a real desperate tactic towards the end. ”

Participant at Roundtable 2 (29 July 2020)

## Patterns of abuse and motivations

2.25 Different motivations for IBSA offending may suggest links with different offence (and likely co-offence) profiles. Perpetrators with different motivations may also perceive the nature and impact – including the wrongness – of their behaviour differently, with implications for the likelihood of recidivism and strategies aimed at addressing this offending.

2.26 Relationship-based motivations are particularly closely linked to threats, typically to share imagery that was consensually provided during a relationship, often as that relationship breaks down or ends. IBSA may be used to blackmail or coerce the victim survivor, including to stay in a relationship or to provide

further imagery or engage in sexual activity with the perpetrator;<sup>84</sup> to cause fear or shame; and to damage other relationships, such as with an employer. This supports a link between relationship-based IBSA, violence and other behaviours associated with coercive control.<sup>85</sup> There is also some evidence that victim survivors of family violence behaviours or offending sometimes perpetrate IBSA in response to, or in retribution for, victimisation.<sup>86</sup>

78. See, for example, McGorry and McMahon (2019), above n 4, 9.

79. Adapted from Social Research Centre (2019), above n 68, 15, 19–23.

80. Adapted from *ibid* 13–16, 24–30.

81. Adapted from *ibid* 17–18, 41–45. Adults sharing sexual images of children (child pornography) is also linked to sexual/deviant motivations, including a desire for a sense of power. This is not further discussed in this report as it belongs to a substantially different offence category and is treated very differently by the criminal justice system.

82. See Janis Wolak and David Finkelhor, *Sextortion: Findings from an Online Survey About Threats to Expose Sexual Images* (2016) 14–15. In this paper, the term *sextortion* does not include the use of threats within a relationship to exercise coercive control but relates to obtaining a financial or other material benefit.

83. Social Research Centre (2019), above n 68, 16–17, 31–35.

84. Where the threat is used to coerce a person into a sexual act, the charge of procuring a sexual act by threat, which carries a maximum penalty of 10 years’ imprisonment, may be appropriate: *Crimes Act 1958 (Vic)* s 44.

85. Victoria, Royal Commission into Family Violence (2016), above n 4, 28–30; Henry et al. (2019), above n 4, 79–87; McGorry and McMahon (2019), above n 4, 8–9.

86. Social Research Centre (2019), above n 68, 21.

Perpetrators with relationship-based motivations tend to be older and male,<sup>87</sup> and they tend to deflect questions of wrongness or illegality by blaming the victim survivor.<sup>88</sup>

- 2.27 Motivations linked to social status are particularly closely linked to distribution.<sup>89</sup> In some instances of distribution, however, especially where the person depicted is identifiable, power and control may be more evident motivations; some of these instances may relate to a perpetrator who has threatened to distribute carrying out that threat.<sup>90</sup> Qualitative research suggests a wide range of potential culpability and harm in this category. Typical presentations include pressuring an acquaintance to share imagery and on-sharing without consent; sharing imagery of an ex-partner (whether or not the sender is depicted) with friends via a messaging service; or secondary distribution of such imagery by recipients who may not know the person or people depicted.<sup>91</sup> Perpetrators in this category tend to be younger and male, and they tend to have low awareness of the criminality of their actions.<sup>92</sup>
- 2.28 Sexual and deviant motivations are particularly closely linked to image creation by strangers (that is, upskirting). Research with stakeholders suggests that offenders in this category are typically male and they belong to a variety of age and socioeconomic groups.<sup>93</sup> While perpetrators in this category are generally aware that their actions are illegal – illegality or risk may contribute to the sexual thrill – they may not realise, or they may avoid thinking about, the harm that their behaviour may cause victim survivors.<sup>94</sup> Perpetrators may view imagery later, reliving the memory of creating it, but they may be less likely than those engaging in other forms of IBSA to share their imagery with others.<sup>95</sup>
- 2.29 Sextortion, which is a form of blackmail, is by definition closely linked to threats. In fact, the typology of sextortion appears to be substantially different from other IBSA offending in that those who experience it are predominantly male and may not know the perpetrator.<sup>96</sup> Threat offending aimed at material gain, rather than relationship-related or sexual ends, may be distinguishable from other forms of IBSA because intimate imagery may merely be a means of accomplishing blackmail rather than a core aspect of the offending.<sup>97</sup>
- 2.30 Other motivations may be more closely linked to sharing imagery where the subject is not identifiable and receipt is unsolicited (for example, on-sharing unsolicited dick pics).<sup>98</sup> Typically, this sharing is done to mock the imagery or gauge how to respond to it, especially if receiving it is perceived as a violation; perpetrators typically have low awareness that their behaviour may be illegal or harmful.<sup>99</sup> Sharing unsolicited imagery is a mixed-gender phenomenon, perhaps because women are more likely than men to receive unsolicited imagery.<sup>100</sup>

87. Ibid 20–21.

88. Ibid 22–23.

89. Ibid 24–30.

90. See Wolak and Finkelhor (2016), above n 82, 27–29: 49% of perpetrators who made threats to people they knew face-to-face went on to carry out those threats or otherwise harm victim survivors compared to 37% of perpetrators who knew victim survivors only online.

91. Social Research Centre (2019), above n 68, 25–28.

92. Ibid 26, 29–30.

93. Ibid 41–43.

94. Ibid 43–45.

95. Ibid 43–44.

96. Australian Communications and Media Authority and Office of the eSafety Commissioner (2019), above n 29, 208.

97. In Victoria, such cases could be prosecuted as blackmail under section 87 of the *Crimes Act 1958* (Vic) rather than threatening to distribute an intimate image under section 41DB of the *Summary Offences Act 1966* (Vic). The maximum penalty for blackmail in Victoria is 15 years' imprisonment, whereas the maximum penalty for threatening to distribute an intimate image is one year's imprisonment.

98. Social Research Centre (2019), above n 68, 31.

99. Ibid 31–35.

100. Ibid 32. The phenomenon of sharing unsolicited sexual images with unwilling recipients is known as 'cyber-flashing': see [2.5].

## Conclusion

2.31 Research on IBSA perpetration and victimisation illustrates that it is very common. It varies widely in type, motivation, the harm it causes, who the perpetrator and victim survivor are and whether or not it is reported and why. The existence of different patterns of IBSA, with divergent motivations and impacts on victim survivors, suggests that IBSA offending may vary substantially in its causes, effects and potential for rehabilitation, with the most severe behaviour being similar to, or part of, other forms of gendered abuse, including coercive control. This will have substantial implications for how any particular instance of IBSA offending is sentenced and which purposes and principles of sentencing are engaged.



## 3. Legal framework

- 3.1 This chapter discusses the legislative provisions that criminalise image-based sexual abuse (IBSA) in Victoria, placing them in context both with one another and with other available enforcement mechanisms.

### Victorian offences

- 3.2 Victoria has five state-level offences that deal specifically with IBSA. The first three were introduced in 2007,<sup>101</sup> and the final two were introduced in 2014.<sup>102</sup> All the offences are found in Division 4A of the *Summary Offences Act 1966* (Vic). They prohibit:
- intentionally using a device to observe another person's genital or anal region when that person would have a reasonable expectation that that region could not be observed (section 41A: the *observe* offence);
  - intentionally capturing a moving or still image or recording of another person's genital or anal region when that person would have a reasonable expectation that that region could not be observed (section 41B: the *capture* offence);
  - having visually captured a moving or still image or recording of another person's genital or anal region, intentionally distributing that image or recording (section 41C: the *distribute genital image* offence);
  - intentionally distributing intimate images of another person, where that distribution is contrary to community standards of acceptable conduct (section 41DA: the *distribute intimate image* offence); and
  - threatening, whether explicitly or implicitly, to so distribute such intimate images, where the threatener intends that the victim will believe, or believes that the victim will probably believe, that they will carry out the threat (section 41DB: the *threat to distribute* offence).
- 3.3 The offences enacted in 2007 can be generally described as 'upskirting' offences because they were introduced in response to the problem of upskirting<sup>103</sup> (this term is sometimes used in this report to refer to these offences). They do, however, capture conduct beyond what is generally meant by the term. For example, it is an offence to distribute an intimate image of someone's genital or anal region without consent, regardless of the circumstances in which the image was taken.

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101. As inserted by *Summary Offences (Upskirting) Act 2007* (Vic).

102. As inserted by *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

103. Explanatory Memorandum, *Summary Offences Amendment (Upskirting) Bill 2007* (Vic) 1: 'The amendments have arisen out of a series of incidents in Victoria in late 2006 and early 2007 where women were the unwitting subjects of photographs taken up their skirts'.

- 3.4 It is not a defence to an upskirting offence that it occurred in public,<sup>104</sup> or that the relevant body part was covered by underwear.<sup>105</sup> However, the requirement that the image be of the 'genital or anal region' excludes downblousing. It is not a requirement for either of the *distribute* offences that the images were created in circumstances that would constitute the capture offence, that is, just because the person depicted has consented to the creation of the imagery does not mean they have consented to its distribution.
- 3.5 The final two offences were introduced following the Victorian Parliament's *Inquiry into Sexting*, which recommended 'that the Victorian Government introduce a specific offence for sexting to the *Summary Offences Act 1966* (Vic).<sup>106</sup> They aimed to address two issues: that 'adults who engage in non-consensual sexting [were] not generally subject to criminal charges for that behaviour' and that 'child pornography offences [were] being applied inappropriately' to children and young adults who created images within consensual sexual encounters, sometimes resulting in serious and lifelong consequences, including sex offender registration requirements.<sup>107</sup>
- 3.6 It is a defence to the section 4IDA offence of intentionally distributing an intimate image that the person depicted was over 18 and they consented, or could reasonably be considered to have consented, to both the distribution and the manner of distribution.<sup>108</sup> In addition to imagery of the 'genital or anal region' – the distribution of such imagery is already captured by the section 4IC upskirting offence – the definition of *intimate image* for the purposes of sections 4IDA and 4IDB includes imagery of female breasts, a person engaged in sexual activity and a person in a manner or context that is sexual.<sup>109</sup> Moreover, there is no requirement under section 4IDA that the person distributing the imagery be the person who visually captured it, a significant limitation of the section 4IC offence. These broader aspects of the section 4IDA offence are perhaps moderated by the requirement that distribution be 'contrary to community standards of acceptable conduct', an element that is not required for the section 4IC offence. It is, however, unlikely that someone could non-consensually distribute an image or video of someone else's anal or genital region in a way that was not contrary to community standards.
- 3.7 None of the intimate image offences are registrable offences under the *Sex Offenders Registration Act 2004* (Vic).<sup>110</sup> The maximum penalty for most IBSA offences is two years' imprisonment, with the exceptions of the threat to distribute offence (one year's imprisonment) and the observe offence (three months' imprisonment).<sup>111</sup>

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104. *Summary Offences Act 1966* (Vic) s 41.

105. *Summary Offences Act 1966* (Vic) s 40 (the definition of *genital or anal region* means the person's 'genital or anal region, whether bare or covered by underwear').

106. Parliament of Victoria Law Reform Committee, *Inquiry into Sexting* (2013) 152; *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

107. Parliament of Victoria Law Reform Committee (2013), above n 106, 95–99, 127, 152.

108. *Summary Offences Act 1966* (Vic) s 4IDA(3).

109. *Summary Offences Act 1966* (Vic) s 40 (definition of 'intimate image').

110. *Sex Offenders Registration Act 2004* (Vic) s 7. This is in contrast to some of the offences used to capture further dissemination of consensually shared images prior to the enactment of the distribute intimate image offence and threat to distribute offence in 2014.

111. *Summary Offences Act 1966* (Vic) ss 41A–41DB.

## Commonwealth offences and other enforcement mechanisms

- 3.8 In addition to the specific Victorian offences, IBSA can also be captured by certain Commonwealth offences and regulatory schemes. In particular, using a carriage (telecommunications) service to menace, harass or cause offence is an offence under the Commonwealth *Criminal Code*.<sup>112</sup> While this is a telecommunications offence, it includes aggravating features that render it specifically applicable in an IBSA context. Committing the offence while using 'private sexual material' increases the maximum penalty from three to five years' imprisonment, or if the perpetrator has previously received three or more civil penalty orders for posting or threatening to post intimate images, to seven years.<sup>113</sup>
- 3.9 The Commonwealth offence is sometimes used to capture IBSA offending, especially where the relevant jurisdiction does not have a specific IBSA offence or where there is cross-jurisdictional offending.<sup>114</sup> It is also sometimes used where aggravating circumstances might differentiate the offending from most IBSA cases (charging the Commonwealth offence can increase the available maximum penalty from one or two years' imprisonment to three, five or seven years', depending on the context).<sup>115</sup> However, consultation revealed that the Commonwealth offence is more often used to capture other types of threats and harassment, and the Victorian offences are the primary vehicles for charging IBSA offending.<sup>116</sup>
- 3.10 In addition to the applicable criminal offences, there is a nationwide civil penalties scheme under which substantial penalties are available against individuals who post, or threaten to post, intimate imagery to a social media service, relevant electronic service or designated internet service.<sup>117</sup> Administered by the Office of the eSafety Commissioner, this scheme provides for removal notices to be issued to original posters, service providers and hosting services, with penalties for non-compliance.<sup>118</sup> The eSafety Commissioner also has relationships with many social media services and has established reporting paths to facilitate quick, informal removal of content.<sup>119</sup> Between the start of the civil penalties scheme on 1 September 2018 and the end of the 2019 financial year, the eSafety Commissioner received 849 reports of image-based abuse.<sup>120</sup> By the end of the 2020 financial year, that had increased to just over 3,550 reports, indicating a substantial increase in reports between the scheme's first and second years of operation.<sup>121</sup>

112. *Criminal Code Act 1995* (Cth) ss 474.17–474.17A.

113. *Criminal Code Act 1995* (Cth) ss 474.17–474.17A. The base offence carries a maximum penalty of three years' imprisonment; an offence involving private sexual material carries a maximum penalty of five years' imprisonment; and an offence involving private sexual material committed after receiving three or more civil penalty orders under the *Enhancing Online Safety Act 2015* (Cth) carries a maximum penalty of seven years' imprisonment. Private sexual material is defined in similar terms to intimate images, but it explicitly does not include images of a person who is or appears to be under 18, which would instead be classified as child abuse material: *Criminal Code Act 1995* (Cth) s 473.1 (definitions of 'private sexual material' and 'child abuse material').

114. *State of Tasmania v Andrew David Gilley* (Unreported, Supreme Court of Tasmania, Pearce J, 26 June 2018); Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

115. Roundtable 2 (29 July 2020).

116. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

117. *Enhancing Online Safety Act 2015* (Cth) s 44B. The penalty is 500 penalty units (currently \$111,000). Relevant electronic services include individual means of communication such as email, SMS and MMS services: *Enhancing Online Safety Act 2015* (Cth) s 4 (definition of 'relevant electronic service').

118. *Enhancing Online Safety Act 2015* (Cth) ss 44D–44G. The penalty for non-compliance is 500 penalty units (currently \$111,000), and the default time period allowed is 48 hours.

119. eSafety Commissioner, 'FAQ About Making an Image-Based Abuse Report' (esafety.gov.au, 2020) <<https://www.esafety.gov.au/report/image-based-abuse/making-a-report-faq>> at 8 September 2020.

120. Australian Communications and Media Authority and Office of the eSafety Commissioner (2019), above n 29, 208.

121. Email from the eSafety Commissioner's Office, 4 September 2020.

## Comparison of Victorian offences with offences in other Australian jurisdictions

- 3.11 Victoria's offences of actual or threatened distribution of an intimate image of another person (enacted in 2014) are unusual in that they were enacted earlier and carry lower maximum penalties than the offences in most other Australian jurisdictions, and they are located in the *Summary Offences Act 1966* (Vic) rather than the *Crimes Act 1958* (Vic).

“ It is a signalling mechanism by the Parliament as to ... the seriousness of that offence as compared to all the other criminal offences that there are on the statute books. Clearly there's been a decision that they're summary status, and therefore the maximum penalties reflect that. ”

Participant at Roundtable 1 (28 July 2020)

### Maximum penalties

- 3.12 There appears to be a correlation between earlier enactment of intimate image offences (in Victoria and South Australia) and lower maximum penalties for those offences, especially for threat to distribute offences. Jurisdictions that enacted these offences early were responding to an emerging problem. In doing so, however, they acted at a time when there was limited research into the prevalence, nature and harms associated with IBSA offending, and consequently the primary focus was on sexting rather than the coercive aspects of IBSA.<sup>122</sup>
- 3.13 In Victoria, the maximum penalty for threatening to distribute an intimate image is half as long as the maximum penalty for actually doing so.

This is consistent with the criminal law's general

approach to threat offences as usually being less serious than their substantive counterparts.<sup>123</sup> However, it may not be consistent with the level of harm associated with the most serious threats to distribute intimate imagery, which can sometimes be *greater* than the harm associated with an actual distribution due to the ongoing, placeless and potentially coercive nature of the threat (see [2.15]–[2.16]). On the other hand, higher maximum penalties could pose an obstacle to reporting, particularly in cases where victim survivors are concerned about potential repercussions for the perpetrator, such as where they remain financially involved or must maintain a co-parenting relationship.<sup>124</sup>

122. Victoria's Royal Commission into Family Violence heard some evidence on the effects of intimate image offending in a coercive relationship context, but its primary focus was on the incidence and consequences of nude image dissemination, particularly among young people: Victoria, Royal Commission into Family Violence (2016), above n 4, 28–30.

123. For example, threatening to inflict serious injury carries a five-year maximum term of imprisonment, while actually doing so has a 15- or 20-year maximum: *Crimes Act 1958* (Vic) ss 21 (threats to inflict serious injury), 16, 17 (intentionally or recklessly causing serious injury).

124. Email from Victoria Legal Aid, 18 August 2020.

**Table 1: Maximum penalties for the offences of distributing and threatening to distribute intimate images, Australian jurisdictions, by date enacted<sup>125</sup>**

Jurisdiction	In force	Penalty: distribution offence	Penalty: threat offence
Victoria <sup>a</sup>	3 November 2014	2 years	1 year
South Australia <sup>b</sup>	28 October 2016	2 years	1 year
New South Wales <sup>c</sup>	25 August 2017	3 years	3 years
Australian Capital Territory <sup>d</sup>	30 August 2017	3 years	3 years
Northern Territory <sup>e</sup>	9 May 2018	3 years	3 years
Queensland <sup>f</sup>	21 February 2019	3 years	3 years
Western Australia <sup>g</sup>	15 April 2019	3 years (or 18 months on summary conviction)	3–7 years (or 18 months to 3 years on summary conviction)
Tasmania	–	–	–

- a. *Summary Offences Act 1966* (Vic) ss 40–41G as inserted by *Crimes Amendment (Sexual Offences and Other Matters) 2014* (Vic).
- b. *Summary Offences Act 1953* (SA) ss 26C–26DA as amended by *Summary Offences (Filming and Sexting Offences) Amendment Act 2016* (SA). Penalties are higher where the image is of a person aged under 17. Some of these offences have existed, in a more restricted form, since 2013: *Summary Offences (Filming Offences) Amendment Act 2013* (SA).
- c. *Crimes Act 1900* (NSW) ss 91Q, 91R as inserted by *Crimes Amendment (Intimate Images) Act 2017* (NSW).
- d. *Crimes Act 1900* (ACT) ss 72C, 72E as inserted by *Crimes (Intimate Image Abuse) Amendment Act 2017* (ACT). Penalties are higher where the image is of a young person: *Crimes Act 1900* (ACT) s 72D.
- e. *Criminal Code Act 1983* (NT) ss 208AA–208AC as inserted by *Criminal Code Amendment (Intimate Images) Act 2018* (NT).
- f. *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code') ss 223, 229A as inserted by *Criminal Code (Non-Consensual Sharing of Intimate Images) Amendment Act 2019* (Qld).
- g. *Criminal Code Act Compilation Act 1913* (WA) app B sch 1 ('Criminal Code') ss 221BD, 338A–338B as amended by *Criminal Law Amendment (Intimate Images) Act 2019* (WA).

125. As not all jurisdictions have consistent upskirting offences, Table 1 is directed at offences dealing with intimate imagery more generally, that is, the equivalents of Victoria's sections 41DA and 41DB offences. The use of private sexual material as an aggravating factor to the Commonwealth offence of using a carriage service to menace, harass or cause offence (increasing the penalty for distribution from three to five years) was enacted in 2018. As a threat to distribute does not involve the transmission, making available, publication, distribution, advertisement or promotion of private sexual material, the penalty for threat under the Commonwealth offence is three years: *Criminal Code Act 1995* (Cth) ss 474.17–474.17A.

“ Some people go to great lengths to de-identify themselves in cyber crime to the point where we may need to identify an address through an IP address, and then going through some of those Internet service providers ... there are levels of complexity about how we identify who those offenders are. Having it in the indictable offence realm [would provide] ... a lot more options in terms of arrest and investigation. ”

Participant at Roundtable 2 (29 July 2020)

## Offence placement

3.14 The Victorian offences (like those in South Australia, which also legislated early) are summary offences rather than indictable offences triable summarily. This creates some limitations on investigation and enforcement. In particular, police can, at any time and without warrant, apprehend any person who they believe on reasonable grounds has committed an indictable offence in Victoria.<sup>126</sup> Arrests for summary offences, on the other hand, are restricted to circumstances closer to the actual commission of the offence.<sup>127</sup> Given that warrantless search and seizure powers apply when executing an arrest,<sup>128</sup> this inevitably limits the circumstances in which these powers can be employed. Additionally, although the *Summary Offences Act 1966* (Vic) contains a specific power to issue search warrants in respect of IBSA offences,<sup>129</sup> it does not replicate the powers available in respect of indictable offences to access and search computer systems.<sup>130</sup>

3.15 In consultation, most stakeholders agreed that these factors limited the ability of law enforcement to respond to IBSA offending in Victoria.<sup>131</sup> One stakeholder noted a particular contrast to the response of police in a jurisdiction in which IBSA offences are indictable:

It was IBSA occurring in the context of family violence, an ex-partner. The victim was in Victoria, the perpetrator in Queensland, and so the Victorian police were preparing the file to transfer to Queensland for investigation. But we noticed a distinct difference in ... evidence gathering capabilities. The perpetrator was using [virtual private networks] and anonymous accounts to do this and there wasn't much to tie him directly to it, although the victim was convinced because of the images in the possession and things that were being said that it was him. But when it went to Queensland, they pretty quickly executed a search warrant, seized devices, actually caught him in the act of uploading content to a website, and ended up charging a series of offences.<sup>132</sup>

3.16 Finally, there is a symbolic effect to IBSA offences being in the *Summary Offences Act 1966* (Vic) rather than in the *Crimes Act 1958* (Vic). In particular, it risks giving the community, victim survivors, offenders and investigating police officers the perception that these offences are necessarily less serious forms of offending. In consultation, some stakeholders commented that the limitations associated with summary status might also affect perceptions of whether IBSA offending should be a priority target for law enforcement in terms of resource allocation, which could be a particularly complicating factor for an offence with a substantial degree of technological involvement.<sup>133</sup> However, concern was also expressed over the potential effect of a change in the summary status

126. *Crimes Act 1958* (Vic) s 459.

127. *Crimes Act 1958* (Vic) ss 458, 462.

128. *Field v Sullivan* [1923] VLR 70; *Reeves (A Pseudonym) v The Queen* [2017] VSCA 291 (13 October 2017).

129. *Summary Offences Act 1966* (Vic) s 41E (compare *Crimes Act 1958* (Vic) s 465).

130. Compare *Crimes Act 1958* (Vic) ss 465AAA, 465AA. For instance, section 41E does not permit police to require assistance (such as the provision of passwords) to access computers or computer networks.

131. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

132. Participant at Roundtable 2 (29 July 2020).

133. Roundtable 1 (28 July 2020).

or maximum penalty for lower-end and younger offenders. In addition to any direct effects on sentencing practices, should the offences become indictable, a reverse onus would apply if they were committed while the perpetrator was on bail. There was also concern that a reclassification might bring about an occasion for the offences to become registrable under the *Sex Offenders Registration Act 2004* (Vic), which would be undesirable.<sup>134</sup> It would also be inconsistent with the recommendation that led to the introduction of the distribute intimate image offence and threat to distribute offence in 2014 and with the present analysis, which tends to suggest that sentenced IBSA offences are often more coercive than sexual in nature.<sup>135</sup>

## Content

- 3.17 Victoria's intimate image offences cover imagery created in public, imagery that depicts intimate content even where the victim is partly or fully clothed, and threats to distribute intimate imagery of someone other than the person to whom the threat is made. Although there is no separate offence of creating an intimate image without consent in Victoria (unlike in other Australian jurisdictions), many such images and video are likely to be captured by the corresponding upskirting offence.<sup>136</sup>
- 3.18 Some jurisdictions' offences arguably go further than Victoria's, capturing emerging IBSA behaviour. For example, some jurisdictions criminalise threats to create intimate imagery;<sup>137</sup> the Commonwealth provisions that govern the civil penalties scheme incorporate culturally mediated definitions of 'intimate image' where the person sharing the imagery is aware of the cultural context, such as imagery of a clothed Muslim woman without a head covering that she would usually wear in public.<sup>138</sup> More recent legislation also often responds to research on the use of intimate imagery and threats in the context of coercive control by clarifying that impossible threats are captured, such as where the imagery that the perpetrator is threatening to distribute does not exist,<sup>139</sup> and explicitly criminalising deepfake porn, that is, where intimate imagery is digitally altered to appear to depict the victim survivor.<sup>140</sup>
- 3.19 Though the behaviours captured by Victoria's offences were not specifically raised as a topic of discussion, consultation did not suggest that concerns over this type of offending in Victoria were particularly urgent.<sup>141</sup> Impossible threats to distribute are arguably caught because section 41DB focuses on the victim's belief in the threat rather than the threat's objective credibility or immediacy. Threats to distribute deepfake porn would be captured because the wording of section 41DB contemplates a threat to distribute imagery of a third party; actual distribution of deepfake porn may also be captured by section 41DA as the definition of *intimate image* includes any imagery that 'depicts' the other person as being engaged in sexual activity. Nevertheless, legislators may want to consider making these points explicit for the sake of clarity, clear labelling and signalling.<sup>142</sup>

134. Email from Victoria Legal Aid, 18 August 2020.

135. Parliament of Victoria Law Reform Committee (2013), above n 106, 95–99, 127, 152.

136. For example, New South Wales criminalises creation of intimate imagery separately from creation of upskirting imagery: *Crimes Act 1900* (NSW) s 91P.

137. *Crimes Act 1900* (ACT) s 72E.

138. *Enhancing Online Safety Act 2015* (Cth) ss 44B(1)–(3). However, the distribution and threat offences in Victoria go further than similar offences in some other jurisdictions as they capture imagery taken in public even where the victim's genitalia are covered: *Summary Offences Act 1966* (Vic) s 40 (definition of 'genital or anal region').

139. *Crimes Act 1900* (ACT) s 72E(2)(c); *Criminal Code Act 1983* (NT) s 208AC(2)(c); *Criminal Code Act 1899* (Qld) sch 1 s 229A(3)(a).

140. *Crimes Act 1900* (ACT) s 72A (definition of 'intimate image'); *Crimes Act 1900* (NSW) s 91N (definitions of 'image' and 'intimate image'); *Criminal Code Act 1983* (NT) s 208AA (definition of 'intimate image'); *Criminal Code Act 1899* (Qld) sch 1 s 207A (definition of 'intimate image'); *Criminal Code Act Compilation Act 1913* (WA) app B sch 1 ('Criminal Code') s 221BA (definition of 'intimate image').

141. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

142. Research and consultation did not suggest that urgent change was required in relation to threats to create or cultural standards. Threats to create appear unlikely to occur in substantial numbers without a corresponding actual creation or threat to distribute. The issue of cultural standards is more complex, but legislating to capture these harms would require careful treatment of *mens rea* and knowledge on the part of perpetrators: see Henry et al. (2019), above n 4, 87–89.

## Sentencing and non-sentencing responses

- 3.20 Compared to criminal prosecution under the Victorian legislation, the eSafety Commissioner's civil penalties scheme offers some practical advantages for victim survivors. Most notably, the scheme provides for removal of imagery, even where the identity of the original poster is not known, by placing the burden on websites, service providers, hosting services and end users.<sup>143</sup> The eSafety Commissioner successfully has imagery removed in around 85% of cases, even where the service provider is not based in Australia (meaning jurisdictional issues would limit the efficacy of legal penalties).<sup>144</sup> Similarly, the eSafety Commissioner can facilitate entry to Facebook's pilot proactive removal scheme for those who have experienced threats to distribute.<sup>145</sup> This scheme involves notifying Facebook, through an approved organisation, of the threat. The participant then uploads the images and videos using a one-off link; the imagery is reviewed and allocated a unique numerical fingerprint, or 'hash', by a specialist team at Facebook (the image or video itself is not stored). Imagery uploaded to Facebook and associated social media services in future is checked against the hash and cannot be posted if it matches.<sup>146</sup>
- 3.21 Whether redress for IBSA behaviours is best sought through these non-criminal avenues, through criminal avenues, or perhaps both, will be governed by the facts of each case and the preferences of the victim survivor. For instance, there may be less of a psychological barrier to victim survivors reporting to a civil scheme if they feel that they are partly to blame or that the behaviour was not criminal (see [2.15]–[2.16]; see also [3.13]). Victim survivors can also make reports to the eSafety Commissioner online, semi-anonymously. As a matter of practice, the eSafety Commissioner does not usually refer matters to police but provides victim survivors with information about the relevant Commonwealth, state and territory laws and options for reporting to the police, as well as appropriate legal advice and support options.<sup>147</sup> Victim survivors can therefore report to the eSafety Commissioner knowing that they will not have to engage in a potentially lengthy and traumatic investigation and court process if they do not wish to do so. There will be cases, perhaps many, where removal and/or a civil penalty provides an adequate remedy for victim survivors.
- 3.22 On the other hand, the eSafety Commissioner's emphasis on, and success with, rapid, informal removal processes also means that enforcement and penalty actions are comparatively rare.<sup>148</sup> A criminal response may be preferable where:
- the behaviour is very serious and removal and/or a civil penalty would not be a sufficient response (for example, if the victim survivor believes that the offender poses an ongoing threat to their safety);
  - the behaviour is part of an ongoing pattern, especially if there has been other criminal offending that could be dealt with alongside the IBSA offending; or
  - the victim survivor wishes to prevent future offending against others.

143. *Enhancing Online Safety Act 2015* (Cth) ss 44D–44F.

144. Email from Office of the eSafety Commissioner, 4 September 2020; see Australian Communications and Media Authority and Office of the eSafety Commissioner (2019), above n 29, 196.

145. Facebook, 'Not Without My Consent: The Pilot' (facebook.com, 2020) <<https://www.facebook.com/safety/notwithoutmyconsent/pilot>> at 8 September 2020.

146. *Ibid.*

147. While the eSafety Commissioner does have disclosure of information powers under Part 9 of the *Enhancing Online Safety Act 2015*, eSafety provides resources to help victim survivors communicate with lawyers or report to the police, including a 'what to take to the police' form: eSafety Commissioner, 'Get Help from the Police' (esafety.gov.au 2020) <<https://www.esafety.gov.au/key-issues/image-based-abuse/take-action/get-help-from-police>> at 8 September 2020.

148. As at 30 June 2020, the Office of the eSafety Commissioner had given eight removal notices to websites and hosting service providers, all based overseas: Email from Office of the eSafety Commissioner, 4 September 2020.



3.23 Additionally, if the behaviour requires substantial further investigation, that investigation might be better undertaken by Victoria Police or the Australian Federal Police, who have legislated arrest, search and seizure powers, than by the Office of the eSafety Commissioner. Importantly, action under the eSafety Commissioner's scheme and criminal prosecution under Victoria's offences are not mutually exclusive options.<sup>149</sup> Reports of IBSA can be made to both, concurrently or consecutively. The Commissioner may also report – or more commonly encourage a complainant to report – information to the Australian Federal Police or to state or territory authorities,<sup>150</sup> refer a matter to a law enforcement agency,<sup>151</sup> or defer a matter to avoid prejudicing a criminal investigation.<sup>152</sup>

## Other potentially relevant offences

3.24 In addition to the specific intimate image offences, IBSA behaviour may form part of a number of more serious offences. In each of the related offences set out in Table 2, one or more of the IBSA offences can comprise a substantial portion of the elements of the more serious offence. Where IBSA behaviour is present but the underlying offence appears to be more serious or suggests a more serious course of conduct, these offences might be available and indeed may already be prosecuted on the basis of the offender having engaged in IBSA behaviours.

**Table 2: Offences for which IBSA behaviour may satisfy one or more elements**

Offence	IBSA offence	Additional elements	Maximum penalty
Stalking <sup>a</sup>	All	Offending is a course of conduct; there are state of mind requirements in relation to causing harm, apprehension or fear in the victim.	10 years' imprisonment
Blackmail <sup>b</sup>	Threat (section 41DB)	Perpetrator makes an unwarranted demand with a view to gain or with intent to cause loss to another (whether or not the person is depicted in the image).	15 years' imprisonment
Procuring sexual penetration by threat <sup>c</sup>	Threat (section 41DB)	Perpetrator intends that, as a result of the threat, the victim will take part in a sexual act and the victim does so.	10 years' imprisonment
Using a carriage service to menace, harass or cause offence <sup>d</sup>	Distribute genital image (section 41C); Distribute intimate image (section 41DA); Threat (section 41DB)	None. The requirement that reasonable people would consider the use of the carriage service menacing, harassing or offensive in all the circumstances is likely almost always to be met.	3 years' imprisonment (threat); 5 years' imprisonment (distribution)

a. *Crimes Act 1958* (Vic) s 21A. Threats are likely to be captured under section 21A(2)(b) or (da), distribution under section 21A(2)(ba) or (e) and creation under section 21A(2)(f) or (g).

b. *Crimes Act 1958* (Vic) s 87.

c. *Crimes Act 1958* (Vic) s 44.

d. *Criminal Code Act 1995* (Cth) ss 474.17, 474.17A.

149. *Enhancing Online Safety Act 2015* (Cth) ss 101–102.

150. *Enhancing Online Safety Act 2015* (Cth) s 80; Meeting with Office of the eSafety Commissioner (20 April 2020).

151. *Enhancing Online Safety Act 2015* (Cth) s 92.

152. *Enhancing Online Safety Act 2015* (Cth) s 93.

- 3.25 Additionally, where orders are in place before the IBSA offending occurs, it may constitute a breach of a family violence safety notice, a family violence intervention order or a personal safety intervention order. Common conditions on these orders that might be breached in the course of IBSA offending include prohibitions on publishing on the internet or distributing by email or other electronic communication any material about the protected person; contacting or communicating with the protected person by any means; and attempting to locate or follow the protected person or keep them under surveillance.<sup>153</sup> Maximum penalties for these offences range from two years' imprisonment to five years' imprisonment (the latter applies where there are persistent breaches of family violence orders or where there is intent to cause the victim mental or physical harm, apprehension or fear for their safety).<sup>154</sup> IBSA offences that occur where no such order is in place may trigger eligibility for one, as the conduct captured by these offences can amount to family violence, harassment and/or stalking for the purposes of the relevant Acts.<sup>155</sup>
- 3.26 For all IBSA offences, but most particularly for threats to distribute, there seems to be a considerable gulf between the maximum penalty for the IBSA offence and the maximum penalty for related but more serious indictable offences. This means that charging decisions for conduct that is fundamentally similar may have a substantial impact on the available maximum and on the actual sentence imposed, because the courts must have regard to the maximum penalty for the offence at sentencing.<sup>156</sup> This may suggest that the current maximum penalties in Victoria may not sufficiently account for behaviour at the most serious end of the IBSA spectrum that does not fulfil the requirements of the more serious related offences.

## Conclusion

- 3.27 Victoria was one of the first Australian jurisdictions to enact specific IBSA offences designed to capture distribution of, and threats to distribute, intimate imagery. For practical purposes, Victoria's intimate image offences capture most IBSA offending, and the eSafety Commissioner's civil penalties scheme bolsters the criminal offences by providing a removal-focused response. This means that low numbers of sentenced offences will, in some cases, reflect the availability of a range of options for victim survivors rather than a lack of enforcement.
- 3.28 However, Victoria's offences also have three potentially limiting features. First, Victoria's maximum penalties are set at a low level (two years' imprisonment for distribution and one year's imprisonment for threats to distribute) compared to other jurisdictions' maximum penalties (three years' imprisonment for both distribute and threat offences or five years' imprisonment for distribution under the Commonwealth offence). Second, the distinction in severity between the maximum penalties for actual and threatened distribution of intimate imagery does not necessarily reflect the levels of harm that victim survivors may experience in coercive situations. Finally, placement of IBSA offences in the *Summary Offences Act 1966* (Vic) limits arrest, search and seizure powers and may send a symbolic message that these offences are not particularly serious.

153. *Family Violence Protection Act 2008* (Vic) ss 29, 81; *Personal Safety Intervention Orders Act 2010* (Vic) s 67; see also Victoria Legal Aid, 'Conditions in a Family Violence Intervention Order' (legalaid.vic.gov.au, 2020) <<https://www.legalaid.vic.gov.au/find-legal-answers/family-violence-intervention-orders/conditions-in-family-violence-intervention-order>> at 10 September 2020; Victoria Legal Aid, 'Conditions in a Personal Safety Intervention Order' (legalaid.vic.gov.au, 2020) <<https://www.legalaid.vic.gov.au/find-legal-answers/personal-safety-intervention-orders/conditions-in-personal-safety-intervention-order>> at 10 September 2020.

154. *Family Violence Protection Act 2008* (Vic) ss 37, 37A, 123, 123A; *Personal Safety Intervention Orders Act 2010* (Vic) s 100.

155. *Family Violence Protection Act 2008* (Vic) ss 4 (definition of 'safety'), 5(1), 26(b)(i), 53(1)(a), 74(1); *Personal Safety Intervention Orders Act 2010* (Vic) ss 4 (definition of 'safety'), 7, 10, 35, 61. Orders under the *Family Violence Protection Act 2008* (Vic) respond to family violence, while orders under the *Personal Safety Intervention Orders Act 2010* (Vic) respond to a more restricted list of prohibited behaviours, including harassment and stalking, which need not involve a 'family member'.

156. *Sentencing Act 1991* (Vic) s 5(2)(a).

## 4. Recorded IBSA offences

### Introduction

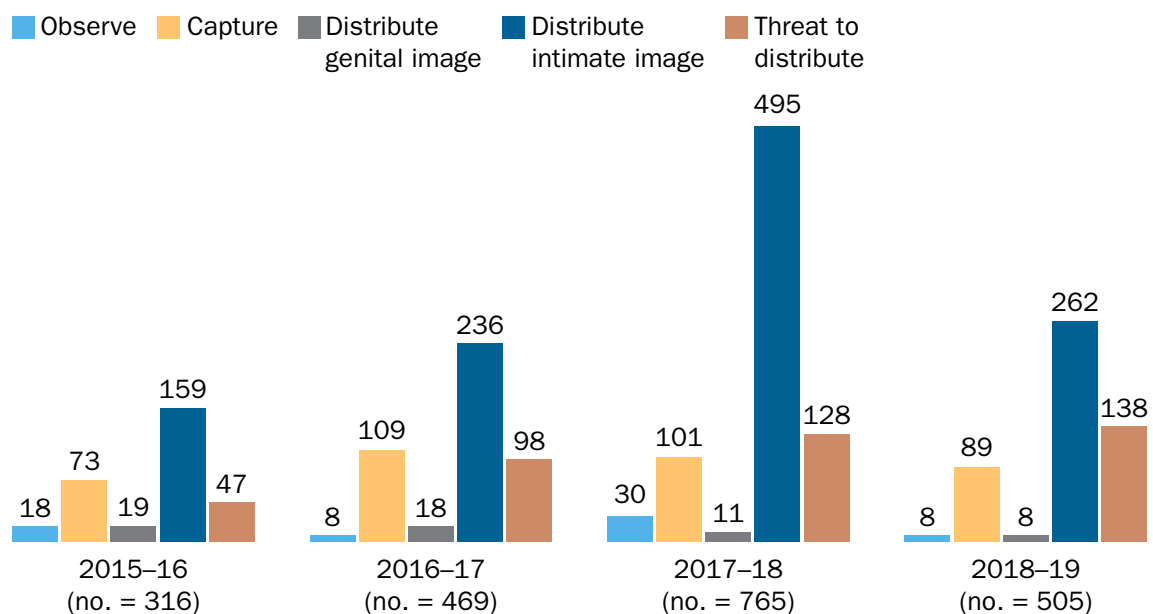
4.1 This chapter examines the prevalence, demographics and relationship context of *recorded* image-based sexual abuse (IBSA) offences in Victoria. Police data in this chapter will contextualise subsequent data on sentenced offences in Chapter 5. The beginning of the study period, 2015–16, is the year in which the last two of the five IBSA offences in Victoria (the distribute intimate image offence and the threat to distribute offence) came into effect.

### IBSA offences recorded by police

#### Prevalence

4.2 In the four years to 30 June 2019, 2,055 IBSA offences were recorded by Victoria Police (Figure 1).<sup>157</sup> Most (1,152 or 56%) of these involved the intentional distribution of intimate images. There were also substantial numbers of threat to distribute offences (411 or 20%) and capture offences (372 or 18%).

**Figure 1: Number of IBSA offences recorded by Victoria Police, 2015–16 to 2018–19**



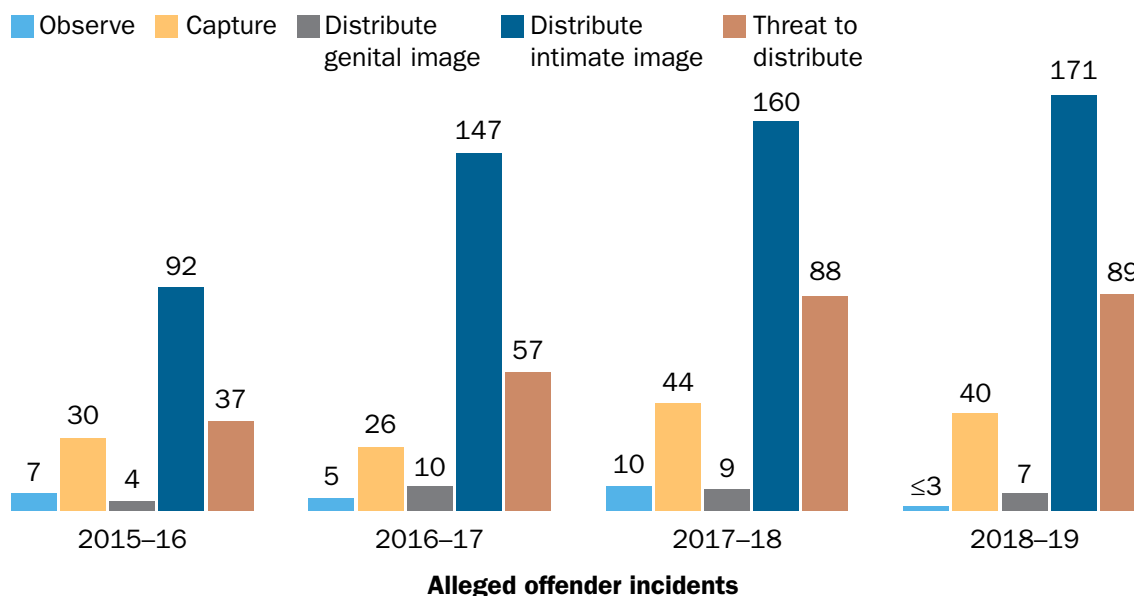
4.3 Victoria's population is approximately six million people. This means that police recorded less than one IBSA offence per 1,000 Victorians over the four-year period. Given that between 11% and 23% of Australians report having had intimate imagery unlawfully created or distributed, or having received threats to distribute (see [2.6]–[2.7]), these recorded offences represent a very small fraction of IBSA offending in the population.

<sup>157</sup> Data was provided to the Council by the Crime Statistics Agency.

Stakeholders suggested that one important reason for this is that victim survivors may not realise that IBSA offending is a potentially criminal matter, and therefore they may only report to Victoria Police once there has been a substantial course of conduct or where IBSA has occurred alongside other criminal offending.<sup>158</sup> This is supported by the eSafety Commissioner's previous research, which found that three-quarters of those who had experienced distribution of their intimate imagery took no action, and of those who did take action, only 35% reported the abuse at all.<sup>159</sup> Far fewer would have reported IBSA to law enforcement.

- 4.4 Nevertheless, there has been a gradual increase in the number of recorded offences between the beginning and the end of the study period, with the exception of 2017–18, when substantially more offences were recorded than in the years before or after. This spike appears to be a result of a larger number of IBSA offences recorded per investigation, rather than a spike in the overall number of unique investigations involving IBSA offending in 2017–18 or a decline in 2018–19. As shown in Figure 2, the number of offender *incidents*, as opposed to *offences*, did not decline in 2018–19. The change in offences per case could be the result of recording practices, a few outlying cases or random variation, given the comparatively small numbers involved. Stakeholders' perception was that reporting rates were rising overall and would most likely continue to do so;<sup>160</sup> Victoria Police's specialist family violence officers were mentioned as being particularly valuable in overcoming some of the system barriers to reporting.<sup>161</sup>

**Figure 2: Number of IBSA offender incidents recorded by Victoria Police, 2015–16 to 2018–19<sup>162</sup>**



158. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020). Other reasons may include embarrassment and stigmatisation or, particularly in a family violence context, concerns about escalating the violence or destabilising aspects of the relationship such as co-parenting arrangements: email from Victoria Legal Aid, 18 August 2020.

159. Office of the eSafety Commissioner (2017), above n 20, 10–11. In that research, the most common reasons given for not taking action were that the victims felt it would not change anything and that they did not know what to do.

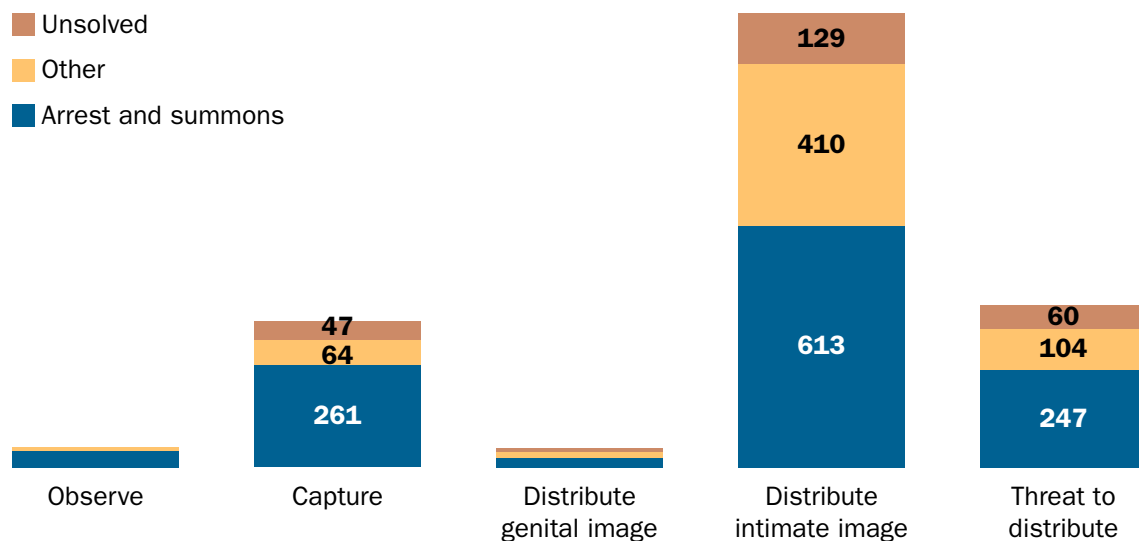
160. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

161. Roundtable 1 (28 July 2020).

162. Due to Crime Statistics Agency data confidentiality rules, some data in this chapter (including offender incident counts) was provided with values of '≤3'. Where this occurred, it is displayed in graphs as '≤3', and a value of 2 is used to calculate totals.

4.5 Data provided by the Crime Statistics Agency identified whether a recorded offence resulted in an arrest or summons, was unsolved or resulted in some other response. For each of the IBSA offences, most recorded offences (58%) led to an arrest and summons. There was a comparatively low arrest rate for distribute intimate image: 53% of these cases led to an arrest and summons, 36% led to another outcome (such as a caution or official warning, or an intent to summons) and 11% were unsolved (Figure 3). This may be partly because some of these cases are still under investigation; it may also be linked to the way that cases come to the attention of police and/or victim survivors. For example, offenders committing a distribute offence can more easily keep their identity anonymous and evade detection, which would complicate an investigation, than offenders committing other IBSA offences. In contrast, the credibility of a threat usually depends (to at least some extent) on the identity of the person making the threat. As a result, stakeholders reported that threats could be less complex to investigate and less affected by limitations on police arrest and investigative powers.<sup>163</sup> Accordingly, if a distribution occurs following a threat, there may be some cases where investigators or prosecutors choose to pursue only the threat.

**Figure 3: Police action by offence, recorded offences, 2015–16 to 2018–19**



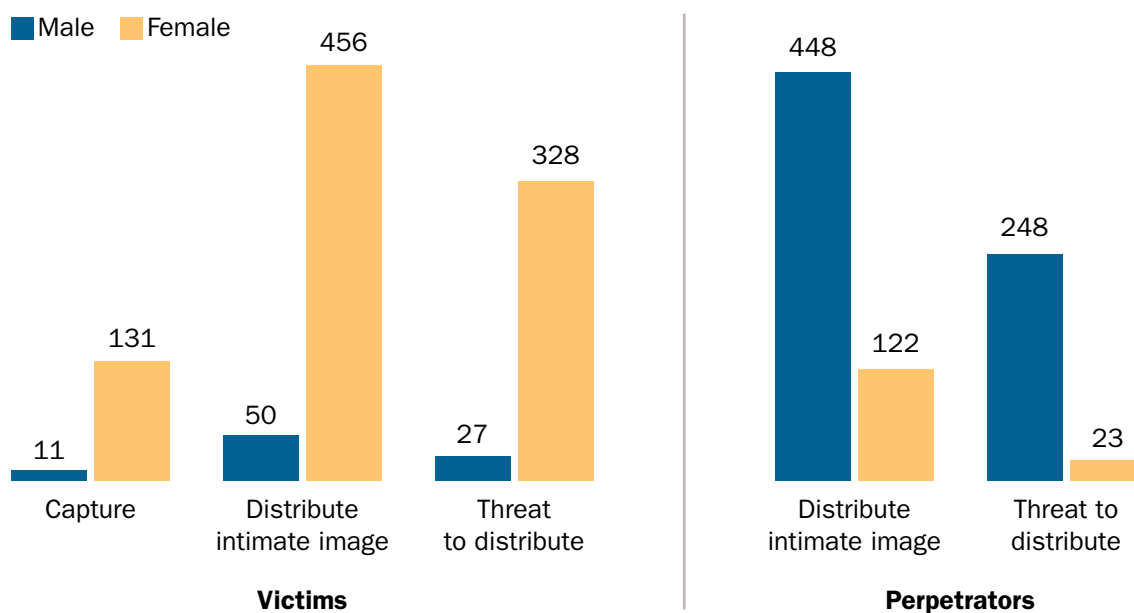
Note: The investigation status is the status indicating how an alleged offender has been dealt with by Victoria Police at the time the data was extracted from LEAP (Law Enforcement Assistance Program); it is subject to change. For the purposes of this report, alleged offender incident investigation statuses include arrest or summons and 'other', which incorporates caution/official warning, intent to summons, unsolved and other outcomes.

<sup>163</sup> Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

## Gender of offenders and victims

4.6 The offender's gender was available for recorded offence incidents of both the distribute intimate image offence and the threat to distribute offence.<sup>164</sup> As Figure 4 shows, recorded offenders were overwhelmingly male, especially for the threat to distribute offence (79% for actual distribution and 92% for threats).<sup>165</sup>

**Figure 4: Recorded victims and perpetrators, by gender and offence, 2015–16 to 2018–19**



4.7 The victim's gender was available for victim reports of the same two offences as well as the capture offence.<sup>166</sup> Recorded victims of these charges were overwhelmingly female (75% of victims of the capture offence, 89% of victims of the distribute offence and 92% of victims of the threat to distribute offence). These results are broadly consistent with previous research that has found that, for serious and relationship-related IBSA, perpetrators are more likely to be male and victim survivors are more likely to be female (see [2.20]–[2.21]). However, the gender distribution differed from that observed in research and in reports to the eSafety Commissioner; in those sources, half to two-thirds of reported victims are female.

164. An alleged offender incident is an incident involving one or more offences to which an individual, business or organisation has been linked as an alleged offender. An alleged offender incident involves only one offender, but it can involve one or more victims and it can involve offences that occur over a period of time but have been processed by Victoria Police as the same incident: Crime Statistics Agency, 'Glossary and Data Dictionary' (crimestatistics.vic.gov.au, 2020) <<https://www.crimestatistics.vic.gov.au/about-the-data/glossary-and-data-dictionary>> at 10 September 2020.

165. This included 448 of the 570 recorded offender incidents of distributing an intimate image, and 248 of the 271 recorded offender incidents of threatening to distribute an intimate image.

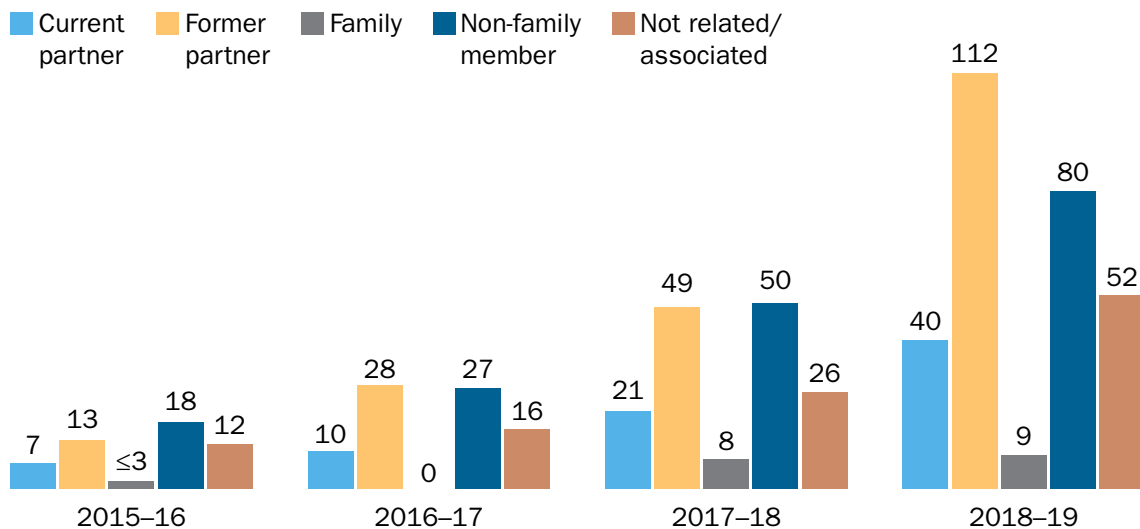
166. A victim report is counted when an individual, business or organisation reports to Victoria Police that they have been a victim of one or more criminal offences. A victim report involves only one victim (where two individuals are victimised in the same incident, two victim reports will be recorded), but it can involve one or more offenders and it can involve offences that occur over a period of time but have been processed by Victoria Police as the same report: see Crime Statistics Agency (2020), above n 164.

Stakeholders suggested that this difference was likely to be primarily attributable to the more severe harms suffered by female victim survivors (see further [2.15]), meaning that they are more likely to go through the potentially onerous criminal justice process.<sup>167</sup> Stigma among male victim survivors in relation to reporting may also play a role.<sup>168</sup>

## Relationship between offenders and victims

4.8 Data on the relationship between the offender and the victim was available for 580 victim reports of IBSA offences.<sup>169</sup> The data should be regarded with some caution because of the high proportion of cases (47%) in which the relationship between the offender and the victim was not available; however, it does suggest that the offences being reported to Victoria Police are broadly consistent with those reported in the research. In particular, almost half (48%) of reports with a known relationship occurred in circumstances where the alleged offender was either a current (13%) or a former (35%) partner of the victim (Figure 5). Relationships other than partner or family were also common, accounting for 30% of recorded offences with a known relationship, while in 18% of reports, the victim did not know the offender. The distribute offence and the threat to distribute offence were especially correlated with an intimate relationship context: 57% and 66% of these offences respectively occurred in the context of a current or former intimate relationship.

**Figure 5: Relationship between IBSA perpetrators and victims, Victoria Police victim reports, 2015–16 to 2018–19 (excludes missing and unknown data)**



<sup>167</sup>. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

<sup>168</sup>. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

<sup>169</sup>. The relationship of victim to offender refers to the relationship the victim reports that they have with their alleged offender at the time of the offence. For the purposes of reporting, the relationship can be a current partner, former partner, family member, non-family member (that is, a person known to the victim who is not a partner, former partner or family member), not known to the victim, not recorded or unknown: see Crime Statistics Agency (2020), above n 164.

## Conclusion

- 4.9 Recorded IBSA offences have a strong association with partner and ex-partner relationships, which suggests that they are often linked to family violence, perhaps even more strongly than previous research on community prevalence would predict. The proportion of known relationships that are partner or ex-partner relationships has increased, along with the total number of recorded offences, as the two offences enacted in 2014 (distribute intimate image and threat to distribute) have been recorded more often, most likely due to increased IBSA reporting. However, the overall numbers of recorded offences are still low compared with estimates of IBSA prevalence in the community. This, along with gender and age data, suggests that IBSA offences reported to Victoria Police are often particularly serious and are probably usually reported in the context of reporting other offending.



# 5. Sentenced IBSA offences

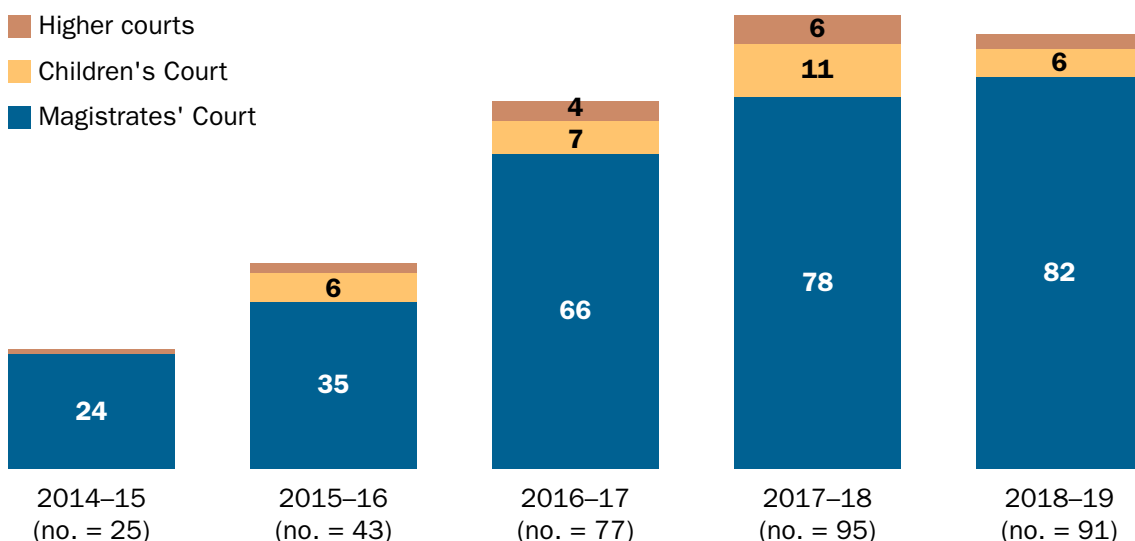
## Introduction

- 5.1 This chapter examines the prevalence, attrition, demographics, relationship context, co-sentenced offences and sentencing outcomes of image-based sexual abuse (IBSA) offences sentenced in Victoria. This includes **304 unique offenders** sentenced for **478 IBSA offences** in **306 unique cases** from 2015–16 to 2018–19 (the study period).
- 5.2 Of the 306 cases, 261 (85%) were sentenced in the Magistrates' Court. The remaining cases were sentenced in either the Children's Court (10% or 30 cases) or the higher courts (5% or 15 cases). The proportion of *charges* heard in each court was similar.
- 5.3 Some of the discussion in this chapter focuses on the *principal proven offence* in a case. This is the most serious offence that is sentenced in the case, usually determined by the offence receiving the *most serious penalty*.<sup>170</sup> Some *charge-level* data is presented (for each IBSA offence), referring to the most serious penalty for that charge. In some places, data for the year 2014–15 is provided to contextualise the study period.

## Prevalence

- 5.4 Figure 6 shows the number of IBSA cases sentenced in Victoria between 2014–15 and 2018–19.

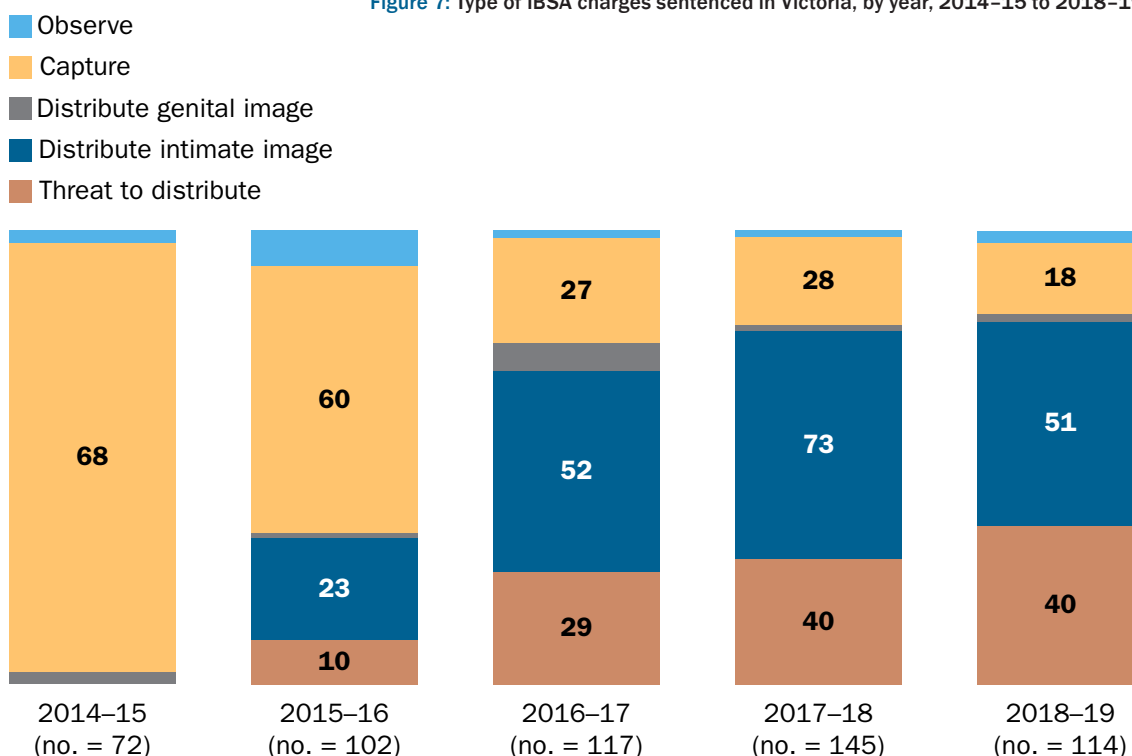
**Figure 6: Number of IBSA cases sentenced in Victoria, by jurisdiction, 2014–15 to 2018–19**



170. The *most serious penalty* was selected using the hierarchy of sentences, in which imprisonment is the most serious, followed by other custodial sentences, community correction orders, fines and finally low-end orders such as adjourned undertakings, dismissals and diversions. The *principal proven offence* was identified using, in order of priority, the sentence outcomes and lengths imposed for each charge in the case; if those were equal, the maximum penalties for each charge; if those were equal, the National Offence Index (NOI) ranking; and if those are equal, by charge number.

- 5.5 There was a small decrease in the number of charges, and an even smaller decrease in the number of cases, sentenced between 2017–18 and 2018–19. The decrease in the number of cases occurred because fewer cases were sentenced in the higher courts and Children’s Court; cases sentenced in the Magistrates’ Court continued to climb, as did the number of cases involving threats to distribute. It is possible that the dip in 2018–19 interrupted an overall upward trend and could reflect some redirection of IBSA distribution complaints to the Office of the eSafety Commissioner following the introduction of the civil penalties scheme (and associated publicity) in September 2018. It could also be the result of random variation, given the numbers involved. The anecdotal consensus among stakeholders was that the overall trend continues to be an upward one.<sup>171</sup>
- 5.6 The offences enacted in 2014 (distribute intimate image and threat to distribute) now constitute approximately 80% of all IBSA offences sentenced in Victoria each year (Figure 7). The proportion is even higher among female offenders: 23 of the 29 cases involving female offenders had at least one charge of distribute intimate image, nine cases had at least one charge of threat to distribute, and four cases had both charges. The other case involving a female offender had a single charge of the capture offence.

Figure 7: Type of IBSA charges sentenced in Victoria, by year, 2014–15 to 2018–19



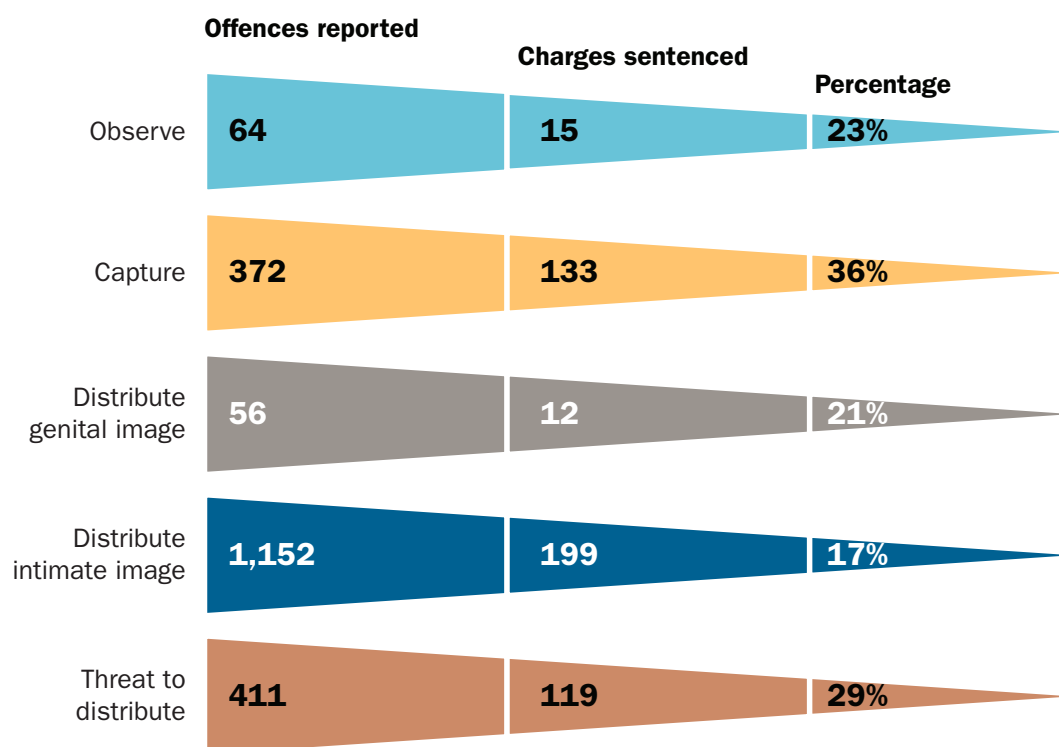
## Attrition

- 5.7 This section compares the number of IBSA offences recorded in the study period with the number of IBSA offences sentenced in the study period. There is inevitably a lag between a complaint being made and a sentence being imposed. As a result, recorded offence and sentence data from the same period does not necessarily reflect the same offending. Nonetheless, comparing the number of offences sentenced with the number of recorded instances of that offence does give an impression of the proportion of reported cases that are ultimately sentenced.

171. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

- 5.8 Overall, the number of charges sentenced during the study period was less than one-quarter (23%) of the number of offences reported (Figure 8). This represents a lower notional attrition rate than for relationship/sexual offending; for comparison, around 10–15% of recorded sexual assault reports lead to a sentence.<sup>172</sup> This is not a true attrition analysis; however, if anything, it is likely to undercount the proportion of cases that are eventually sentenced. As the overall number increases, the effect will be felt first at earlier points in the justice system, meaning that the number of recorded offences is likely to increase before the number of sentenced offences does; and in cases involving multiple alleged offences, one or more charges may be dropped or consolidated while other charges remain.

**Figure 8: IBSA offences reported and charges sentenced in Victoria, 2015–16 to 2018–19**



- 5.9 There was a particularly substantial difference between the number of recorded and the number of sentenced distribute intimate image offences. This may reflect aspects of the investigation process, including the relative ease of proving identity in threat cases compared to distribute cases (see [4.5]), or it may reflect the resolution of plea negotiations in which multiple IBSA charges are consolidated. It may also reflect higher rates of recording of distribute intimate image offences: if, as one stakeholder suggested, the distribute intimate image offence is more readily recorded, it may mean that threat offences that are recorded are the most serious and as such are more likely to be prosecuted and sentenced.<sup>173</sup> Some of this reduction may also be explicable by representative charging practices.<sup>174</sup>

172. In Victoria, for example, a recent Crime Statistics Agency study found that 8.9% of recorded sexual assaults led to a conviction in the Magistrates' Court. A further 8.3% were transferred to the higher courts for hearing, but the results of those hearings are not available: Melanie Millsteed and Cleave McDonald, *Attrition of Sexual Offence Incidents Across the Victorian Criminal Justice System* (2017) 5, 9. In New Zealand, 11% of recorded sexual violence victimisations led to a conviction: Ministry of Justice, *Attrition and Progression: Reported Sexual Violence Victimisations in the Criminal Justice System* (2019) 2.

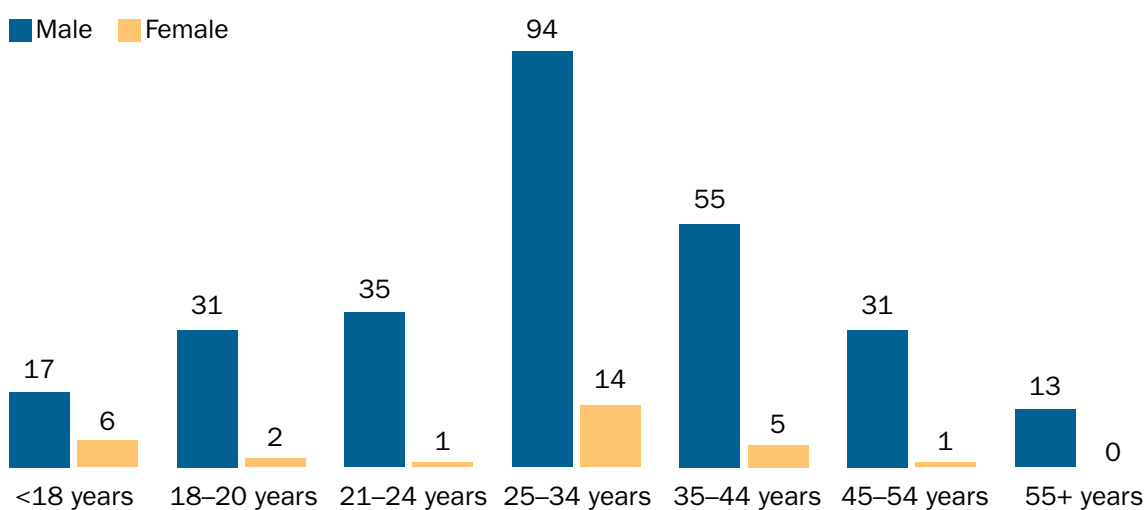
173. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020). The eSafety Commissioner sees more reported threats than actual distributions (though for reporting purposes, both of these are split into narrower subcategories): Australian Communications and Media Authority and Office of the eSafety Commissioner (2019), above n 29, 210.

174. Roundtable 1 (28 July 2020).

## Demographics of sentenced IBSA offenders

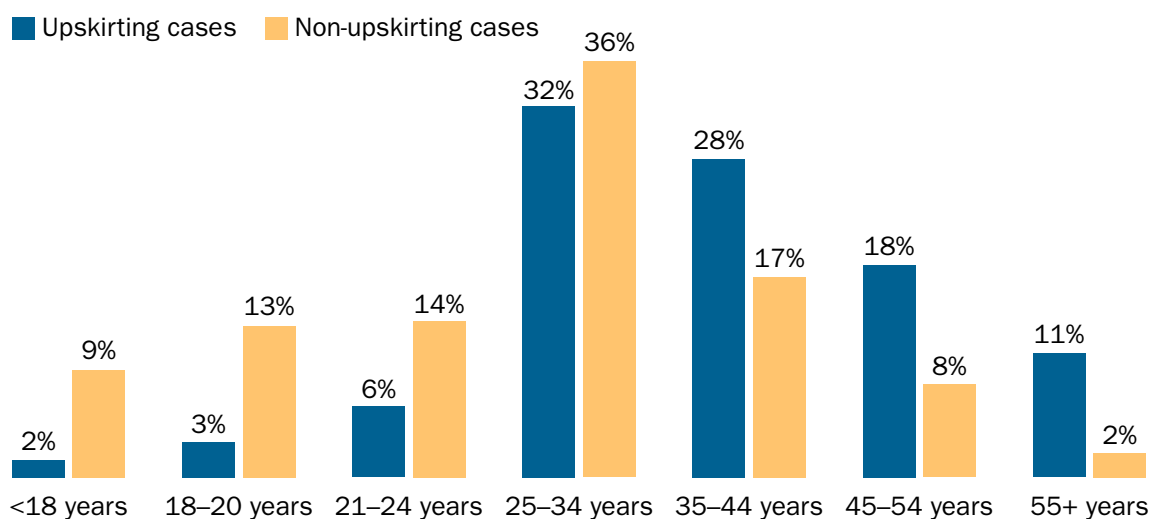
5.10 Figure 9 shows that the vast majority of sentenced offenders, like recorded offenders, were male (91%). People under 35 accounted for a very high proportion of offenders (66%), which is consistent with previous research suggesting that IBSA is particularly common among younger people.<sup>175</sup> This may be related to patterns of technology use as well as relationship type and length.

**Figure 9: Age and gender of offenders in IBSA cases sentenced in Victoria (all courts), 2015–16 to 2018–19<sup>176</sup>**



5.11 When the analysis is split into the 2007 (upskirting) offences and the 2014 (intimate image) offences, however, it becomes clear that the age distribution is not equitable across offence types. Offenders sentenced for the 2014 offences are younger than those sentenced for the 2007 offences (Figure 10).

**Figure 10: Age of offenders in IBSA cases with only upskirting charges and with only intimate image charges in Victoria (all courts), 2015–16 to 2018–19<sup>177</sup>**



<sup>175</sup> Henry et al. (2019), above n 4, 34.

<sup>176</sup> One offender's age was unknown; this person is excluded from Figure 9.

<sup>177</sup> Cases with a mix of charges of offences enacted in 2007 (observe, capture, distribute genital image) and in 2014 (distribute intimate image, threat to distribute) were excluded from Figure 10.

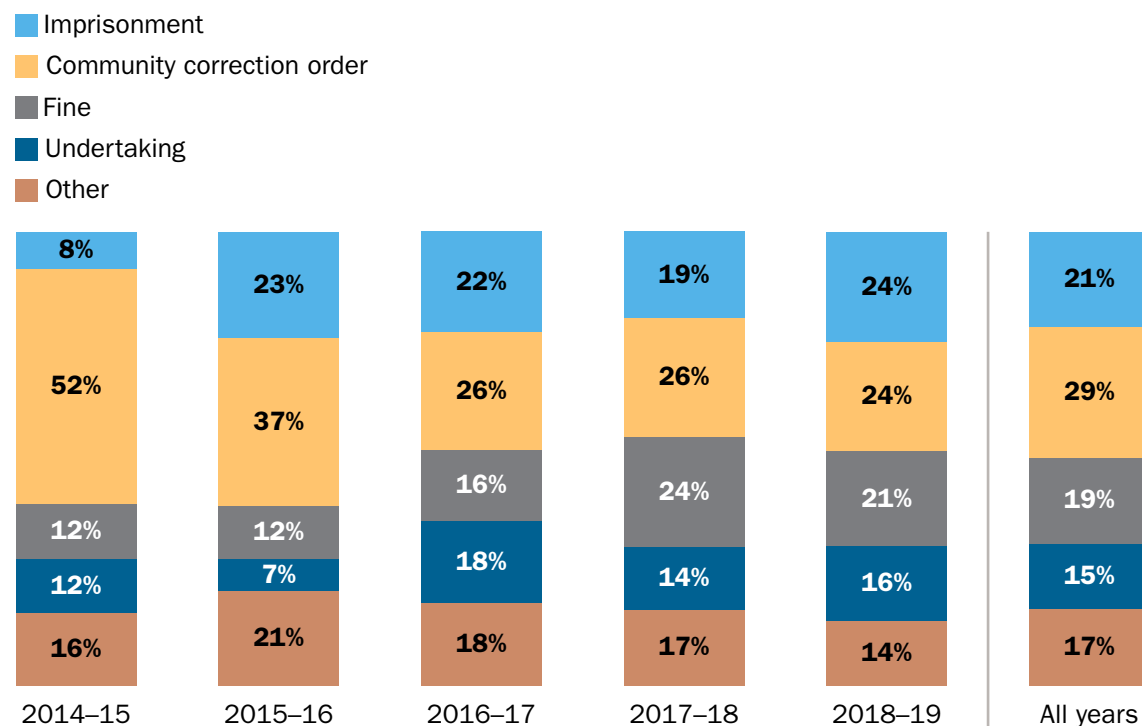
## Sentence outcomes

5.12 This section analyses sentencing outcomes for IBSA charges, and for cases involving at least one IBSA charge, between 2015–16 and 2018–19.

### Sentence type

5.13 The distribution of sentencing outcomes imposed in IBSA cases has changed considerably since the distribute intimate image offence and threat to distribute offence were introduced in 2014. The proportion of IBSA cases resulting in a community correction order dropped from 52% in 2014–15 to 24% in 2018–19, and the proportion of sentences of imprisonment, fines and undertakings all increased. These changes could not be attributed to broader sentencing trends across the study period.<sup>178</sup> Figure 11 shows the change over time, including the year before the study period to place the change in context.

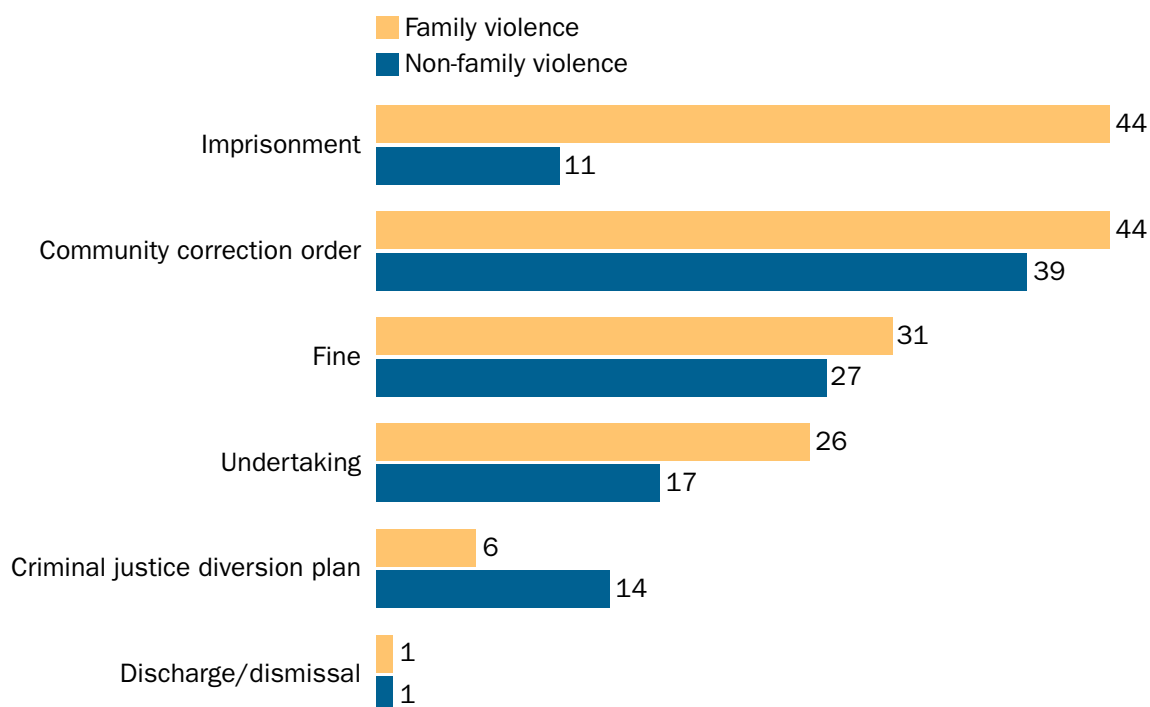
**Figure 11: Sentence outcomes for IBSA cases (all courts), 2014–15 to 2018–19**



<sup>178</sup> Whereas the use of community correction orders dropped for IBSA offences over the study period, they remained comparatively steady for offences more widely, with 10,512 cases in the Magistrates' Court attracting a community correction order in 2015–16, compared to 8,807 in 2018–19. Moreover, most of that decline occurred in the last year of the relevant period, a trend not borne out in the IBSA data: Sentencing Advisory Council, 'Sentencing Outcomes in the Magistrates' Court' (sentencingcouncil.vic.gov.au, 2020) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/sentencing-outcomes-magistrates-court>> at 10 September 2020.

- 5.14 This change occurred primarily in the 2015–16 and 2016–17 financial years and appears to have stabilised since then. The change in sentence types appears to be related to differences in the number of IBSA cases involving family violence. Commentary on a recent Western Australian case raised concerns that IBSA in a family violence context may attract overly lenient sentencing outcomes.<sup>179</sup> Figure 12, however, shows that Magistrates' Court cases involving family violence, which appeared substantially more often in relation to the distribute intimate image offence and the threat to distribute offence, had a lower proportion of community correction orders during the study period and a higher proportion of sentences of imprisonment.<sup>180</sup> Fines were similarly common in family violence and non-family violence cases. None of the 23 female offenders sentenced for an IBSA offence during the study period received a sentence of imprisonment.

**Figure 12: Number of case outcomes by family violence flag status (Magistrates' Court), 2015–16 to 2018–19**



- 5.15 Unsurprisingly, sentence outcomes in IBSA cases also varied substantially by court. In the higher courts, all 15 cases resulted in a custodial outcome, including 12 cases (80%) with a sentence of imprisonment.<sup>181</sup> In contrast, most of the cases sentenced in the Children's Court in the study period resulted in either youth diversion (37%) or a good behaviour bond (23%), and there were no custodial sentences. Also unsurprisingly given the low maximum penalties, cases in which an IBSA charge was the principal proven offence received lower penalties overall than cases where the IBSA charge was a secondary offence. Fines and undertakings were the most common sentence outcomes in these 125 cases; a community correction order was imposed in just 22 cases (18%), and imprisonment was imposed in eight cases (6%).

179. Marilyn Bromberg, 'The Devil You Know Is Not Better: The Non-Consensual Distribution of Intimate Images and Sentencing' (2020) 44 *Criminal Law Journal* 173, 185–188. A subsequent case in Western Australia involving IBSA threats and distribution in the context of a relationship breakdown attracted a sentence of 20 months' imprisonment, with the behaviour described as 'a form of domestic violence': Angie Raphael, 'Man Jailed for Uploading Ex-lover's Image to Porn Site, Threatening to 'Ruin' Her' (news.com.au, 2020) <<https://www.news.com.au/national/western-australia/man-jailed-for-uploading-ex-lovers-image-to-porn-site-threatening-to-ruin-her/news-story/c7ea9c753bb1c1be2cdab1ca040de806>> at 10 September 2020.

180. Magistrates' Court data is presented because it represents the majority of offences. Higher courts data does not include a family violence flag, and sentenced IBSA offences in the Children's Court are substantially different.

181. The remaining two cases resulted in a youth justice centre order, a Commonwealth recognisance release order and a suspended sentence with Commonwealth recognisance release order.

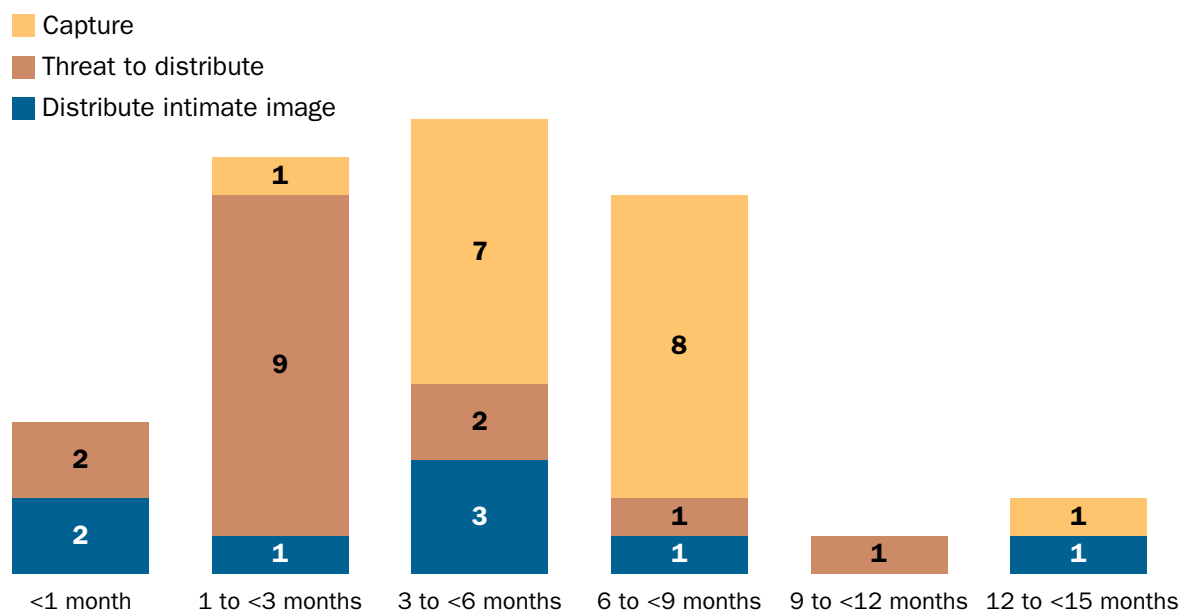
## Sentences of imprisonment

- 5.16 Sentences of imprisonment were associated with higher numbers of charges per case. Imprisonment was more likely to be imposed in the context of family violence, and principal proven offences with longer maximum terms were more likely to receive imprisonment than other sentence types. Offence types commonly co-sentenced in cases that received imprisonment included breach of family violence order, stalking, breach of bail conditions and sexual offences against children.
- 5.17 At the case level, there were 67 cases where imprisonment was imposed for the IBSA offending, involving 112 IBSA charges. In three of these cases, the only charges were IBSA charges. The average total effective sentence for cases that resulted in imprisonment was 22 months. Most cases (66%) that attracted a sentence of imprisonment were family violence cases.
- 5.18 The lengths of imprisonment terms were further analysed by excluding aggregate sentences of imprisonment and looking at charges rather than cases to enable comparison across the different IBSA offences. Aggregate sentences apply to multiple charges, meaning it is impossible to determine the separate contribution of each charge to the overall sentence. IBSA cases that resulted in imprisonment usually involved other charges with longer imprisonment terms, meaning that case-level data on imprisonment would often reflect those other charges rather than the IBSA offending. Among the 112 sentences of imprisonment imposed on IBSA charges, there were 72 aggregate sentences. It was, however, possible to determine the length of imprisonment terms in the remaining 40 charges.

### Duration of non-aggregate sentences of imprisonment

- 5.19 Figure 13 shows the duration of the 40 non-aggregate sentences of imprisonment imposed for IBSA charges. The majority (68%) were less than six months in length, another 25% were between six and nine months, and just three charges (in separate cases) received sentences longer than nine months. It was not possible to meaningfully compare the average terms of imprisonment in family violence cases with those in non-family violence cases.

**Figure 13:** Duration of non-aggregate imprisonment sentences imposed in respect of IBSA charges (all courts), 2015–16 to 2018–19



- 5.20 The longest sentence of imprisonment imposed for an IBSA offence was 14 months (seven months of which was served concurrently with imprisonment imposed for other offending). This was a representative charge of an offender committing multiple capture offences against numerous victims, including young children, for over a year. The second longest sentence of imprisonment imposed for an IBSA offence was 12 months (six months served concurrently) for distributing an intimate image. That charge related to a course of offending that included the offender raping the victim.<sup>182</sup> Notably, the third longest sentence of imprisonment was nine months for threatening to distribute an intimate image, in the context of using threats to coerce further sexual contact and production of sexual imagery with a 16-year-old victim. That sentence represents 75% of the maximum penalty for that particular offence.<sup>183</sup>
- 5.21 Of the 40 non-aggregate sentences of imprisonment imposed for IBSA charges, half (20) were wholly concurrent sentences of imprisonment, meaning that they did not increase the overall amount of time that the offender already had to spend in prison for other offending. A further 16 were partially concurrent, and just three were either the base sentence (one charge with an eight-month imprisonment term) or wholly cumulative (two charges with one-month imprisonment terms).<sup>184</sup>
- 5.22 The effect of the outcomes and the high rate of concurrency in sentences of imprisonment for IBSA offending is that there were only two cases in which an IBSA offence contributed six months or more to a term of imprisonment during the study period. The principle of totality can have the effect of limiting cumulation where multiple charges are sentenced in a single case. Multiple stakeholders suggested that, in addition to the effect of totality where multiple offences are sentenced, low maximum penalties and placement of the IBSA offences in the *Summary Offences Act 1966* (Vic) most likely contribute to lower sentencing outcomes, even for IBSA offences in the upper range of offence seriousness:

You could expect longer sentences if there were higher maximum penalties. It's Parliament's indication of the seriousness they're attaching to that level of offending.<sup>185</sup>

## Fines

- 5.23 In 59 (19%) of the 306 IBSA cases in the study period, a fine was the most serious penalty imposed in that case. Fines were primarily associated with threat to distribute and distribute intimate image charges. In 29 of the 59 cases (49% or 9% of all cases) where a fine was the most serious penalty imposed, the only charges in the case were IBSA charges. In six cases, a fine was combined with an undertaking, perhaps aimed at rehabilitative outcomes.

182. *DPP v Hartland* [2019] VCC 628 (10 May 2019).

183. *DPP v Li* [2017] VCC 1696 (11 October 2017).

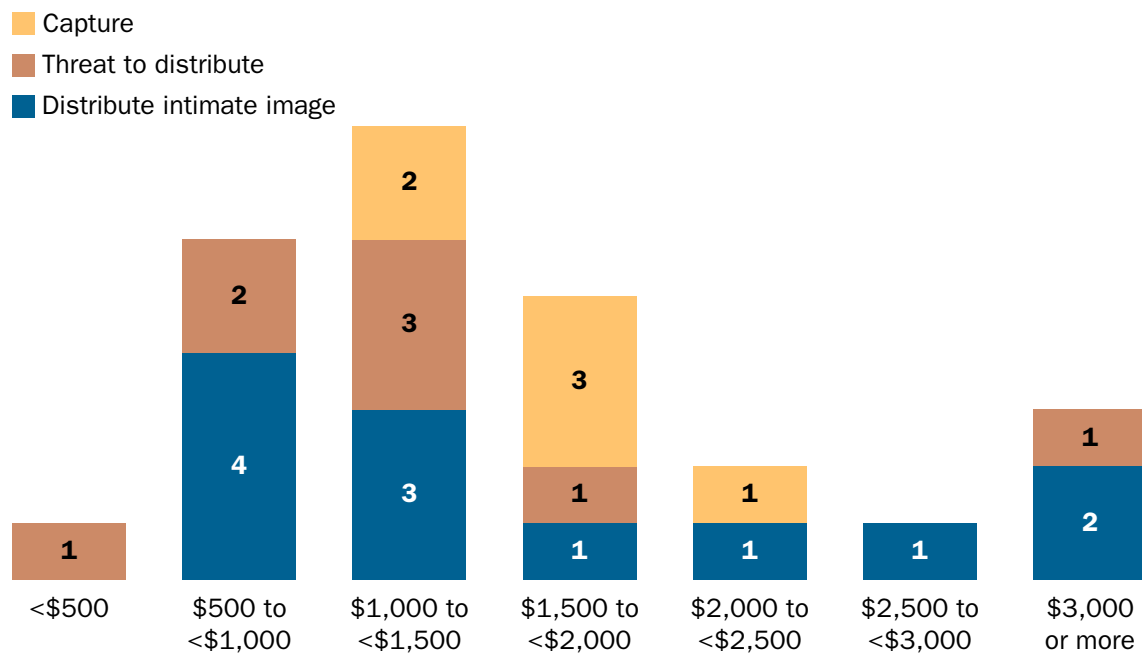
184. The concurrency status of two sentences of imprisonment was not known because those cases were sentenced in the higher courts, and their sentencing remarks were not provided.

185. Roundtable 1 (28 July 2020).



5.24 Like sentences of imprisonment, aggregate fines are sometimes imposed where a single fine is applied to reflect the criminality of a collection of offending. For the same reasons, aggregate fines are excluded from the analysis below, and charges, rather than cases, are analysed to enable comparison across the different IBSA offences. In 68 IBSA charges, a fine was the most serious penalty, and in 26 (38%) of these, the fine was a non-aggregate fine (Figure 14). The average non-aggregate fine was \$1,450.

**Figure 14: Non-aggregate fines imposed in respect of IBSA charges (all courts), 2015–16 to 2018–19**



5.25 Fines alone have limited rehabilitative effect, and their use in situations of domestic violence can be complex.<sup>186</sup> Given the harms involved with IBSA offending and the lack of understanding among perpetrators of those harms (see [2.22]–[2.27]), there can be concern over the utility of fines as a sole sentencing disposition for IBSA offending. For cases where a non-custodial sentence is called for, a sentence that may have a therapeutic or rehabilitative effect (such as an adjourned undertaking, depending on its conditions) may be preferable. One stakeholder commented:

I think from a victims' perspective, someone getting a fine for this type of behaviour would not necessarily feel like it's being treated seriously by the justice system ... I'm not sure it's an appropriate outcome for what we would consider to be quite a harmful sexual offence.<sup>187</sup>

5.26 Conversely, it could be argued that fines may be a useful disposition in some IBSA cases where the offender has already shown progress by the time of sentencing. In these cases, fines can censure the offending without unduly disrupting the offender's job and housing and potentially endangering further progress.<sup>188</sup> Another stakeholder suggested that fines could be used where a therapeutic option might be preferred but the offending was not serious enough that a community correction order could be imposed.<sup>189</sup>

186. Sentencing Advisory Council, *Contravention of Family Violence Intervention Orders and Safety Notices: Prior Offences and Reoffending* (2016) 64, 69–72.

187. Roundtable 2 (29 July 2020).

188. Roundtable 1 (28 July 2020); see also Sentencing Advisory Council (2016), above n 186, 65.

189. Roundtable 2 (29 July 2020).

## Sentenced IBSA cases involving family violence

5.27 Overall, 58% of sentenced cases in the Magistrates' Court occurred in a context suggestive of family violence.<sup>190</sup> Cases in the Children's Court were usually not linked to family violence: of the 30 cases in that court, only six (20%) had a family violence indicator, all involving male offenders.

5.28 This proportion varied somewhat by age. Fewer cases involving the youngest and oldest sentenced IBSA offenders were marked with a family violence flag (older and younger age groups were often sentenced for *non-family violence* related IBSA), whereas more family violence cases involved offenders in the 21–24 and 25–34 age ranges (Figure 15). Stakeholders commented that this mirrored the overall prevalence of family violence by age.<sup>191</sup> Additional possible explanations for high rates of family violence related IBSA among those aged 21–34 may include the following:

- People aged under 18 and 18–20 years might engage in IBSA behaviour in a school, college or university context, and if the victim is also a student, this may increase the odds of behaviour being reported to the educational institution and subsequently referred to police.
- People aged under 18 and 18–20 years who are comfortable socialising on the internet might engage in more casual, rather than targeted and coercive, on-sharing of imagery.
- People who engage in upskirting may continue doing so until a comparatively late age, consistent with other sexually motivated crime such as child pornography.

**Figure 15: Number of cases with a family violence flag (Magistrates' Court and Children's Court), by offender age, 2015–16 to 2018–19<sup>192</sup>**



5.29 The proportion of family violence cases also varied substantially by offence type. Distribute intimate image and threat to distribute cases exhibited a strong correlation with family violence, while upskirting cases exhibited a far weaker correlation (Figure 16, page 39).

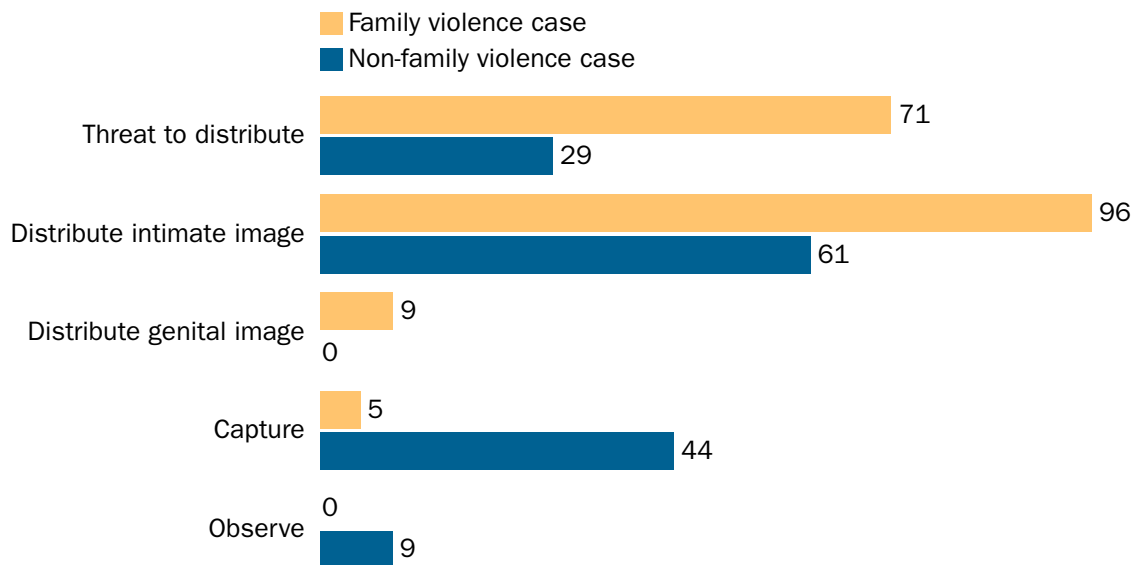
190. Cases in which one or more offences occurred in a context suggestive of family violence are designated using the Magistrates' Court or the Children's Court family violence flag. This flag is added when the case commences in the court system and is based on all available information, including the Victoria Police file. The flag can also be updated as a case progresses if a link to family violence emerges. Information about family violence flags was not available for the higher courts. However, manual analysis of sentencing remarks revealed a similar prevalence, with approximately 50% of remarks suggesting the existence of a current or previous intimate relationship. For analysis of cases involving family violence flags, the total number of cases is 291.

191. Roundtable 2 (29 July 2020).

192. One offender's age was unknown; this person is excluded from Figure 15.

Of the 225 distribute intimate image and threat to distribute cases where a family violence indicator was available, 145 (64%) had a family violence flag. In contrast, only eight of the 61 upskirting cases (13%) had a family violence flag. Five cases involved a mixture of upskirting, distribute intimate image and threat to distribute; all five were linked to family violence.

**Figure 16: Number of IBSA cases flagged as involving family violence (Magistrates' Court and Children's Court), by specific IBSA offence, 2015–16 to 2018–19**



- 5.30 This is consistent with the different typologies of the behaviour underlying the distribute intimate image offence and the threat to distribute offence compared to the other IBSA offences (see [2.24]–[2.30]). Unlike cases involving male offenders, cases involving female offenders were less likely to have a family violence flag. Nine cases involving female offenders (31%) were flagged as involving family violence, compared to 57% of cases involving male offenders, even though female offenders were overwhelmingly sentenced for distribute intimate image and threat to distribute, which have the strongest links to family violence.
- 5.31 The overall proportion of sentenced cases with a family violence flag (54%) is somewhat higher than has been observed in previous research, where partner or ex-partner relationships were reported in 23% to 45% of cases depending on the specific categories interrogated.<sup>193</sup> There could be numerous reasons for this; a particularly significant one, however, appears to be that IBSA cases linked to family violence are more commonly associated with other offending linked to the relationship. Family violence cases involved an average of 6.3 charges per case, compared with 3.8 charges per case in non-family violence cases. The presence of other offending in an IBSA case may mean that victim survivors are more likely to view the conduct as criminal and report it to law enforcement,<sup>194</sup> and that Victoria Police are more likely to investigate, charge and prosecute the matter. If the other offending involves indictable offences, including indictable offences triable summarily, additional evidence gathering and arrest powers may also facilitate easier investigation.<sup>195</sup>

193. Henry et al. (2019), above n 4, 39–41; see also Powell et al. (2019), above n 30, 397. In Henry et al., partners or ex-partners accounted for between 23% and 45% of IBSA as reported by victim survivors, and in Powell et al., they accounted for between 22% and 40% of IBSA as reported by perpetrators, depending on the type of IBSA and the gender of the victim survivor. The eSafety Commissioner's study of distribution found 25% of perpetrators were partners or ex-partners, and a further 10% were family members: Office of the eSafety Commissioner (2017), above n 20, 5.

194. See [2.17]–[2.18]; Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020); see also [2.17]–[2.18].

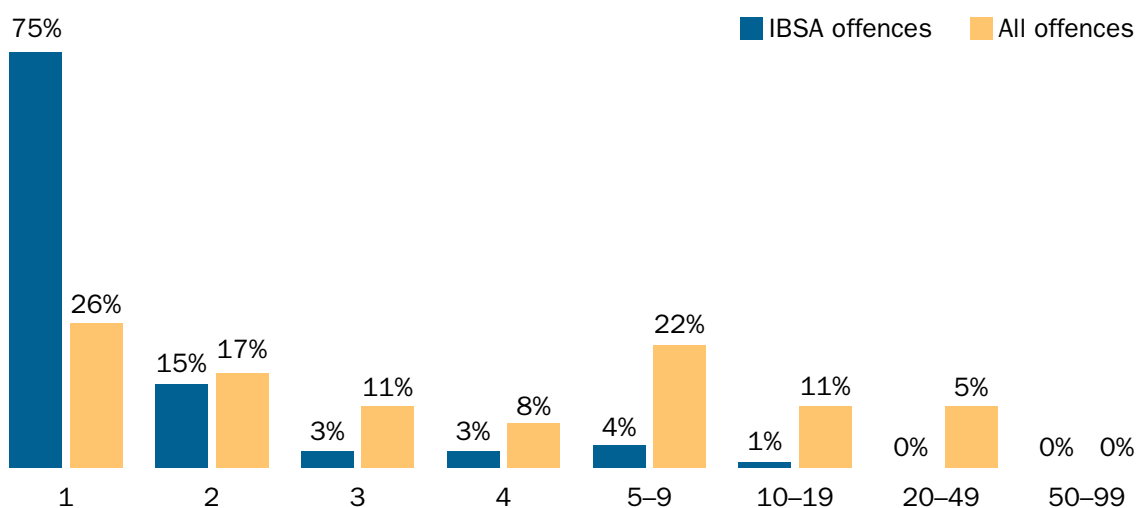
195. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020); see further [3.14]–[3.15].

## Co-sentenced offences

### Number

5.32 Figure 17 shows the number of cases in which an IBSA offender was sentenced for one or multiple IBSA offences and one or multiple offences in general (not just IBSA offences). It was rare for IBSA offenders to be sentenced for multiple IBSA offences in the same case, but it was common for IBSA offenders to be sentenced for one or more non-IBSA offences along with their IBSA offence. Most IBSA cases (75%) involved only one IBSA offence, and only 10% of IBSA cases involved three or more IBSA offences. Conversely, three-quarters of IBSA cases (74%) involved at least one other offence. More than one-third of IBSA cases involved five or more offences in total, and 5% of IBSA cases involved 20 or more offences. Among female offenders, 20 of 29 (69%) had at least one other offence, and six of 29 (21%) had at least one co-occurring IBSA offence.

**Figure 17: Proportion of IBSA cases sentenced in Victoria, by number of offences in the case (all courts), 2015–16 to 2018–19**



5.33 Of the 306 IBSA cases that were sentenced between 2015–16 and 2018–19, an IBSA charge was the principal proven offence in 125 cases (41%), 13 in the Children’s Court and 112 in the Magistrates’ Court. Most of these cases (79% in the Magistrates’ Court and 100% in the Children’s Court) involved only IBSA offending; in the remainder, co-sentenced offences were often breaches of bail, breaches of orders and criminal damage. These results are consistent with stakeholder comments that IBSA was more likely to be reported and prosecuted if it occurred alongside other offending, and they are consistent with the high incidence of family violence in IBSA cases.<sup>196</sup>

5.34 The IBSA case with the highest number of IBSA offences was an upskirting case, which involved 13 charges of the capture offence along with stalking and sexual offences against children. This is consistent with research suggesting that upskirting offences are associated with sexual and deviant motivations, with perpetrators enjoying the ‘thrill’ derived from creating the imagery rather than necessarily sharing it or exerting control over the person depicted.<sup>197</sup>

196. Roundtable 1 (28 July 2020); Roundtable 2 (29 July 2020).

197. Social Research Centre (2019), above n 68, 41–45; see also [2.28].

- 5.35 The IBSA case with the highest number of offences overall was heard in the County Court.<sup>198</sup> It involved 67 charges in total, including five charges of the threat to distribute offence and extensive child sexual offending and child pornography charges. In that case, the threat to distribute had been used to coerce further imagery and sexual contact. This is an example of how threats to distribute can be used coercively outside a family violence context.
- 5.36 The Magistrates' Court case with the highest number of offences overall involved 37 charges in total. These included one charge of threat to distribute, as well as charges of stalking, criminal damage and breach of bail, and 26 charges of breaching family violence orders (two persistently). This offence profile is suggestive of ongoing family violence, and it is consistent with research linking threats to distribute to family violence and coercive control.<sup>199</sup> The combination of the capture and threat to distribute offences also suggests that the imagery that the perpetrator threatened to distribute may have been created without the consent of the victim survivor, and the capture offence applied outside its usual context of upskirting to reflect that conduct.

### Single charges of IBSA offences

- 5.37 There were 79 IBSA cases in which a single IBSA offence was the sole charge sentenced, all in the Children's Court (eight cases) or in the Magistrates' Court (71 cases). Of those 79 cases, 34% were flagged as involving family violence (27 cases), a much lower rate than for sentenced IBSA cases that involved more than one charge (62% or 131 of 212 cases).
- 5.38 IBSA cases involving a single charge also tended to receive lower sentences, with lower rates of imprisonment and community correction orders and higher rates of low-end sentences such as undertakings and discharges.<sup>200</sup> IBSA cases in which the only charge was an IBSA charge less often involved the threat to distribute offence and more often involved the upskirting offence, than IBSA cases overall. This is consistent with the association between the threat to distribute offence and family violence, which in turn is associated with further offending.

### Other IBSA offences

- 5.39 There appeared to be a very low crossover between the distribute intimate image offence and the threat to distribute offence among adults, but a much higher crossover among children. Of the 87 IBSA cases in which an offender was sentenced in the Magistrates' Court for at least one threat to distribute offence, there were only 19 cases in which the offender was also sentenced for at least one distribute intimate image offence, and one case in which the offender was also sentenced for at least one distribute genital image offence. None of the threat to distribute cases in the higher courts also involved a distribute intimate image offence. There was virtually no overlap between the other IBSA offences. This may be attributable to the comparative ease of investigating the source of a threat – by necessity, the threat involves a communication to the victim survivor who can then produce it to police – and the consolidation of multiple charges in plea negotiations (see [5.9]). It is also consistent with the upskirting offences being typologically distinct from the threat and distribute intimate image offences.
- 5.40 The results differed in the Children's Court. Of the 30 IBSA cases sentenced in that court, 10 (33%) involved more than one IBSA charge. This included eight cases (27%) involving more than

198. *DPP v Meharry* [2017] VCC 298 (22 March 2017).

199. Victoria, Royal Commission into Family Violence (2016), above n 4, 28–30; Henry et al. (2019), above n 4, 79–87; McGorriery and McMahon (2019), above n 4, 8–9.

200. Diversion plans (though not sentences per se) were also applied in some of these cases.

one type of IBSA offence: in all eight, the IBSA offences were threats and distribution of intimate images. This meant that almost two-thirds of the 13 cases involving threat to distribute offences in the Children's Court also involved at least one distribute intimate image offence. Stakeholders suggested that this could be related to plea processes in the Children's Court, where a child may be required to admit an offence in order to receive an outcome of diversion.<sup>201</sup>

## Non-IBSA offences

5.41 Table 3 shows the types of non-IBSA offences most commonly co-sentenced with IBSA offences. Co-sentenced non-IBSA offences involve substantial family violence related offending. Overall, the most common offence type co-sentenced with an IBSA offence was breach family violence order, with stalking a close second. Almost all of the most common co-sentenced offences arose most commonly in family violence cases (assaults, threats, criminal damage, breaches of orders). Only two of the 10 most common co-sentenced offence types in IBSA cases were particularly correlated with non-family violence offending: stalking, which occurred frequently in IBSA cases involving both family violence and non-family violence offending, and sexual offences against children, which were much more strongly associated with IBSA cases involving *non*-family violence offending than family violence offending.

**Table 3: Percentage of IBSA cases in which non-IBSA offences were co-sentenced with IBSA offences, by 10 most common non-IBSA offence types and presence of a family violence flag<sup>202</sup>**

Offence type	IBSA cases overall	IBSA cases with a family violence flag	IBSA cases without a family violence flag
Breach family violence order <sup>a</sup>	26%	46%	2%
Stalking	24%	29%	19%
Breach bail conditions	16%	25%	6%
Common assault	13%	20%	5%
Harassment and private nuisance <sup>b</sup>	13%	20%	5%
Threatening behaviour <sup>c</sup>	12%	16%	6%
Criminal damage	9%	13%	5%
Sexual offences against children <sup>d</sup>	8%	1%	11%
Serious assault	7%	11%	2%
Other theft	6%	8%	2%

a. Breach family violence order includes persistent breaches.

b. Harassment and private nuisance includes some instances of the Commonwealth charge of using a carriage service to menace, harass or offend (that is, using a carriage service to harass) as well as harassing a witness.

c. Threatening behaviour includes using a carriage service to menace as well as threats to kill.

d. Sexual offences against children include child pornography offences as well as offences involving sexual contact.

201. Roundtable I (28 July 2020).

202. 'IBSA cases overall' refers to all courts. 'IBSA cases with a family violence flag' and 'IBSA cases without a family violence flag' refer to the Magistrates' Court and the Children's Court, as the other courts do not have family violence indicators.

5.42 IBSA cases involving sexual offences against children often included numerous charges of those offences. Sexual offences against children (mostly child pornography offences) were often linked to the capture offence: 13 of the 25 IBSA cases with a sexual offence against children involved at least one capture offence, and 24% of capture cases were co-sentenced with sexual offences against children, all with at least one charge linked to child pornography. This may be due to the typology of the capture offence, which is associated more strongly with upskirting than with revenge pornography or other coercive relationship contexts (see [2.28]), as well as due to intersecting investigations. For example, if IBSA imagery depicting multiple people was found on the computer of a person being investigated for possession or creation of child pornography involving multiple children, that person would most likely then be charged multiple times in relation to their multiple victims. In contrast, there were few stalking charges per case, most likely because a single such charge can represent a substantial course of conduct.

### Commonwealth offence

5.43 As discussed at [3.9], the offence of using a carriage service to menace, harass or offend (the *Commonwealth offence*) can be used to capture IBSA behaviour as well as other behaviour. Analysis of the higher courts sentencing remarks (in which this charge appeared four times) found no instances where the Commonwealth offence had been used to capture IBSA behaviour in those courts. Instead, it was sometimes used to capture other threats that occurred during the course of a coercive relationship, including threats that the perpetrator would take their own life or that the perpetrator would have the victim survivor's children removed.<sup>203</sup> Consultation with stakeholders revealed that in some cases (presumably in the Magistrates' Court and/or Children's Court, for which sentencing remarks are not available), the Commonwealth offence is used to capture IBSA offending, but it is usually used to capture other types of harassing and threatening conduct and should not be considered a proxy for further IBSA offending.<sup>204</sup>

5.44 The incidence of the Commonwealth offence in IBSA cases increased from three to 17 between 2015–16 and 2018–19, following a similar pattern to the distribute intimate image offence and threat to distribute offence enacted in 2014. In total, the Commonwealth offence was present in 54 of the 261 IBSA cases sentenced in the Magistrates' Court during the study period (21%). The vast majority (83%) of the 54 cases in which the Commonwealth offence was sentenced in the Magistrates' Court were flagged as being related to family violence. This is consistent with the link seen in higher courts sentencing remarks between this charge and coercive control.<sup>205</sup> This change may therefore result not from differences in the Commonwealth offence itself but from a strengthening of the association between IBSA and family violence: the distribute intimate image offence and the threat to distribute offence, which are also strongly linked to family violence, made up a greater proportion of the total at the end of the study period than at the beginning.

203. *DPP v Willats* [2018] VCC 1030 (23 May 2018); *DPP v Hodson* [2019] VCC 578 (30 April 2019); *DPP v Hartland* [2019] VCC 628 (10 May 2019).

204. Roundtable 1 (28 July 2020).

205. The higher courts data does not include a family violence flag.

## Conclusion

- 5.45 Once recorded, IBSA offences have low attrition rates compared with other offences for which attrition rates have been studied, especially contact sexual offences. While the low rates are encouraging, they may result partly from a displacement effect, where the initial barriers to reporting are so high that only the most serious offences are reported.
- 5.46 There is a strong link between IBSA offences and other offence types, particularly family violence related offending among adults. This is consistent with previous research suggesting that IBSA often occurs as part of a course of conduct that includes other behaviour linked to coercive control. It may also suggest that the IBSA offences that are recorded and sentenced are linked to other offending because IBSA offending alone is rarely perceived as serious enough to justify a criminal prosecution, including and perhaps especially by victim survivors.
- 5.47 Sentencing outcomes appear to have become less severe since the introduction of the distribute intimate image offence and threat to distribute offence in 2014, with decreases in the proportion of community correction orders and increases in the proportion of fines. This may be linked to the high level of aggregation and the offence types co-sentenced with IBSA offences: if the sentence for a non-IBSA offence in an IBSA case is substantial, the principle of totality may limit cumulation in respect of the IBSA offence.



## 6. Concluding remarks

- 6.1 When Victoria's image-based sexual abuse (IBSA) offences were introduced, they were understood to relate to the emerging and comparatively minor problems (as they were often then perceived) of upskirting, sexting and revenge pornography. However, the research literature and the Council's analysis in this report show that the different IBSA offences actually reflect distinct behaviour patterns, often associated with more serious offending, including family and sexual violence, stalking and child pornography.
- 6.2 This report presents the first empirical research on sentenced IBSA offences in Victoria. Key findings from the analysis of IBSA cases sentenced from 2015–16 to 2018–19 include:
- the vast majority of IBSA offenders (91%) were male;
  - there has been a gradual increase in the number of IBSA cases sentenced in Victoria each year, particularly since the introduction of the distribute intimate image offence and threat to distribute offence in 2014, but victimisation rates reported in other research suggest that sentenced offences still represent only a small fraction of actual instances of IBSA offending;
  - in the four financial years following the introduction of the distribute intimate image offence and threat to distribute offence, they became the most commonly sentenced IBSA offences, constituting 67% (42% and 25% respectively) of all IBSA charges sentenced in those four years;
  - almost all IBSA cases sentenced in Victoria were sentenced in the Magistrates' Court (85%), with the remainder sentenced in the Children's Court (10%) and in the higher courts (5%);
  - the most common sentencing outcomes in IBSA cases in Victoria were community correction orders (27%, though the proportion has declined in recent years), imprisonment (22%, and the proportion has increased in recent years) and fines (19%, the proportion has also increased in recent years);
  - more than half (54%) of IBSA cases were flagged as involving family violence – 58% of cases involving adults, and two-thirds (64%) of cases involving distribute intimate image and threat to distribute offences; and
  - the most common offence types co-sentenced with IBSA offences were breach family violence order (in 26% of IBSA cases) and stalking (in 24% of IBSA cases), and these offences were particularly prevalent in cases flagged as involving family violence.
- 6.3 The data in this report shows low numbers of recorded and sentenced IBSA offences and particularly low proportions of cases in which an IBSA offence was the sole offence sentenced in a case. One clear implication of the data is that IBSA offending is often not reported or detected until after other offending has occurred. This happens partly because people – even victim survivors and perpetrators themselves – do not necessarily perceive IBSA as a criminal matter. Instead, those who experience IBSA deal with it more frequently in other ways, typically only resorting to a criminal justice response to prevent others from experiencing IBSA or where the alternatives are inadequate, the behaviour is extreme or they are afraid. Limitations on evidence gathering and arrest powers due to the summary status of IBSA offences may also be contributing to some of the attrition between recorded and sentenced offences.

- 6.4 Even where IBSA offences are prosecuted, it is not apparent that those offences have much effect on the penalty that is ultimately imposed in each case. This is partly because most IBSA charges that attract a term of imprisonment (64%) are sentenced as part of an aggregate sentence imposed on multiple offences in a case, making it impossible to determine the effect of each offence on the overall sentence. Even where an IBSA charge was serious enough to attract a non-aggregate sentence of imprisonment, the sentence imposed was usually wholly or partially concurrent with sentences of imprisonment imposed on other charges in the case.
- 6.5 Some examples of IBSA offending, particularly by children and young adults, involve comparatively minor behaviour for which a low-end order or short sentence might be appropriate. But altogether, the data in this report and the Council's consultations suggest that the criminal law's response to IBSA does not reflect the type and severity of harms that attend the more serious examples of this type of offending, which, given the low reporting rates, are likely to make up a comparatively high proportion of IBSA cases for which a sentence is imposed.
- 6.6 In addition to the low rate of reporting, the attrition between recorded and sentenced offences is high, and sentences imposed for IBSA offending are low relative to the harms involved in more serious cases. Moreover, Victoria's IBSA offences are contained in the *Summary Offences Act 1966* (Vic) and have the lowest maximum penalties in the country for this type of offending. This most likely contributes to perceptions that IBSA is relatively minor offending compared to other criminal offences. Even in the absence of any legislative reform, wider understanding of the seriousness of IBSA might increase community awareness of the criminality of IBSA behaviours. In turn, this could help raise reporting rates and encourage a criminal justice response more commensurate with the harms that victim survivors of IBSA experience.

# Appendix: Consultation

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<b>Date</b>	<b>Meeting</b>
20 April 2020	Meeting with Office of the eSafety Commissioner
5 May 2020	Meeting with Victoria Legal Aid
4 June 2020	Meeting with Domestic Violence Victoria
8 May 2020	Meeting with ANROWS
13 May 2020	Meeting with Dr Asher Flynn, Monash University
28 May 2020	Meeting with Inspector Martin Allison, Victoria Police
10 June 2020	Meeting with Inspector Sherril Handley, Victoria Police
28 July 2020	Roundtable 1
29 July 2020	Roundtable 2

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# Glossary

## **Accused**

A person who is charged with a criminal offence.

## **Adjourned undertaking**

A sentencing order under which the court adjourns a proceeding for up to five years after the offender gives an undertaking with conditions. If the offender complies with the conditions of the undertaking, the court must discharge the offender when the proceeding is heard. If the offender does not comply, they may be brought back before the court for sentencing.

## **Aggregate sentence**

A single sentence imposed on multiple charges in one case. The value of an aggregate sentence (for example, length of imprisonment term or fine amount) relates to at least two charges sentenced in the same case. The individual sentence for each charge is not specified.

## **Case**

In this report, one or more charges against a person that are sentenced or diverted at one hearing.

## **Charge**

In this report, a single count of an offence.

## **Community correction order**

A sentencing order, available since 16 January 2012, that may require the offender to comply with a range of conditions, including unpaid community work, treatment, supervision, curfews and restrictions on the offender's movements and associates.

## **Custodial sentence**

In this report, a general term for a sentence that deprives an offender of their liberty by holding them in a facility.

## **Deepfake porn**

Pornographic images and videos that are edited to give the impression that they are of a particular person. See also **morph porn**.

## **Dick pic**

An image of a penis shared with a recipient, whether with or without the consent of the recipient.

## **Discharge**

An order dismissing a proven charge without recording a conviction or imposing a penalty.

## **Dismissal**

An order unconditionally releasing an offender after a conviction has been recorded, but without further penalty.

**Downblousing**

Taking imagery of a clothed woman's cleavage or breasts from an angle that exposes areas of the body intended to be concealed under clothing.

**Fine**

A sentence that requires an offender to pay a sum of money to the state.

**Higher courts**

In this report, the County Court of Victoria and the Supreme Court of Victoria.

**Image-based sexual abuse (IBSA)**

In this report, a catch-all term used to describe the non-consensual creation and/or distribution of private nude or sexual imagery. This includes *upskirting*, *downblousing* and *revenge porn*, and in Victoria is captured by the offences in sections 41A–41DB of the *Summary Offences Act 1966* (Vic).

**Intimate image**

A nude or sexual image (or video) of a person. Section 40 of the *Summary Offences Act 1966* (Vic) defines an intimate image as a moving or still image that depicts a person engaged in sexual activity or a person in a manner or context that is sexual, or the genital or anal region of a person or, in the case of a female, the breasts.

**Morph porn**

Pornographic imagery that is edited to give the impression that it depicts a particular person. See also **deepfake porn**.

**Principal proven offence**

The most serious offence for which an offender is sentenced at one hearing. In this report, the principal proven offence is determined using, in order of priority, the sentence outcomes and lengths imposed for each charge in the case; if those are equal, the maximum penalties; if those are equal, the National Offence Index (NOI) ranking; and if those are equal, by charge number.

**Revenge pornography**

In this report, distributing private nude or sexual imagery, usually in the context of a relationship, whether or not motivated by revenge. In Victoria, distributing revenge pornography is captured by the offence in section 41DA of the *Summary Offences Act 1966* (Vic), and threatened revenge pornography is captured by the offence in section 41DB. The offence in section 41B may capture some instances of the creation of revenge pornography.

**Sextortion**

In this report, a form of blackmail that involves coercing a person into paying money or providing a material benefit by threatening to distribute their private nude or sexual images or videos. While all sextortion involves a threat to distribute intimate images, not all threats to distribute are sextortion within this definition.

**Study period**

In this report, the period from 1 July 2015 to 30 June 2019. The report also discusses some offences that occurred outside the study period, between 1 July 2014 and 30 June 2015.

**Upskirting**

Taking an image or video of a clothed person from an angle that exposes areas of the body intended to be concealed under clothing, particularly by using a mobile phone or camera positioned under a woman's skirt. In Victoria, upskirting is captured by the offences in sections 41A–41C of the *Summary Offences Act 1966* (Vic).

**Victim and victim survivor**

This report uses the term *victim survivor* to refer to people who have experienced IBSA in general terms. In situations where such a person has a legal status in relation to a recorded or sentenced offence, they are instead referred to as a *victim*.

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