



30 June 2017

The Director, Online Content Section  
Department of Communications and the Arts  
GPO Box 2154  
CANBERRA ACT 2601

**By email:** [onlinesafety@communications.gov.au](mailto:onlinesafety@communications.gov.au)

Dear Director

The Digital Industry Group Incorporated (DIGI) welcomes the opportunity to provide comments on the Discussion Paper released by the Department of Communications and the Arts on a *Civil penalty regime for non-consensual sharing of intimate images*.

DIGI members include Facebook, Google, Microsoft, Twitter and Oath who collectively provide various digital services to Australians ranging from Internet search engines to digital communications platforms. These services and platforms facilitate new distribution, marketing and revenue generating channels for Australian businesses and content creators. They are also driving fundamental changes to the way that business is conducted and content is created and distributed.

DIGI thanks the Department for the opportunity to make this submission. If you have any questions or require any additional information, please let me know.

Kind regards,

A handwritten signature in black ink that reads "N Buskiewicz". The signature is written in a cursive, flowing style.

Nicole Buskiewicz  
**Managing Director**  
DIGI

# **DIGI submission on a Civil Penalties regime for the non-consensual sharing of intimate images**

## ***1. Executive summary***

DIGI understands the purpose of the Discussion Paper and consultation process is to assist the Department in providing advice to the Government on establishing a new prohibition at the Commonwealth level on the non-consensual sharing of intimate images, and implementing a civil regime designed to 'deter and penalise persons and content hosts who share intimate images or videos of a person without their consent'. It also proposes to give additional powers to the (Children's) eSafety Commissioner to enforce the prohibition.

We recognise that the non-consensual sharing of intimate images can cause humiliation and harm for the victims, and that is why all DIGI members have rapid processes to remove such images once they are notified of their existence. These processes are clearly communicated both on member sites and also on the website for the Office of the eSafety Commissioner. We question whether providing an additional layer of Government bureaucracy would actually result in more effective and expedited removal process rather than encouraging victims to go directly to the sites where their images are posted. Our members are unaware of any instances where such images have not been removed following notification by a victim.

The Discussion Paper is proposing an increasingly broad remit and wide ranging powers for the Office of the eSafety Commissioner that we suggest should be closely examined to determine if there is a case to be made for wider powers.

## ***2. DIGI member eSafety Initiatives***

For the digital industry, the safety and well-being of the people who connect and engage via our services is our top priority. It is imperative that we work to ensure that people have a positive experience when using our services. The Connected Continent II<sup>1</sup> report confirms that the digitally enabled economy contributed \$79 billion to the Australian economy in the 2014 financial year and created the equivalent of \$75 billion in consumer benefits. However, these benefits can only be fully realised if we as an industry work together with government and the community to mitigate any harm that can be caused by misuse of our services.

For this reason, across the industry, we have policies that outline what can and cannot be shared via our services, which expressly prohibit the non-consensual sharing of intimate images; tools that allow any of the millions of people who use our services to flag content to us

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<sup>1</sup> <http://www2.deloitte.com/au/en/pages/economics/articles/connected-continent.html>

that may violate our policies; and we invest in a reporting infrastructure that allows us to promptly review and remove any such content. We also invest considerably in education and awareness initiatives to promote the responsible use of online services.

Specific policies that prohibit the use of member platforms and services for the sharing of intimate images without consent, and actions taken, are outlined below.

- Facebook removes all content of which it becomes aware that violates its Community Standards<sup>2</sup> across all of its services – Facebook, Messenger, Groups and Instagram -- including non-consensually shared images, and then uses image-matching technology to automatically prevent the re-sharing of known images. Facebook has also formed a Working Group to explore how to prevent even the initial sharing of non-consensually shared intimate images, of which the eSafety Commissioner is an active part<sup>3</sup>;
- In June 2015, Google announced that it would begin honouring requests from people to remove nude or sexually explicit images shared without their consent from Google Search results. This announcement is an addition to the existing policies that prohibit image based abuse on all Google-hosted platforms, including YouTube, Blogger, Google+ and Play.
- Microsoft will remove links to photos and videos from search results in Bing, and remove access to the content itself when shared on OneDrive or Xbox Live, when we are notified by a victim. While people have been able to report to us in the past, we've set up a new web page to make it easy for victims to let us know about these particular photos and videos. When we remove links or content, we do so globally<sup>4</sup>.
- In March 2015 as part of its private information policy, Twitter further strengthened its non-consensual nudity policies in the Twitter Rules, reinforcing that users “may not post intimate photos or videos that were taken or distributed without the subject's consent.”<sup>5</sup> Twitter also updated its abusive user policy to specifically mention “intimate photos or videos that were taken or distributed without the subject's consent.” As part of this effort, Twitter also streamlined its reporting tools<sup>6</sup> to make the reporting of non-consensual nudity easier through a form in its Help Center. All users must adhere to the policies set forth in the Twitter Rules. Failure to do so may result in the temporary locking of an account and/or permanent suspension from Twitter.
- Similarly, Yahoo's Community Guidelines<sup>7</sup> expressly state, “Don't bully or harass

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<sup>2</sup> <https://www.facebook.com/communitystandards>

<sup>3</sup>

<https://newsroom.fb.com/news/2017/04/using-technology-to-protect-intimate-images-and-help-build-a-safe-community/>

<sup>4</sup> For more details: <http://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control/>

<sup>5</sup> <https://support.twitter.com/articles/20169991>

<sup>6</sup> [https://support.twitter.com/forms/private\\_information](https://support.twitter.com/forms/private_information)

<sup>7</sup> [https://policies.yahoo.com/us/en/yahoo/guidelines/index.htm?soc\\_src=mail&soc\\_trk=ma](https://policies.yahoo.com/us/en/yahoo/guidelines/index.htm?soc_src=mail&soc_trk=ma)

members of the community. Yahoo communities aren't a place to harass, bully, abuse, impersonate, or intimidate others. . . . [Yahoo has] a zero tolerance policy toward . . . sharing adult or sexualized content of another person without that person's consent (Non-Consensual Pornography). If you experience this, learn how to report it to our attention."<sup>8</sup>

- In addition, Flickr guidelines<sup>9</sup> also expressly prohibit non-consensual pornography, which includes the following: "Flickr also has a zero tolerance policy towards sharing adult or sexualized content of another person without that person's consent (Non-Consensual Pornography). If you experience this, report it to us". The reporting link is the same as the Yahoo reporting link.
- Tumblr's Community Guidelines<sup>10</sup> also expressly prohibit users from posting non-consensual pornography: "Absolutely do not post non-consensual pornography—that is, private photos or videos taken or posted without the subject's consent. . . . You can report violations of these guidelines to [Tumblr] directly."

As our policies make clear, we share the Government and community's concern to stop the non-consensual sharing of intimate images. In our experience, promoting the safety and wellbeing of Australians is best achieved when industry, Government, and the community work together.

### **3. *Establishing the need for a civil penalties regime***

Before we answer specific questions raised in the Discussion Paper, we ask whether the case has been made for the need for a civil regime, especially since victims are already able to take legal action under various laws, including:

- the *Criminal Code Act 1995* (the Code);
- the *Telecommunications Interception and Access Act*, which forbids the user of a carriage service for the purpose of threatening, abusing or harassing someone;
- the *Privacy Act*, which prevents the sharing of personal information without consent; and
- the *Defamation Act (Cth and States)*, which provides civil remedies for people whose reputation has been diminished through the publishing of information about them.

The Discussion Paper lists one of the benefits of a civil penalties regime as "potentially reducing the burden on the criminal justice system by providing a complementary avenue for victims to pursue" without considering the existing aforementioned laws and the number of cases relating to intimate images being brought forward under each one. The Discussion Paper gives the example of the *Criminal Code* and notes there have been over 884 proven charges against 432 defendants brought under it; however, not all of these are related to intimate images. In order to

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<sup>8</sup> Additional information regarding Yahoo resources and support are available at

<https://help.yahoo.com/kb/flickr/SLN26123.html?impressions=true>

<sup>9</sup> <https://www.flickr.com/help/guidelines>

<sup>10</sup> <https://www.tumblr.com/policy/en/community>

get a clearer picture of the problem, and the number of people resorting to legal processes, it's important to know the exact number of cases brought forward under these existing laws. For this reason, DIGI contends that existing legislative frameworks are highly relevant to this consultation and should be reviewed before any new additional laws are considered.

Further, it's not possible to establish the appropriate and effective policy response for tackling the non-consensual sharing of intimate images without further details regarding the makeup of digital content hosts, and the specific segment of digital content hosts in which intimate image sharing is most prevalent. We know from the eSafety Office that:

- Image-based abuse is occurring on dedicated websites, as well as on social media services;
- Around 3,000 sites have been identified as being used for image-based abuse purposes; and
- Mainstream pornography sites are essentially aggregators with image-based abuse seen as a niche market<sup>11</sup>.

However, if most of the offending sites are based overseas, this would seriously compromise a civil penalty regime targeted at digital content hosts given the Commissioner would not be able to compel overseas sites to remove images. Hence, more information is needed in order to be able to make an informed decision.

Finally, the Discussion Paper refers to the existing civil penalty regime for cyberbullying administered by the eSafety Office. DIGI understands that no penalties have been levied under this regime, which suggests the industry is acting above and beyond what is required by law and that the number of complaints are low. We suggest these factors are considered before exploring new civil penalties and bestowing additional powers upon the Office of the eSafety Commissioner. Further detail on how the precedents mentioned in the Discussion Paper are being used in practice, the volume of civil penalty orders being sought, and if there's anything that can be learned from these experiences, would also be useful in deciding if an additional civil penalties regime is the appropriate response.

We would also like to query the proposed requirement that like the cyberbullying complaints scheme, the eSafety Commissioner must formally approve a complaints mechanism before victims could lodge a complaint (p.11). Our complaints handling schemes are global in nature and therefore are designed to be best practice and effective in all jurisdictions in which we operate. Regardless, we suggest that if a social media service provides a complaint handling service and prohibits this kind of content, they should be deemed to be acting responsibly and therefore don't need formal approval.

#### ***4. Expanding the role and power of the eSafety Office***

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<sup>11</sup> Online Safety Consultative Working Group (OSCWG) Record of Meeting, p.12, 10 April 2017.

The Discussion Paper proposes that the civil penalty regime would see the eSafety Commissioner given additional powers in a similar manner to the cyberbullying complaints scheme and suggests a number of enforcement measures.

One of the enforcement measures proposed are takedown notices. As per our complaints processes, some of which are described above, we already operate efficient takedown policies (see Appendix). In order to mitigate potential impacts to freedom of expression, the victim of nonconsensual pornography must reach out directly to a company to request the removal and confirm that the content was posted without their consent. As member companies have teams working diligently to review reports, this is the most efficient and quickest way to have images removed. If the Office of the eSafety Commissioner is granted this power, DIGI strongly supports a requirement for victims to first exhaust companies complaint channels.

On the question of whether the eSafety Commissioner should be given additional enforcement powers such as seeking court orders, issuing search warrants, and information gathering, we believe these powers are best left to law enforcement agencies. It is unclear how these additional powers would be used, how they would provide a quicker remedy for the victim, and how they would allow a victim to avoid a court process unless the suggestion is that sharing of images would be a statutory offence. We are concerned about the legal process of determining guilt given the importance of establishing intent.

### **5. Penalties for content hosts**

The discussion paper explicitly identifies content hosts as a target of any civil penalties regime. We are concerned that the reference to content hosts is very broad and does not single out hosts that are actively encouraging and distributing pornographic content. Rather it seeks to include within scope hosts, such as DIGI member companies, that have a proven record of acting responsibly through removing any instances of non-consensual sharing of intimate images and cooperating with the Office of the eSafety Commissioner. We would like to see the target group of content hosts narrowed to focus on hosts of websites where the primary or sole purpose is to distribute and share pornographic images, including non-consensual pornography.

Search engines categorise and summarise the content on the Internet; they do not moderate or editorialise it. User generated social media platforms equally are not proactively moderated. In most cases of objectionable content and breaches of our policies and terms of use, we require notice by a user, victim's advocate, regulator, or law enforcement agency.

In order for content hosts to be targeted and penalised under a civil penalty scheme, there needs to be an element of knowledge on the host's part that they are hosting such objectionable content. If a content host is unaware of the objectionable content, then there must be a safe harbour regime to limit the service's liability.

## **6. *The importance of education***

DIGI believes that ongoing awareness-raising and education around existing methods of objectionable image removal are critical components in dealing with the non-consensual sharing of intimate images.

DIGI already shares links to member safety resources on our website, and with the eSafety Commissioner, we would be happy to explore further opportunities to raise awareness around the tools available on member platforms with the Department and Office of the eSafety Commissioner.

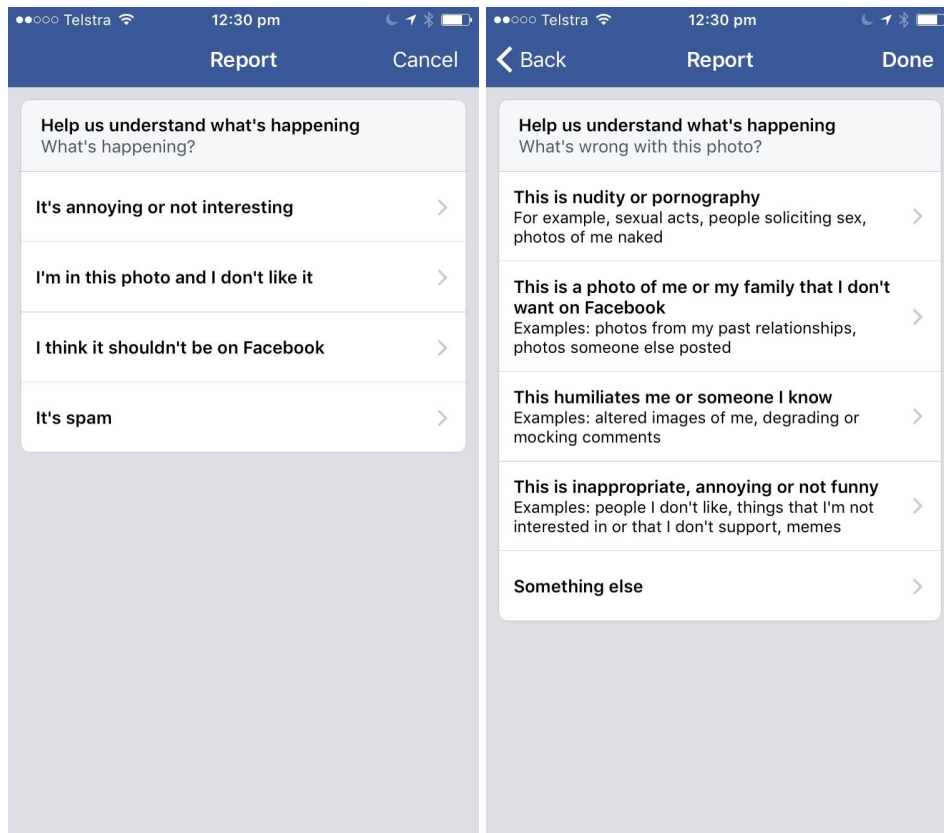
# Appendix

## Member links for reporting image-based abuse

### Facebook

#### Facebook News Feed

- Victims can report an intimate image on Facebook that looks like it was shared without permission by using the “Report” link that appears when the downward arrow or the ellipsis (...) next to a post is tapped.



- Specially trained representatives from Facebook’s Community Operations Team will review the image and remove it if it violates [Community Standards](#). In most cases, Facebook will also disable the account for sharing intimate images without permission. Facebook offers an appeals process if someone believes an image was taken down in error.



## Instagram, Messenger

- Facebook uses photo-matching technology to help thwart further attempts to share the image on Facebook, Messenger and Instagram. If someone tries to share the image after it's been reported and removed, we will alert them that it violates Facebook policies and their attempt to share it has been stopped.

For more information on Facebook's tools for reporting image-based abuse, see [here](#).

## Google

### Search

- Removal of image based abuse from within Search:  
<https://support.google.com/websearch/troubleshooter/31111061#ts=2889054%2C2889099%2C2889064%2C3143868%2C6256340>

### YouTube

- Removal of image based abuse from YouTube: please flag the video using the flag option underneath the specific video

### Google+

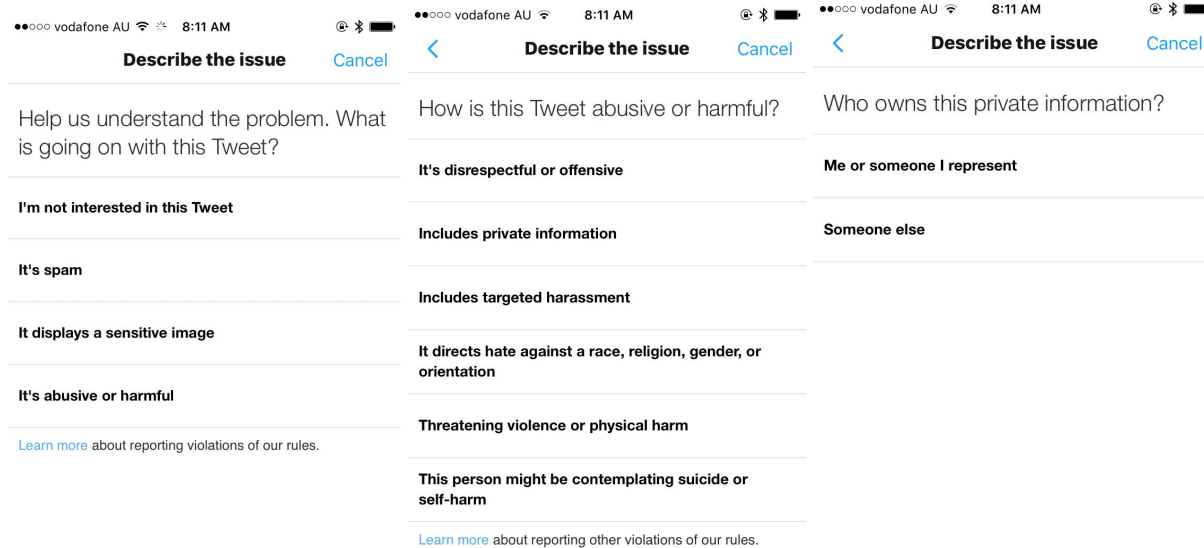
- Removal of image based abuse from Google+: report the individual post using the instructions [here](#)

## Microsoft

- Individuals can use this form to ask Microsoft to remove from its consumer services a nude or sexually explicit photo or video that's been shared without their consent, from Microsoft's services. Microsoft's consumer services include Bing, OneDrive and Xbox Live.  
[https://support.microsoft.com/en-au/getsupport?oaspworkflow=start\\_1.0.0.0&wfname=capsu\\_b&productkey=RevengePorn&ccsid=636268598894758699](https://support.microsoft.com/en-au/getsupport?oaspworkflow=start_1.0.0.0&wfname=capsu_b&productkey=RevengePorn&ccsid=636268598894758699)

## Twitter

- How to report private information posted on Twitter (including image-based abuse): users can report that their private information has been posted on Twitter directly from the offending Tweet(s) through our in-app reporting tools.



- For further instructions about how to report individual Tweets, see this [article](#).
- Users can also file a report that someone has posted their private information by going to this [page](#).

## Oath

- Users can report content that they believe violates Yahoo policies through the [Report Abuse](#) icon within each Yahoo product.
- The [Yahoo Safety](#) and [Help](#) pages also provide information about how to report content that may violate Yahoo policies.
- More information about how to report non-consensual pornography on Yahoo properties is available on this [help page](#).
- Users can report abuse on Flickr on this [page](#), or by clicking the “Flag photo” link on a particular photograph.
- Tumblr users can report abuse through Tumblr’s [report abuse form](#) or [support form](#).



