



30 June 2017

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

Dear Senator Fifield and Senator Cash,

**Re: Public Consultation: Civil Penalty Regime for Non-Consensual Sharing of Intimate Images**

We welcome the opportunity to respond to the discussion paper on a civil penalty regime for the non-consensual sharing of intimate images. Our submission responds to the key points within scope of the consultation, and expresses our views on the merits of a civil penalties scheme: how it might complement existing initiatives; how it might be framed; how a new scheme might be administered and enforced; and definitions of key terms and behaviours.

We are criminologists and socio-legal scholars working on a Criminology Research Grant (CRG) and an Australian Research Council (ARC) Discovery Project on image-based sexual abuse. We define image-based sexual abuse as encompassing three key behaviours: (1) the non-consensual taking of nude or sexual images; (2) the non-consensual sharing of nude or sexual images; and (3) the making of threats to share non-consensual nude or sexual images. Our research involves a mixed methods approach to understanding the nature, prevalence, and impacts of image-based sexual abuse, as well as the legal and non-legal responses to this growing problem. Our recent national survey revealed that 1 in 5 Australians report having experienced at least one form of image-based abuse, and that victims were twice as likely as non-victims to report experiencing significant psychological distress consistent with a diagnosis of moderate to severe depression or anxiety (see Henry, Powell & Flynn, 2017). This

demonstrates that image-based abuse is common amongst the Australian population, with wide-ranging and significant impacts. Although we are highly supportive of the introduction of a civil penalties scheme, we also note the limitations of this one mechanism alone, and as such, more broadly support a range of different legal and non-legal options to both address and prevent image-based sexual abuse.

## ISSUES FOR CONSIDERATION

### Proposed Civil Penalty Regime

#### A prohibition against sharing of intimate images

1. *Are there options for an alternative framing of the prohibition?*

We propose the following wording:

“A person engages in prohibited behaviour if they share a nude or sexual image of another person, or cause such an image to be shared, without that other person’s consent, through a relevant electronic service.

2. *Should an Australian link be included in order for the prohibition to come into effect, e.g., should the person sharing the image, the subject of the image or the content host (or all) be Australian (or in the case of a content host, based in Australia or owned by an Australian company?).*

We question the necessity of explicitly including an Australian link in the wording, regardless of the fact that a civil penalty scheme will be ineffective if the person sharing the image and/or the site hosting the content are not located in Australia. By not specifying an Australian link, it may be that non-Australian perpetrators and websites restrict their behaviour, believing the prohibition to also apply to them.

#### Civil penalty regime

3. *What would be the best mix of enforcement tools to make available to the Commissioner?*

We support the expansion of powers for the Office of the Children’s eSafety Commissioner (backed by legislation) to administer a complaints system to ensure the quick removal of image-based abuse material, and to provide a national online portal that will facilitate reporting and provide access to support for victims of image-based abuse. We support a range of measures that are applied for, or authorised by, the Commissioner, including: formal warnings; infringement notices; civil penalties; injunctions; takedown notices; and enforceable undertakings. This scheme should apply to individuals who participate in the sharing of non-consensual intimate images, as well as content hosts who know about the non-

consensual sharing of intimate images. We note that in New Zealand, under the *Harmful Digital Communications Act 2015*, a range of civil remedies are available through the New Zealand District Court if the approved agency is unable to resolve disputes. Such remedies include: takedown orders (to website hosts, internet intermediaries or individuals); cease-and-desist orders; correction or apology orders; orders to identify the author of the posting; and name suppression for any parties. These civil orders do not impose fines or terms of imprisonment, however failure to comply with a civil order is an offence of either 6 months imprisonment or a \$5,000 fine (\$20,000 for companies). A similar approach could be adopted in Australia.

4. *Should the Commissioner be able to share information with domestic and international law enforcement agencies?*

Yes, the Commissioner should be able to share information with domestic and international law enforcement agencies, particularly given the blurring of borders when dealing with online behaviour.

5. *What triaging processes should be implemented by the Commissioner for the handling of complaints? For example, if an intimate image is of a minor (a person under the age of 18), should the Commissioner be required to notify police and/or the parents/guardians of the minor? Should there be any circumstances in which the minor should have the option to request that police or family are not notified?*

We believe that the minor should have the option to request that police are not notified unless the alleged perpetrator is an adult (over 18 years), in which case the Commissioner should be required to notify police. This mandatory reporting requirement should be made clear to the minor.

6. *In cases where an intimate image of a minor is shared without consent by another minor, should a different process be followed to cases where an image of an adult is shared by another adult?*

Determinations should be made on a case-by-case basis. For instance, if the sharing is just showing another person, then our view is that this is a less serious case of image-based abuse, compared with an image being distributed (whether via mobile phone or other digital device, or on internet sites). The Commissioner should have the power to issue a formal warning and/or infringement warning, or apply to the Federal Court for civil penalties, injunctions, takedown notice, or enforceable undertakings. In situations where a minor distributes (not just shows) an intimate image of another minor, they should not be subjected to child pornography/child exploitation material criminal charges, unless there are exceptional circumstances (e.g. the nature of the image-based abuse is so serious as to warrant such charges and/or if there is more than a 2 year age gap between the alleged perpetrator and victim).



7. *In cases where the intimate image is of a minor and is shared by another minor, are civil penalties appropriate, or should existing criminal laws be used? Should this be dependent on the severity of the case (for example, how widely the image is shared or on what forums the images is shared)?*

Where images are shared by a minor of another minor, civil penalties are appropriate and criminal laws should only be used in exceptional circumstances. The decision about whether civil penalties are more appropriate than existing criminal laws (for minors) should be made on a case-by-case basis, guided by the severity of the case - including how widely the image has been shared, on what forums and to what audiences; the age of the alleged perpetrator and victim; the motives of the perpetrator; the likely impacts on the victim; and the sexual nature of the image. One exception is where a sexual assault has been recorded and distributed. This should be dealt with by the criminal law regardless of the age of the alleged perpetrator.

8. *Should a hierarchy of increasing severity of penalties be established? (This could reflect the severity of the incident and harm caused, with greater penalties for 'repeat' offenders, or for offenders which have sought to impose additional harm by intentionally seeking to maximise the exposure of the images through various forums.)*

Although it is difficult to develop criteria for severity, factors to take into consideration should include: nature of distribution; motivations of perpetrator; likely impacts on victim; nature of imagery; and repeat offences.

9. *Would a hierarchy of penalties lengthen the complaint process, and what effect might that delay have on a victim?*

We are unaware of the reasons for why a hierarchy of penalties would be likely to lengthen the complaints process, however, we hope that such a scheme would not cause unnecessary delays for victims, many of whom will want the images removed immediately.

10. *What technological tools could the Commissioner use in order to combat the sharing of intimate images without consent?*

Manually searching for image-based abuse material is extremely difficult since it is not always easy to differentiate between consensual and non-consensual adult material, particularly on pornography websites. The problem with image-based abuse material is that when nude or sexual images are distributed online, they can be easily copied by third-party web scraping tools, and once downloaded by another individual, can be republished on multiple sites. Even if a particular site gets taken down, or if images are removed on some sites or by individuals on their personal devices, it may be impossible to prevent the image from resurfacing elsewhere. Therefore, consideration of technological tools is crucial in order to identify and combat image-based abuse. Technological tools have been useful in relation to child



exploitation material. For instance, investigators can use a range of tools including: *Microsoft's PhotoDNA*, which compiles a digital signature of an image which can be matched against a database of images; *F1*, which generates unique hashes of child exploitation videos to more easily identify copies or partial copies; *Griffeye Analyze DJ*, a platform to support investigations and streamline the reviewing process, including flagging similar and previously identified images; and *Hubstream*, which allows law enforcement personnel from all over the world to upload and compare illegal images in order to identify both perpetrators and victims.

In relation to non-consensual imagery, in 2017, Facebook introduced new photo matching technologies to enable the identification of already-reported images on the platform and its subsidiaries, Messenger and Instagram. Reverse image searches (e.g. through Google Images or TinEye) may also be another option to consider. This would involve providing a sample image that is then used to retrieve information about that image (e.g. locate the source and content creator of the image; find out where it is stored elsewhere on the web; etc).

*11. Should a cooperative arrangement with social media services be established, in a similar manner to the existing cyberbullying complaints scheme?*

Yes this is a vital step and one that is currently missing for adults who are victims of image-based abuse. However it is important to recognise much image-based sexual abuse takes place on pornography sites, image-board sites, community forums, "revenge porn" sites and other "dark web" platforms that will not be part of this co-operative service.

*12. Should penalties differ depending on the intent of the image sharer, or on how widely the image is shared?*

We believe that penalties should differ according to the severity of the act or acts, and that the following factors should be taken into consideration: nature of distribution; motivations of perpetrator; likely impacts on victim; nature of imagery; and repeat offences.

*13. Should the range of enforcement actions be applicable to parties other than the person sharing the image or the content host?*

No, the enforcement actions should be limited to persons sharing the image, or content hosts.

*14. Should the Commissioner be able to seek a court order to require Internet Service Providers (ISPs) to block individual website(s) in extreme cases where all other avenues have been exhausted?*

In 2015, the introduction of amendments to the federal *Copyright Act 1968* means that copyright owners are able to apply to the Federal Court for an injunction to require ISPs to block access to copyright infringing overseas websites. In December 2016, the Federal Court for the first time ordered internet companies to block five copyright infringement sites such

as Pirate Bay. However, such sites can easily change their domain name, and consumers can access these sites through the use of Virtual Private Networks (VPNs). We believe that other measures will be more effective in responding to image-based sexual abuse and blocking sites alone is not going to solve the problem.

#### Information gathering powers

*15. Should these information gathering powers be made available to the Commissioner in order to administer the proposed civil penalty regime?*

Yes, these powers should be made available to the Commissioner in order for the Office to be able to administer the proposed civil penalty regime.

*16. Should the Commissioner be granted search warrant powers?*

Search warrant powers can authorise the search of a person's home and contents, seizure of property, and interception of phone calls. We believe that these powers should be restricted to police and are not required in order for the Commissioner to administer the proposed civil penalty regime.

#### **Complaints Process**

*17. Should victims be compelled to use established complaints processes (where available) prior to lodging a complaint with the Commissioner?*

Many internet companies, social media and other website providers (including some porn sites) have introduced policies and reporting mechanisms to combat image-based abuse. For instance, in 2015, Microsoft and Google announced new reporting options so that victims can request to have content involving them excluded from Bing or Google searches. Other companies, such as Facebook, Twitter, Reddit, Tumblr, Pornhub, SnapChat, Instagram and Flickr (among many others) have introduced reporting mechanisms for victims of non-consensual intimate imagery. However, these measures are not foolproof. In May 2017, Facebook's internal rulebook for moderators was leaked by the *Guardian* newspaper revealing that non-consensual images will be removed only if the image or images are meant to "shame or embarrass" the person depicted, and only if the image was "produced in a private setting". This means that images secretly recorded or distributed, or images taken non-consensually in public settings (e.g. upskirting images), might not fit the criteria for content removal. There may also be significant delays, or a victim's request may simply not be actioned.

We believe that as a first step, victims should be given the option of using an established complaints process where available but only on a selected approved list provided on the Commissioner's website, such as Google, Bing, Facebook, Twitter, Reddit etc. This will give

some agency and empowerment to victims who wish to take action themselves. But it will also not require any victims to take this action into their own hands when they are uncomfortable about doing so, and/or if the site where their images are contained does not have a reporting/complaint mechanism, or where the site is a porn site. Victims who make complaints on their own behalf in the first instance and who do not get a response within 48 hours, will then be able to have their complaint proceeded to the Commissioner.

*18. What is an appropriate length of time for a victim to wait to hear the result of a complaint prior to contacting the Commissioner?*

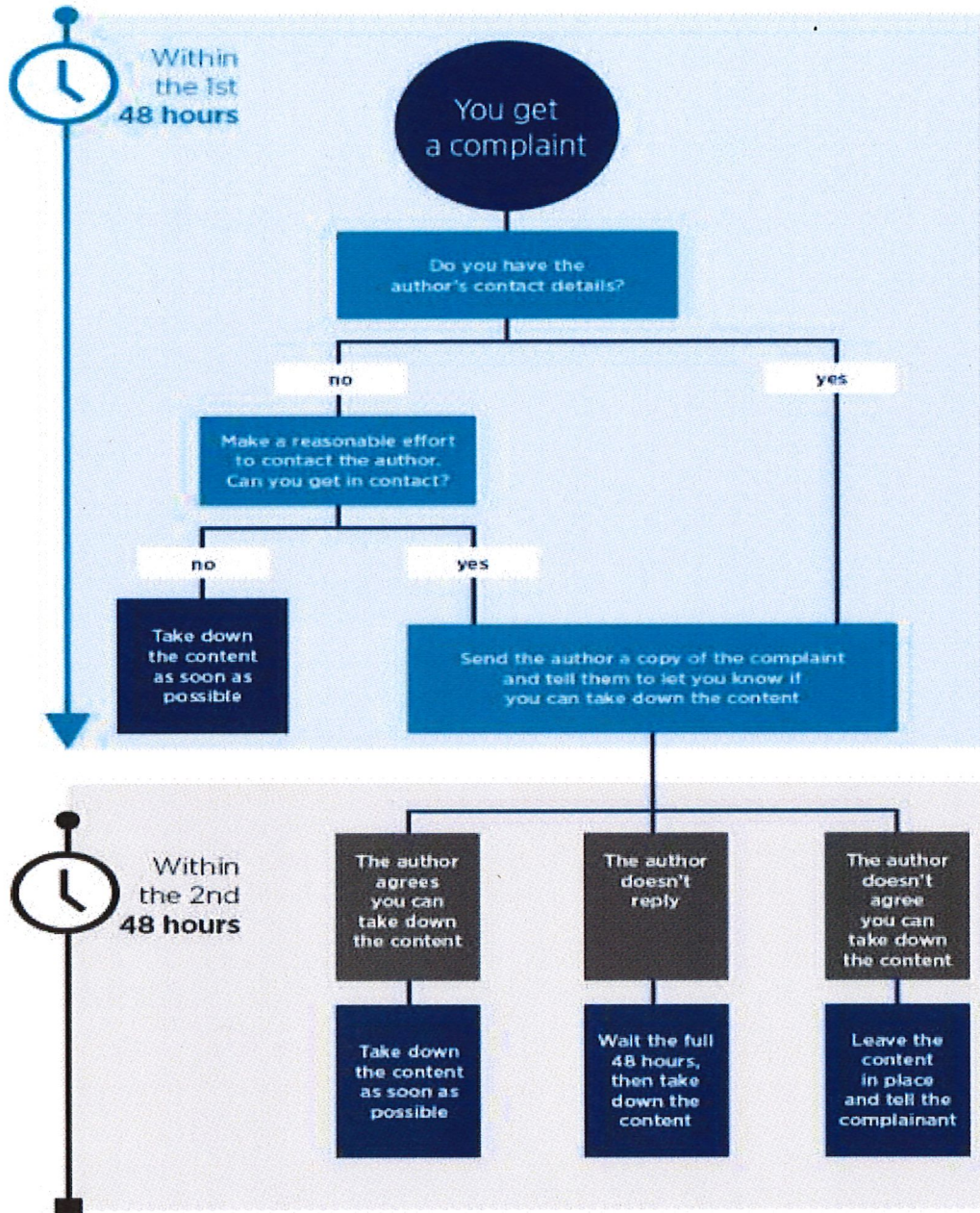
48 hours is a reasonable amount of time and is consistent with the existing cyberbullying scheme in Australia and the New Zealand civil penalties scheme (see comment below).

*19. Should there be a legal obligation on content hosts (e.g. websites, online forums, message boards, social media services) to remove the images identified by the Commissioner as requiring removal?*

Under the New Zealand *Harmful Digital Communications Act 2015*, online content hosts are protected against proceedings against them (called a safe harbour defence) provided they follow the complaints handling procedure prescribed under section 24 of the Act (with some exceptions - including content procured by the host itself). The prescribed process includes: notifying the author of the content within 48 hours of receiving a complaint; removing the content if the author is not contactable, or does not submit a valid counter notice, within 48 hours of receiving a complaint; removing the content as soon as the author consents to its removal and no more than 48 hours later; if author does not consent, notifying the complainant and providing information that identifies the author (if the author consents to the release of that information). Under the NZ Act, content hosts can be required to identify authors of anonymous communications through a civil order. Netsafe is the approved independent agency to receive, assess and investigate complaints under the Act, such as cyberbully, image-based abuse and online harassment. A diagram which explains the procedure under section 24 of the NZ Act is provided below:



Safe Harbour Provision in the *Harmful Digital Communications Act 2015 (NZ)*



Source: <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/harmful-digital-communications/safe-harbour-provisions/>

We believe the NZ Act provides a good model for civil and criminal liability for content hosts, and that there should be legal obligations imposed on content hosts with a prescribed list of procedures to follow in order to be exempt from liability.

*20. What penalties should apply to content hosts which refuse to comply with a directive from the Commissioner to remove images which have been the subject of a complaint?*

Under the NZ Act, if the dispute is not resolved through the approved agency, the complainant can then apply to the New Zealand District Court to make a civil order against either the individual who posted the material and/or the online content host. The court has the power to enforce content hosts to take down the material, disclose the identity of the author, and provide a correction or right of reply. In the case of non-compliance, the court has the power to impose a criminal penalty on content hosts.

If a civil penalties scheme were to be introduced in Australia, with the Commissioner having powers to issue a formal warning or infringement notice, or apply to the Federal Court for injunctions, fines and enforceable undertakings, this should include both content hosts and individuals.

### **Definition of Terms**

#### Consent

*21. What should constitute 'consent to share'? Can consent be implied, or should explicit verbal or written permission be required?*

We support a definition of consent as encompassing 'free agreement'. Consent is negated in some circumstances, for instance in relation to vulnerable groups or situations (e.g. those with an intellectual impairment, or incapacitated by alcohol/drugs, or those in a domestic violence relationship etc). We believe that consent needs to be explicit and determined on a case-by-case basis. Implied consent, on the other hand, allows alleged perpetrators to claim that consent to sharing in one context, amounts to consent to share in other contexts. Like other forms of sexual encounters, consent needs to be given on each and every occasion for each and every act. For example, consent to kissing or foreplay does not constitute consent to intercourse. Likewise, sharing a nude image with an intimate partner does not constitute consent for them to share the image with others. We support the default position that an individual has a reasonable expectation of privacy that nude or sexual images of them will not be shared, regardless of whether the images were taken in public or private settings. The only exception to this is in cases where the image has been produced for commercial or public purposes with the free consent of those depicted in the image. In other words, consent to pose naked for a magazine should be taken as an expectation that the image is not private.

Overall, it is important that it is made clear that consent at one time to take or share an image does not equate to consent to take or share an image at another point in time, that a person may withdraw their consent at any time and that giving someone permission to possess an image does not constitute consent to distribute the image (Citron 2014).



22. Should cases be treated differently where the victim has given consent for an image to be shared in one context, but the image is then shared in a different context to that for which consent had been given? (For example, if consent is initially given for an image to be shared via one-to-one message, but the image is later shared by posting online?)

These cases should not be treated differently. If a person consents to their image being shared amongst a group of four friends, and then one of those friends shares it with one or more persons outside of the group, that should be taken as a form of non-consensual sharing. Likewise, a person who consents to sharing an image with a partner via text message, does not by extension, consent to those images being shared online. However, the severity of the image-based abuse should be taken into account when determining penalties, and the number of people the images have been shared with will be a factor that should be taken into consideration.

23. Should special consideration be given regarding consent from vulnerable people? If so, how can 'vulnerable people' be defined?

Yes, special consideration should be given regarding consent from vulnerable people, much in the same way there exist consent negating circumstances in the context of sexual assault and rape (see e.g. *Crimes Act 1958* (Vic) s 38C)). Under s 7 of the *Working with Vulnerable People (Background Checking) Act 2011* (ACT), a vulnerable person is defined as:

- (a) a child; or
- (b) an adult who is—
  - (i) disadvantaged; and
  - (ii) accessing a regulated activity in relation to the disadvantage.

Examples—disadvantaged

- 1 an adult with a physical or mental disability
- 2 an adult who suffers social or financial hardship
- 3 an adult who cannot communicate, or who has difficulty communicating, in English

Note An example is part of the regulation, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see *Legislation Act*, s 126 and s 132).

The Australian Department of Human Services likewise defines a vulnerable person as 'a child or children', or 'an individual aged 18 years and above who is or may be unable to take care of themselves, or is unable to protect themselves against harm or exploitation by reason of age, illness, trauma or disability, or any other reason' (see <https://www.dss.gov.au/about-the-department/doing-business-with-dss/vulnerable-persons-police-checks-and-criminal-offences>). We support a similar definition being used.



24. *Should the person sharing the image be required to prove consent?*

Yes. The Australian Law Reform Commission (2014) considered that, in a civil action, the defendant should have to prove that the plaintiff had consented to the conduct that is the subject of the complaint. We support this model for a civil penalties scheme.

25. *How should cases be treated where consent is given, but is later withdrawn?*

In Germany, a court ruled that individuals can request that their images be revoked at any time, even if the images have not been disclosed or distributed. The case concerned a man who had taken several erotic photographs of his partner, which she had consented to, yet after their relationship had ended, the woman demanded he delete the images. When he refused, she sought legal help, with the court ruling that such images can be revoked at any time. We support a similar approach. If consent is withdrawn at any time by an individual who had previously agreed for an image to be shared or posted to a particular platform, then the person who has distributed the image should be required to make every reasonable effort to take down and/or delete the image. Likewise, it is not unreasonable to require individuals to destroy intimate and sexual images of another person at their request, even if they previously agreed for the individual to have possession of that image.

Intimate image

26. *What should the definition of 'intimate images' be for the purpose of the prohibition?*

Under the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) in Victoria, the term 'intimate image' is defined as 'a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or content that is sexual; or (c) the genital or anal region of a person, or, in the case of a female, the breasts'. The Victorian legislation also states that community standards of acceptable conduct must be taken into account, including regard for the nature and content of the image, the circumstances in which the image was captured and distributed, and any circumstances of the person depicted in the image, including the degree to which their privacy has been affected.

We note that in South Australia, the term that is used in criminal legislation is 'invasive image' which captures a broader array of private acts, such as a sexual act not done in public or the use of a toilet, or images of a person in a state of undress (where their bare genital or anal region, or female breast, is visible). While the term 'invasive' can imply either the quick and harmful spread of something and/or the intrusion of privacy, which may seem to perfectly capture the nature of the harms of non-consensual imagery, we contend it is the *act itself* of creation, distribution or threat of distribution that is invasive, not the image per se. Therefore, 'invasive image' does not appear to capture the harms of the acts themselves sufficiently; for instance, the image may be a sexual act that was recorded in the context of a loving relationship and as such, the image itself is not 'invasive - rather, *it is the act of distributing*

*that image without consent that is invasive.*

While we recognise that 'intimate images' may be considered overly broad (e.g. could capture images that are not nude, semi-nude or sexual in nature), if it is more narrowly defined to encompass nude, semi-nude, sexual or sexually explicit images, then it would overcome the problems with an overly broad term. We also support the definition to include the female breasts (which would also include the breasts of a transgender or intersex person). We believe the Victorian legislation is a good model because it also requires that the intimate image be contrary to 'community standards of acceptable conduct', which is defined as having regard to: the nature and content of the image; the circumstances in which the image was captured and distributed; age, intellectual capacity and other circumstances of the victim; and the degree to which the distribution affects that person's privacy. This is consistent with other jurisdictions, for instance, Canada's definition of 'intimate image' is a photo, film or video recording in which the person is 'nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity'. Similarly, Scotland's definition of an 'intimate situation' is an act which a reasonable person would consider sexual, or which is not ordinarily done in public, or of a person's 'genitals, buttocks or breasts' (either exposed or covered only with underwear).

Consideration should also be given to culturally-specific contexts in defining intimate images. For example, a photograph of a Muslim woman without her hijab on may, in some contexts, be considered an intimate image, although it would not be considered 'pornographic' or 'sexual' (pers. comm. Mohamad Taabba) and should not be covered by the legislation. However, there is a need to ensure flexibility in the legislation for judicial interpretation of circumstances where an image in some cultural contexts might not be considered 'sexual', but would in other cultural contexts; for example, an image of a woman with a very short skirt or low cut top might be considered sexually explicit in some Muslim societies (pers. comm. Mohamad Taabba) and the non-consensual distribution of such images should therefore be considered as falling under the definition of an 'intimate image'.

*27. Should the prohibition cover 'digitally manipulated or created' images where, for instance, the victim is not readily identifiable or, conversely, added to a sexually explicit photo?*

The prohibition should cover photo-shopped images, such as where a person's face has been imposed onto a nude or sexually explicit image, which has the potential to cause significant harm and distress to victims in a way similar to if the photograph depicted the real body of the victim. In Scotland, the new law does cover digitally manipulated images, and in NSW, the proposed new bill criminalising image-based abuse, also covers such images.

*28. How might community standards be applied in the consideration of whether an image is intimate?*

It is unclear what a reasonable person from the community might consider either 'intimate'



or 'sexual' images. For instance, should the prohibition extend to the non-consensual distribution of an image of a Muslim woman in her underwear without her hijab on (Yosufzai, 2015)? Would an 'intimate' image also include women's cleavages or nipples underneath clothing? We contend that interpretations of the meaning of such language should take into account the nature and content of the image, the degree to which the distribution affects the privacy of the person, as well as the degree to which the distribution of images violates that person's community's standards of acceptable conduct (as in the Victorian law). Other jurisdictions require that the image be private, of a kind not ordinarily seen in public, which could extend to cover images that are taken in public settings but are nonetheless deemed 'private' images - e.g. upskirting and downblousing images.

### Sharing

*29. What should the definition of 'sharing' be for the purpose of the prohibition?*

Although the terms 'distribute', 'disclose' or 'disseminate' appear variously in different laws internationally, the law needs to be clear about what distribution, disclosure, sharing or dissemination means. For instance, do these terms equally apply where a hidden device is used to record another person without their knowledge engaging in a sex act? Does showing another person a picture on a mobile phone (but not actually pressing send or upload) mean the same thing as 'distribute'? We believe there is need for any prohibition to include a clear definition. The definition contained in s40 of the *Summary Offences Act 1996* (Vic) (which is similar to the South Australian definition) is not clear, defining 'distribute' as 'publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not'. Under this legislation it is not clear, for instance, whether 'communicate' could mean 'showing' another person an image. In criminal law, we believe that sharing should be defined as showing and/or distributing via a variety of different electronic and non-electronic methods, including (but not limited to): text message; email; internet uploads; mail distribution; mobile phone apps; and public displays (e.g. posters). However, for the purpose of a civil penalties scheme, we understand that it is likely to be restricted to electronic forms of distribution.

*30. To the extent the Commonwealth is able to legislate, should the definition of sharing be confined to the digital space, or should the definition consider sharing beyond this? (For example, a still digital image that is printed and then shared in physical form.)*

The definition of sharing should not be exclusively confined to the digital space and should include distribution via more traditional means, such as postal mail or displays in public spaces.

*31. Should an intimate image which is shared with only one person be considered less harmful than an image publicly shared with a wider audience or with unknown parties?*



Yes, each case should be assessed on a case-by-case basis in determining severity, with audience reach being one factor for consideration.

32. *How might the prohibition apply to a person sharing intimate images who claims to be, or is found to be, unable to fully understand 'consent' (e.g. the sharer was intoxicated at time of sharing the image, the sharer is mentally disabled, the person is under the age of 18, etc.)?*

Intoxication should not be used as an excuse for the non-consensual sharing of intimate images. Where the sharer is mentally disabled, or if the person is under the age of 18, the Commissioner should consider the application of a prohibition on a case-by-case basis.

#### Intent to cause harm

33. *Should 'intent to cause harm' or 'seriousness' be included as elements of the prohibition?*

Perpetrators of image-based abuse are motivated by a whole range of different factors. While some intend to cause the victim distress and harm, others may be motivated by sexual gratification, monetary gain, or social status building. Should new criminal or civil laws or civil penalties be introduced in Australian jurisdictions, we do not support the requirement that the prosecution or plaintiff prove that the accused or defendant intended to cause harm or distress. However, in relation to civil penalties, we support a court to consider the degree to which the victim suffered harm or distress, and whether or not the defendant was motivated by malice, or knew the extent to which the invasion of privacy was likely to offend, distress or harm the plaintiff (ALRC 2014: 131). This will help to ascertain the severity of the privacy invasion. However, we do not support the requirement in the New Zealand Act, that the perpetrator must have intended to cause serious emotional distress to the victim and that there must be serious harm resulting from the disclosure of such images.

We support a model that prohibits behaviour where the perpetrator knows another person did not consent to the disclosure of an intimate or sexually explicit image, or is reckless as to whether consent was given. One key question is whether prohibitions should apply to the actions of third parties who may not know whether the image was distributed without consent, and yet may participate in distributing the image further; for instance, people who 'collect' or share images for fun or sexual gratification. Although that behaviour may be abhorrent, the prohibition should take into consideration whether the person knows, or has reason to know, that the other person did not consent to the distribution of the image.

34. *Should 'intent to cause harm' or 'seriousness' be factors to be considered by the Commissioner in determining the action to be taken against a perpetrator?*

Yes, these factors should be taken into consideration by the Commissioner in determining what action should be taken against the perpetrator.

35. *Should actual harm (emotional or otherwise) have to be caused to the victim for the purposes of the Commissioner determining what action to take against a perpetrator, or should it be sufficient that there was a likelihood of harm occurring?*

We do not support the requirement that the plaintiff prove that they suffered actual harm or damage (emotional or otherwise) in order for the Commissioner to determine what action to take against the perpetrator. It should be enough that there was sufficient likelihood (not probability) of the act causing harm.

36. *Should the Commissioner give consideration to the 'likely' degree of harm to the victim in determining the action to take, or to the actual degree of harm that has arisen?*

We believe that the Commissioner should give consideration to the 'likely' degree of harm to the victim in determining action, not the actual degree of harm that has arisen. This would be in addition to the Commissioner considering the nature of the distribution; the motivations of the perpetrator; the nature of the imagery; and repeat offences. As noted above, we do not support a requirement on the plaintiff to prove that they suffered actual harm or damage (emotional or otherwise) in order for the Commissioner to determine what action to take against the perpetrator.

#### Electronic service, social media service and relevant electronic service

37. *Should any other technologies or distribution methods not covered by these definitions be included?*

We believe the definitions in the *EOSC Act* are suitable for cases involving the electronic/online non-consensual distribution/sharing of intimate images. While we believe that 'sharing/distribution' should not be confined to the digital space and include non-electronic and more traditional means of distribution such as postal mail or displays in public places, we agree that this is likely to go beyond the scope of the Commissioner and may be more appropriate within a criminal legislative scheme as opposed to the proposed civil penalties scheme.

#### **Conclusion**

In conclusion, we strongly support a civil penalties scheme in Australia to address the problem of image-based sexual abuse. The scheme will ensure that effective action will be taken to remove content to reduce further harm to victims. It will serve as a clear and consistent regulatory scheme at the Commonwealth level to both deter and penalise individuals who share intimate images without consent, as well as content hosts that are non-compliant with orders to remove image-based abuse material.

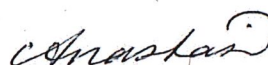
Australian law has not kept pace with evolving behaviours where technology is used in some



way to perpetrate violence or harassment. In addition to a civil penalties scheme, we support the introduction of criminal legislation across all Australian states and territories (including at the federal level) in order to capture the harms related to image-based sexual abuse. Any amendments to civil and criminal laws, however, should be implemented in conjunction with a range of other non-legal remedies and support services at educational, community, law enforcement, and policy levels. A civil penalties scheme is but one of many different avenues that will provide some relief to victims, and deter some from future engagement in abusive behaviours.

Thank you for considering our submission. We are happy to respond to any further questions. We are also happy for this submission to be made public.

Yours sincerely,



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Henry, N, Powell, A & Flynn, A (2017) Not Just 'Revenge Pornography': Australians' Experiences of Image-based Abuse: A Summary Report. Melbourne: RMIT University.

Yosufzai, R (2015) 'Labor MP Tim Watts Introduces Revenge Porn Bill, Says Blaming Women for the Crime is Wrong', *Daily Life*, 12 October. Available from

<http://www.dailylife.com.au/dl-people/celebrity-news/labor-mp-tim-watts-introduces-revenge-porn-bill-says-blaming-women-for-the-crime-is-wrong-20151012-gk76zj.html>

## **Legislation**

*Copyright Act 1968 (Cth)*

*Crimes Act 1958 (Vic)*

*Enhancing Online Safety for Children Act 2015 (Cth)*

*Harmful Digital Communications Act 2015 (NZ)*

*Summary Offences Act 1966 (Crimes Amendment (Sexual Offences and Other Matters) Act) 2014 (Vic)*

*Summary Offences (Filming Offences) Amendment Act 2013 (SA)*

*Summary Offences Act 1966 (Vic)*

*Working with Vulnerable People (Background Checking) Act 2011*