# (Submission by Noelle Martin, I grant permission to publicly publish/share this submission. Address: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/ Phone: \_\_\_\_\_\_\_\_\_\_/ Email: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

# **Civil penalties regime for non-consensual sharing of intimate images: Discussion Paper 2017**

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My name is Noelle Martin. I am in my final year of Law/Arts at Macquarie University. I am a survivor (victim) of around 5 years of ‘image-based abuse’ and ‘sextortion’, specifically ‘altered’ image abuse. My submission, **in part**, provides a much-needed perspective into how a civil penalties regime could be formulated to address the issue of ‘altered’ images in the wider scope of what is the ‘non-consensual sharing of intimate images’.

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Australia’s legal system has **not** been formulated for the digital age. We live in a **new** civilisation and paradigm now, and our lives are dominated by the internet, social media and ever-expanding technologies. Our legal system **must** adapt to meet the unique nature of technology and image-based abuse.

So, while this public consultation is seeking views on: how a proposed civil penalty regime might be framed to best complement existing regulation and other initiatives; the expansion of the role of the Commissioner to administer the new scheme, and how the Commissioner might enforce the civil penalty regime; and definitions of key terms and behaviours. I believe that our **focus** should **not** be trying to formulate a proposed civil penalty scheme that complements existing regulation and other initiatives. Trying to formulate a proposed civil penalty regime that complements existing regulation and other initiatives (as suggested in the discussion paper) essentially serves as a piecemeal approach to an issue that warrants the enactment of a fresh, new piece of legislation and a specific civil penalty regime entirely. The following submission will unpack this further by looking at the issues for consideration.

1. **Prohibition Provision**

The discussion paper suggests the establishment of:

1. a prohibition; and
2. a civil penalty regime.

The prohibition would be included within legislation, such as the *Enhancing Online Safety for Children Act 2015* (Cth) (EOSC Act) or perhaps the *Telecommunications Act 1997*; *Broadcasting Services Act 1992* (BSA), *Spam Act 2003; Do Not Call Register Act 2006*; *Resale Royalty Right for Visual Artists Act 2009*.

The prohibition provides that:

‘A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, without that other person’s consent on a relevant electronic service or social media service’.

The biggest issue here is including this prohibition within a range of relevant legislation. **Why are we using such a piecemeal approach to image-based abuse?** Why can’t we have a specific, direct, fresh, new enactment of Commonwealth legislation that deals with this huge area of under-legislated, under-regulated behaviour?

Why can’t we enact a (hypothetical) ‘*Image-Based Abuse Act’* that would contain the **entirety** of the civil penalty regime for image-based abuse (including the granting of powers to the Commissioner/other initiatives, and provisions for minors and adults alike, etc.)?

**Reasons a new, fresh Act is warranted over a piecemeal approach:**

* Public Interest – 1 in 5 Australians are affected by image-based abuse. It is necessary that our legal system understands just how significant this issue is, and ensures this understanding is reflected in our law.
* Ease and Efficiency - One Act would make it easier for lawyers and victims to know what recourse is available.
* Foresight for Future - As new technology emerges, (and it will) there will be more ways in which technology is abused to violate others in a sexual/intimate matter, and so we need one piece of legislation that we can expand on moving forward.

Surely, **the aforementioned reasons** warrant the enactment of a fresh piece of legislation focussing directly on this significant, complex issue at hand.

**Closer Look at the Prohibition**

Issues for consideration

1. Are there options for an alternative framing of the prohibition?
2. Should an Australian link should 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?)

**Alternative Framing of Prohibition**

The suggested prohibition:

*‘**A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, without that other person’s consent on a relevant electronic service or social media service’.*

**The suggested prohibition does not include, and should include:** (These elements are dealt with in the definitions section of the latter part of this submission)

* Recording intimate images without consent
* Threatening to share intimate images
* Definition of ‘share’
* Definition of ‘image’
* Definition of ‘intimate image’

**The suggested prohibition may include and should not include:**

* The limiting element – ‘on a relevant electronic service or social media service’
* An Australian link, similar to the *Spam Act 2003*. While this Australian link could ensure that this prohibition has the **largest potential scope** to protect Australians in the face of image-based abuse. The mention of Australian link could seek to be counter-productive to deterring a person in Ukraine from committing image based abuse from committing acts against Australians, whether or not Australia even has jurisdiction over that person in say Ukraine. The optics of the ‘Australian link’ could seek to be restrictive and less deterred in nature.

1. **The Civil Penalty Regime**

The next part of the discussion paper is the framing of a civil penalty regime. One that would ‘complement the online complaints portal to be implemented by the Commissioner and existing Commonwealth and state and territory criminal offences’. This regime could include enforcement measures such as:

* civil penalties (including scaled points for first time offenders to repeat offenders);
* enforceable undertakings; and
* injunctions.
* infringement notices;
* formal warnings;
* take down notices; and
* other actions that the Commissioner thinks appropriate.

Issues for consideration

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

At the outset, I want to note that if we are to create a civil penalty scheme for image based abuse, then I believe there should be a provision for the injured person/victim to access damages included in this scheme. This is something that is not mentioned in the discussion paper, but believe it should be included in the scheme.

Another issue with determining the best mix of enforcement tools to make available to the Commissioner is that we are trying to fit a new and unique issue into existing measures that are not made for image based abuse or the digital age. Existing measures can guide our solutions to combatting image based abuse, and whether such solutions happen to be similar to existing measures is more or less incidental. But the question we should ask is what enforcement tools can be created to deal with image based abuse that could be made available to the Commissioner. The answer is relatively simple.

We need practical measures that are:

* Immediate – Time is the enemy here. The more time an intimate image is shared, the more harm to the victim.
* Removal-Based – We want the non-consensual images which have been shared without consent to be destroyed, taken down, halted in its dissemination
* Cheap – It costs money to apply for injunctions/other civil penalties, not just for victims but to our justice system.
* Accessibility/Efficiency – We cannot have a situation in which the Commissioner, through the online portal is inundated with complaints and the time taken to remove the intimate images is simply too inefficient to adequately minimise harm to victims
* Deterrent in Nature – To end this unacceptable behaviour in the long term.

I have serious reservations that the online complaints portal will be able to rapidly remove material. I also have serious reservations about how quickly civil penalties can be enforced on relevant people/hosts, resulting in the actual take down of material. While, social media services and other initiatives like Google do have reporting tools to take down intimate images that have been shared without consent. For websites, and forums, and other threads, in the interim between the time the victim discovers the image based abuse, to the time where the victim receives recourse for the abuse, there needs to be a more immediate, accessible, cheap, efficient alternative CREATED for image based abuse.

**Suggested Alternative**

We need a system where the eSafety Commissioner allows for some form to be downloaded, which puts a person/website on immediate notice of alleged infringement, that within a period, say 48 hours, the material in question must be taken down. And if the ‘perpetrator’ wants to content this or does not comply, then we should transfer the onus on them to obtain an order of the court to display the image.

* This would ensure that in the delay between complaining to the Commissioner through the complaints tool, or in the delay between reporting incidents to established complaints mechanisms through social media, or in the delay or proceeding with civil action/criminal action, THAT victims have the immediate possibility to act. This does not place the burden on victims to take action, it instead gives victims the power to immediate recourse.

As a final point, the best mix cannot be known at this point, or at any point before any type of civil penalty regime is established and tested. Unless the regime is tested we won’t know what the best mix is. Due to this uncertainty, we should err on the side of having more enforcement measures **available** for victims. On the other hand, what we do know, as cemented by the ‘National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images’ is that our responses to image-based abuse should be:

‘*designed to encompass the broad range of conduct, motivations, relationships and means of distribution that such behaviour can involve.’[[1]](#footnote-1)*

The nature of image-based abuse is such that it can happen to anyone, in so many different forms, committed by so many different motivations. This ought to justify a wide range of enforcement actions made available.

Issues for consideration

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

* What is defined as ‘information’?
* And for what purpose is the ‘information’ shared?
* Who are the domestic and international law agencies?

The answers to this must be clear, and transparent, even providing ‘approved’ lists of agencies that could be receiving information.

* The problem I envision with sharing information is when the victim may want complete privacy/confidentiality, or when others are unknowingly/unintentionally involved in some way (not in the perpetration).
* To deal with the issue above, necessity/discretion should essentially dictate the Commissioner’s sharing of information.
* If information is shared for say, the sole purpose of investigating/removing an intimate image/site/thread/page, then in such circumstances it is necessary.
* But for practicality and efficiency purposes – there should be some disclaimer that complainants ‘tick’ that possibly stipulates an understanding/permission, that information may be shared, for a specific purpose, and to whom.
* Discretion should be given to the Commissioner, because to raise red flags with domestic or international agencies of people, or sites, etc. then some information must necessarily be shared.

Issues for consideration

1. 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?

* Minors can be victims of image-based abuse, as well as perpetrators.
* Discretion always for cases involving minors - Anything involving minors must be met with discretion by the Commissioner to notify police/parents/guardians of minor
* There should be no requirement that the Commissioner must notify police/parents/guardians – but the Commissioner should and must exercise discretion and have the power to notify police/parents.
* There should be an option to request police/family are not to be notified.
* Image based abuse is extremely personal, sensitive, can be humiliating and shameful, and even for me as an adult victim, I couldn’t and didn’t want my family to know much about this. For many minors, I believe they would feel the same.
* However, the effect of this option MUST add significant weight to the Commissioner’s discretion.
* But in extreme circumstances. the Commissioner’s discretion should be able to override this option to request, for minors.
* Extreme circumstances could include:
  + - victims in imminent danger
    - victims in fear of safety;
    - victims being harassed;
    - victims shows self-harm ideations
* When it comes to minors, the model being used by NSW in the criminalisation of the non-consensual sharing of intimate images requires that the commencement of prosecution must be approved by the Director of Public Prosecutions.[[2]](#footnote-2)
* In a similar vein, extra care, sensitivity and discretion should be afforded to the Commissioner when dealing with cases involving minors.

Issues for consideration

1. 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?

* There shouldn’t necessarily be any different process
* Minors should be able to use the complaint process for the Commissioner, in the same way as adults.
* This would recognise that minors can be victims and perpetrators, and whether you are a minor, image based abuse is unacceptable.
* So, discretion should be had as to possibly:
  + - How the Commissioner is to communicate the alleged breaches to alleged perpetrators, whether through police/parents/guardians
    - The consequences for failure to comply with any requirements in those communications.

Issues for consideration

1. 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)?

* Of course, civil penalties are appropriate for minor v minor circumstances
* Civil penalties rather than criminal penalties seem to be providing a framework catered towards practical solutions particularly, for taking down and halting the dissemination of intimate images that have been shared without consent.
* This must apply to minors because victims who are minors can experience the same harm as adults, and the harm could be a lot worse because they are minors
* Minors deserve as much recourse as adults for this unacceptable behaviour.
* if we want civil penalties to serve as a deterrent in our society then the severity of the case shouldn’t necessarily be relevant to whether civil penalties should be available altogether.

Issues for consideration

1. 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.)

* NO hierarchy of increasing severity of penalties.
* Why? Because image based abuse has become a culture, where people think it’s acceptable/fun or for whatever reason, commit this disgusting behaviour. It’s happening on a mass-scale. It’s unacceptable on all counts. And victims are often silenced and feel ashamed to speak out because they are slut shamed and victim blamed in this culture.
* **This DOES NOT mean that a range of penalties can be available.**
* BUT IF we were to establish a hierarchy of increasing severity of penalties, we take the stance that one type of image-based abuse is less severe than another.
* We CANNOT take the stance that one type of image based abuse is less severe than another if we are to combat the cultural attitudes toward image based abuse and the cultural attitudes toward victims.
* ALL types of image-based abuse are unacceptable. NO hierarchy.
* BUT by making the penalties simply available, we reserve the right to apply such penalties that are appropriate in any given circumstance, that could be by its nature more severe. This is IMPORTANT for cases where we want to proportionately penalise perpetrators for their conduct/harm caused.

Issues for consideration

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

* A hierarchy of penalties is impractical and is counter-productive to deterring perpetrators (See, answer 8).

Issues for consideration

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

Issues for consideration

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

* Facebook also has the tools to remove intimate images that have been shared without consent from Facebook, Messenger and Instagram.
* Google has a reporting function to remove intimate images that have been shared without consent. Google can remove such images from its search results.
* There must be a cooperative arrangement with social media services because image based abuse is being carried out through social media services, and because these social media services/other services have the technological tools to remove images.
* The cooperation should be similar to the cyberbullying complaints scheme BUT time is the factor that must be ensured for image-based abuse
* Victims of image based abuse cannot afford any time delay as could possibly occur with cyber bullying complaints.

Issues for consideration

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

* To start off with there should be a range of penalties AVAILABLE to reflect the broad scope of forms, motivations, victims, circumstances that surrounds image based abuse.
* Penalties shouldn’t necessarily differ in any explicit way, but certain penalties could be more applicable for some circumstances than others.
* If we explicitly delineate what penalties apply to what intent/how wide the image is shared, it becomes way too complicated because we know that there is a wide range of motivations involved here.
* To delineate what penalties apply is to AGAIN, send a message that some image based abuse is less severe than another. We cannot afford to do that if we are dealing with a cultural issue of image based abuse.

Issues for consideration

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

* Again, to start off with there should be a range of penalties AVAILABLE to reflect the broad scope of forms, motivations, victims, circumstances that surrounds image based abuse.
* There could be circumstances where enforcement actions should be sent to persons other than the person sharing the image or content host, for example –
  + - People who threaten to share, but have not shared the image
    - Police/parents/guardians of minors

Issues for consideration

1. 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?

* This is NECESSARY, practical and makes sense. (With a few reservations)
* Where a website is hosting and sharing intimate images that have been shared without consent, on a mass-scale, like ‘get revenge on your ex sites’ or ‘morphed pornography sites’ or ‘parasite porn threads’ the Commissioner must require ISP’s to block websites as a **last resort**.
* The reason I say last resort is because blocking the website does not ensure that the images are destroyed, it just ensures we cannot see that website on which it appears. **Thus,** blocking is similar to ‘sweeping the dirt under the mud’, we can’t see it but it’s there.
* Intimate images can be shared on MANY websites and can be disseminated rapidly.
* So, it is very important that we focus on removing websites/content on websites altogether, rather than blocking them.
* However, blocking websites will probably be necessary as a last resort, if other avenues have been exhausted. **But it should be noted, it’s not going to solve much, in the LONG TERM.**

Information Gathering Powers

Issues for consideration

1. Should these information gathering powers be made available to the Commissioner in order to administer the proposed civil penalty regime?
2. Should the Commissioner be granted search warrant powers?

* Yes. It is necessary that the Commissioner has the power to gather information or evidence of the non-consensual sharing of intimate images if it going to have the function and power to administer a complaints mechanism for image based abuse.
* How can the Commissioner effectively, practically administer a complaints mechanism and actual provide victims with adequate recourse if they cannot investigate and gather information?

**Re: Search Warrants**

* The Commissioner should be able to issue search warrants if we are placing much of our responsibility of dealing with image-based abuse on the Commissioner.
* It seems that we are placing a lot of responsibility on the Commissioner in image based abuse.
* Police, the Commissioner and other government agencies should all be working together to deal with this issue.
* But again, the Commissioner is going to need this power if they are to effectively and practicably deal with complaints and combat this issue.

Complaints Process

Issues for consideration

1. Should victims be compelled to use established complaints processes (where available) prior to lodging a complaint with the Commissioner?
2. What is an appropriate length of time for a victim to wait to hear the result of a complaint prior to contacting the Commissioner?

* To make victims use established complaints processes where available assumes that victims are aware of the established complaints processes and how they work.
* Simply having a list of social media safety centres on the Commissioner’s website is not enough for victims.
* If we were to ever say that victims must be compelled to use establish complaints processes then it must be when OUR EDUCATION initiatives in this area are solid.
* Our education/awareness initiatives in this area are essentially non-existent.
* How can we place the burden on victims to HAVE to use established complaints processes without the relevant education initiatives/campaigns?
* The effect of not compelling victims to complain directly to established complaints process could inundate the Commissioner with complaints that could be sorted out using those established means.
* While this effect is true ^ the Commissioner can bypass this potential inundation by making it clear that:
  + - Facebook also has the tools to remove intimate images that have been shared without consent from Facebook, Messenger and Instagram.
    - Google has a reporting function to remove intimate images that have been shared without consent. Google can remove such images from its search results.
    - These established mechanisms can be faster for the images to be removed.
    - So, we encourage you to use BOTH the established complaints process AS WELL as complaining to the Commissioner.
* It is also in the Commissioner’s interest to receive complaints because then certain mass-scale websites can become known to the Commissioner, as well as repeat offenders.

**Re: Time**

* I believe we should only start setting the appropriate length of time for a victim to wait to hear the result of a complaint prior to contacting the Commissioner, ONCE we have established education initiatives and campaigns. It’s not good enough for the Commissioner, and by extension our legal system to want to ‘lessen the load’ by compelling victims to use established complaints mechanisms before using the Commissioner’s services.
* These established mechanisms should be used AS WELL as complaints to the Commissioner, until such time as our education initiatives/campaigns are solid.

Issues for consideration

1. 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?
2. 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?

* To determine whether there should be a legal obligation on content hosts, can be easily addressed when we adequately define ‘sharing’/distribute.
* The NSW Intimate Image Bill has defined distribute to mean:[[3]](#footnote-3)

1. Send, supply, exhibit, transmit or communicate to another person, or
2. Make available for viewing or access by another person,

Whether in person or by electric, digital or any other means

* I believe we should follow the definition of ‘distribute’ in the NSW Bill BECAUSE

we necessarily include websites, online forums, message boards, social media services, if they ‘DISTRIBUTE’ intimate images without consent.

* This necessary inclusion makes it easier for EVERYONE, rather than trying to delineate the potential parties that could be involved in image based abuse.
* Therefore, the penalties should be the same to content hosts as individuals who refuse to comply with directives involved.

Consent

Issues for consideration

1. What should constitute ‘consent to share’? Can consent be implied, or should explicit verbal or written permission be required?
2. 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?)

* The meaning of consent should follow the NSW Intimate Image Bill’s definitions on consent.[[4]](#footnote-4)
  + The meaning of consent in that Bill, is whether someone freely and voluntarily agrees to the recording/distribution of an intimate image, but does not for reason of that fact, consent to the recording or distribution of an image on another occasion.
* The meaning of consent should also be based other formulations of consent in sexual assault offences where - consent can be express or implied, or could reasonably be considered to have been expressed or implied. And consent is specific meaning that it applies to a particular act, condition at a particular time.
* THEREFORE, YES – CASES SHOULD BE TREATED differently, for cases where consent was given in one instance and not in another.
* Consent should be able to be revoked at any time (possibly except ‘after the fact’ in some circumstances – as I will show under Q 25)

Issues for consideration

1. Should special consideration be given regarding consent from vulnerable people? If so, how can ‘vulnerable people’ be defined?

* The meaning of consent should also follow the NSW Intimate Image Bill’s definitions on who cannot give consent (vulnerable people).[[5]](#footnote-5)
  + In that Bill, a person does not consent if they:
    - are under 16 or who otherwise doesn’t have the capacity to consent (i.e. cognitive capacity, intoxication)
    - are unconscious/asleep
    - consent out of threat of force/terror
    - consents out of being unlawfully detained.

Issues for consideration

1. Should the person sharing the image be required to prove consent?
2. How should cases be treated where consent is given, but is later withdrawn? Should such cases be treated differently to cases where consent has never been given?

* I believe the person who is accused of sharing the intimate image without consent must prove they had consent.
* It shifts the burden and onus on the alleged perpetrators, rather than the victims.

**Re: Withdrawn Consent**

* Consent should be able to be revoked at any time when it comes to image based abuse.
* However, the effect of withdrawn consent is difficult here.
* If someone gives a lover consent to share an intimate image with a mutual friend, at a specific time.
* And that lover does show the specified mutual friend, the original person cannot say they did not consent, to that instance/circumstances. They can revoke consent though after, by saying that the lover must delete the image or not show anyone again. In the latter case, the absence of any consent to share is only attached to the continuation of sharing or breaching the conditions that were seemingly altered.
* So, consent should be able to be revoked at any time.
* The qualification though, is that if consent is revoked after the fact as it relates to a specific instance/circumstances, then it can’t be said that there wasn’t consent for that specific instance/circumstances. What can be said is once consent is revoked, then any further actions relating to the instance/circumstances are non-consensual.

Intimate Images Definitions

Issues for consideration

1. What should the definition of ‘intimate images’ be for the purpose of the prohibition?
2. 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?
3. How might community standards be applied in the consideration of whether an image is intimate?

* The definition of ‘intimate images’ should mimic that of the NSW’s Intimate Image Bill.[[6]](#footnote-6)
  + Where ‘image’ is a photo/video, whether altered or not.
  + Where ‘intimate image’ is an image of:
    - A person’s private parts;
    - A person engaged in a private act (in circumstances in which a reasonable person would reasonably expect privacy)
    - An altered image that appears to show a person’s - private parts/engaged in private act, etc.
* As someone who HAS experienced altered image abuse, **IT IS NECESSARY that the prohibition cover altered images,** as the harms are the same/extremely similar to victims of ‘revenge porn’, and victims of doctored images feel just as violated, and degraded.
* Whether the victim is readily identifiable is WAY too subjective. If the victim can identify themselves, that should be the standard **if anything**. BECAUSE the harm is attached to the victim.
* Community standards can be applied to whether an image is intimate –
  + - * Based on how, who, when, why, what - was taken
      * Whether the above is socially acceptable or not.
      * Matter of fact and circumstance.

### **DEFINITIONS - Sharing**

Issues for consideration

1. What should the definition of ‘sharing’ be for the purpose of the prohibition?
2. To the extent the Commonwealth is able to legislate, should the definition of sharing be confined to the digital space, or should the definition should consider sharing beyond this? (For example, a still digital image that is printed and then shared in physical form.)

* The meaning of ‘sharing’ should follow how the NSW Intimate Image Bill defined ‘distribute’ to mean:

1. Send, supply, exhibit, transmit or communicate to another person, or
2. Make available for viewing or access by another person,

Whether in person or by electric, digital or any other means

* To the extent that the Commonwealth can legislate, it should be encompassing sharing intimate images without consent to instances beyond the digital space, as it can happen in the physical world, and isn’t that what we’re fundamentally tackling here – while YES, technology has changed how this issue is carried out – it is the non-consensual sharing of intimate images, regardless of means that is the crux of the unacceptable conduct.

Issues for consideration

1. 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?
2. 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.)?

* There should be NO EXPLICIT delineation between what is considered more harmful because all non-consensual sharing of intimate images is harmful and unacceptable.
* And we must maintain that if this civil penalty regime is to be a powerful deterrent and change this disgusting culture of image based abuse.

**BUT**

* Having said that the harm aspect should be taken into account in sentencing, and deciding which civil penalties are used from the **available civil penalties**.
* The penalties placed on a perpetrator should be PROPORTIONATE TO THE HARM caused to the victim.

Issues for consideration

1. 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.)?

* If a person is unable to fully understand consent, they cannot give full consent, any ‘consent’ given that is less than full consent, is not consent. Thus, this prohibition applies to cases where CONSENT could not be said to be fully given/understood.

Issues for consideration

1. Should ‘intent to cause harm’ or ‘seriousness’ be included as elements of the prohibition?
2. 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?
3. 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?
4. 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?

* The motivations for image based abuse ARE NUMEROUS. It can be perpetrated for sexual gratification for example, but this motivation for sexual gratification wouldn’t fall under an intent to cause harm.
* The elements ‘intent to cause harm’ or ‘seriousness’ ARE SO LIMITING in scope, that you would knock out most cases of image based abuse with these elements.
* When we use the terms ‘intent to cause harm’ or ‘seriousness’ we give perpetrators a loophole from which they can escape penalties because they ‘didn’t intend to cause harm’. THIS SHOULD NOT BE ALLOWED. All types of image based abuse is unacceptable. Harm is caused on victims whether perpetrators intended to cause harm or not.
* The only feasible mention of intent is whether the perpetrators intentionally shared, recorded or threatened to share or record intimate images without consent.
* Any qualification of intent beyond that would seek to restrict the provision because the scope of motivations/intent behind image based abuse are too numerous to be addressed.

**ONE ISSUE I HOPE FOR YOU TO CONSIDER IS:**

* Recklessness. If a person does not intend to distribute/share (or record), and they do, they should be subject to the same penalties as someone who intended to distribute/share (or record)

Issues for consideration

1. 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?
2. 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?

* The harm upon the victim/likelihood of harm will obviously influence WHICH of the available penalties the Commissioner could enforce.
* But there should be no explicit delineation between actual harm/likelihood of harm in deciding which penalties to enforce because:
  + - The likelihood of harm can be just as harmful as actual harm
    - Determining and qualifying/quantifying actual harm and likelihood of harm is subjective, and therefore time-consuming and costly
* Actual harm/likelihood of harm should only be relevant to possible civil sentencing/compensation in damages to victim.

Electronic Services

Issues for consideration

1. Are the definitions in the EOSC Act suitable for cases involving non-consensual sharing of intimate images?
2. Should any other technologies or distribution methods not covered by these definitions be included?

* Not suitable because while the non-consensual sharing of intimate images is mainly perpetrated through electronic means, and is exacerbated in the digital age, the crux of what we are dealing with is simply – the non-consensual sharing of intimate images. So, however means that happens or whatever medium is used, is secondary to the crux of the issue at hand.
* Electronic means should be mentioned to reflect HOW this issue is perpetrated but this issue should not in any way be limited to electronic carriage/technological carriage/distribution, as image based abuse can happen in physical form, or other ways not involving electronic means.

1. National Statement of Principles Relating to the Criminalisation of the Non-consensual sharing of intimate images’ < https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Documents/National-statement-of-principles-criminalisation-non-consensual-sharing-intimate-images.> [↑](#footnote-ref-1)
2. *Crimes Amendment (Intimate Images) Bill* *2017* (NSW). [↑](#footnote-ref-2)
3. *Crimes Amendment (Intimate Images) Bill* *2017* (NSW). [↑](#footnote-ref-3)
4. *Crimes Amendment (Intimate Images) Bill* *2017* (NSW). [↑](#footnote-ref-4)
5. *Crimes Amendment (Intimate Images) Bill* *2017* (NSW). [↑](#footnote-ref-5)
6. *Crimes Amendment (Intimate Images) Bill* *2017* (NSW). [↑](#footnote-ref-6)