



YOUR REFERENCE

DATE

5 July 2017

Mr Steven Zorzi
Director/Online Content Section/Content and Copyright Branch
Department of Communications and the Arts

By email: onlinesafety@communications.gov.au

Dear Mr Zorzi

**Consultation process on a proposed civil penalty regime for the
non-consensual sharing of intimate images**

Thank you for the opportunity to comment on the Australian Government's discussion paper in relation to the above topic.

This Office supports the implementation of a civil regime designed to deter and penalise persons and content hosts who share intimate images or videos of a person without their consent, as such a regime will establish a valuable complementary system to criminal sanction. I also support, as part of this, measures designed to enforce the prohibitions and measures that will ensure the subject images are taken down as quickly as possible.

I make the following specific comments:

Proposed civil penalty regime

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

Although the issue of consent is discussed elsewhere in the discussion paper, I would note that in framing the prohibition, the parameters of the concept of consent should be clear and the addition of the words "explicit" or "express" may be useful.

Civil penalty regime

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?

All options and processes should be available where the person sharing the image without consent is a minor and the person depicted is also a minor, as this category of victims should be entitled to the same protections under the regime as adult victims or victims who are minors but whose image is shared by an adult. Children or young people are as capable as adults at engaging in this type of harmful behaviour. Rather than adopting another process, additional processes that can be applied on a case-by-case basis in matters involving minors should be developed. These additional processes may consider the ability of a minor to "respond" to the

civil penalty process and also factors relevant to the particular behaviour, such as the type and scale of distribution, whether it was accompanied by text or comment which exacerbated the damage to the victim, the minor's response if they were requested to take down the image, and the ages, including the age disparity, if any, of the minor who distributed the image and that of the minor depicted (Question 7).

8. Should a hierarchy of increasing severity of penalties be established?

Linking the severity of penalty to the "harm" caused risks putting an unfair burden of proof on the victim and requires measurement of something that can be hard to quantify and does not necessarily depend on, for example, how many images were distributed or how widely.

Information gathering powers

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

The ability to obtain information relevant to the functions of the Commissioner from carriers, service providers and other persons would clearly assist the Commissioner in investigating relevant matters and has a basis in other Commonwealth legislation.

Complaints process

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

As established complaints processes or mechanisms operated by, for example, social media sites, may provide a quick and effective solution for victims – and may address one of their overriding concerns, that images are quickly taken down – a requirement that victims firstly lodge a complaint with the relevant site seems appropriate and considerate of resources. This should not, though, prevent a victim from also lodging a complaint with the Commissioner, even where their complaint has been successfully addressed by the relevant site. It is important that victims have recourse to a range of remedies.

It is also important that these sites address complaints quickly, in days, not weeks (Question 18) and that hosts have a legal obligation to remove the offending images (Question 19).

Definition of terms

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

As indicated at Question 1, consent should equal explicit/express consent to the distribution of the particular image or images at the particular time, to the particular form of distribution used and its scale. There should be no requirement that it be in written form but the burden of proof in relation to consent should lie with the person who shared the image (Question 24).

As the non-consensual sharing of intimate images often involves images taken, and initially shared, by the victim, requiring explicit consent in the above terms will avoid the situation where perpetrators seek to rely on the initial sharing by the victim as implied consent. The initial sharing by the victim should not operate to lessen penalties for defendants who "on-share" the image without consent (Questions 22).

Cases where consent was initially given and then withdrawn, but the image was shared as a result of the initial consent, would require a different process; one perhaps focussed on the attempts made by the person to take down the image when requested (Question 25).

26. What should the definition of “intimate image” be for the purpose of the prohibition?

Images to which the person depicted has a reasonable expectation of privacy should be caught by the definition of “intimate image”.

A reasonable expectation of privacy would include such things, as an image in which:

- A person is depicted naked or partially naked, irrespective of whether their genitals are explicitly exposed and irrespective of the type of pose the person has adopted;
- A person is depicted engaged in a sexual act/activity, irrespective of whether their face is visible;
- A person is depicted in a way which, by the context or content, would suggest that the image is of an intimate or private nature, such as images depicting a person dressed in lingerie or in a sexual pose.

Images in the second example of this non-exhaustive list are included, as even though a person’s face may not be visible, they will likely be identifiable by their association with the other person (if depicted) or by the accompanying text or by reference to whom the image is distributed. As such, images which are digitally manipulated or created should also be covered by the prohibition (Question 27).

Framing “intimate image” in terms of an image to which a person has a reasonable expectation of privacy allows for different victims and different attitudes towards images in which they are depicted. It also removes the need for a separate community standards test, as such a test is inherent in the concept of a “reasonable expectation” (Question 28).

Sharing

30. Should the concept of sharing be confined to the digital space or should the definition consider sharing beyond this?

If possible, the definition should extend to cover non-digital methods of sharing, such as the distribution of flyers and posters.

Intent to cause harm

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

It is hard to envisage of an intent other than to cause some form of harm. Linking the fault element of the prohibition to an intent to cause harm, or any such concept, may give a person who has shared an image without consent a “loophole” where they can claim another intention or motivation, particularly where they have resisted accompanying the distribution with derogatory text.

Including an intent to cause harm may also send to the community an unacceptable message – that the non-consensual sharing of intimate images is acceptable, as long as no harm was intended. I doubt many victims would appreciate such as nuance.

Yours faithfully



Lloyd Babb SC

Director of Public Prosecutions