



office of the  
privacy  
commissioner

Senator the Hon Mitch Fifield  
Department of Communications and the  
Arts  
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Our Reference: IPC17/A000319

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Dear Senator the Hon Mitch Fifield

**Submission to proposed civil penalty regime for non-consensual sharing of intimate images**

Thank you for the opportunity to make a submission to the Department of Communications and the Arts on the Australian Government's proposed new civil penalty regime to specifically penalise non-consensual sharing of intimate images, colloquially referred to as 'revenge pornography'.

The NSW Privacy Commissioner has a responsibility for the protection of the privacy of NSW citizens' personal and health information. The relevant legislation establishing my position and statutory functions are the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

My Office has received a number of enquiries from members of the public concerned about what redress is available when personal images, videos and other textual information are posted online without their knowledge or consent. These concerns are exacerbated given the rapidly increasing technological capacity for capturing images and making recordings; and vast scale dissemination of digital material. The recently reported incident, where intimate images and health information of patients of a cosmetic institute were capable of being displayed on the health service provider's website, raises serious concerns about the adequacy of privacy protections available to victims.

My Office has consistently advocated for the introduction of a statutory cause of action for serious invasions of privacy. While introducing a civil penalty regime does not address all possible invasions of privacy, I acknowledge it is a step towards enhancing individual privacy and autonomy in this area.

Due to the limited resources of the NSW Privacy Commissioner this submission will not be a complete review of the Discussion Paper, and instead will seek to address the main issues for consideration in establishing the civil penalty regime.

Please find comments regarding the Discussion Paper below. I agree to this submission being published, should the Department decide to publish submissions, but request that my signature is redacted from the published version.

Yours sincerely

**Dr Elizabeth Coombs**  
**A/NSW Privacy Commissioner**



## SUBMISSION TO PROPOSED CIVIL PENALTY REGIME FOR NON-CONSENSUAL SHARING OF INTIMATE IMAGES

### What is privacy and why is it important in this context?

1. Privacy is a fundamental Human Right recognised and protected by State, National and International law.<sup>1</sup> The right to privacy is designed to protect and empower all citizens and is essential to maintaining dignity and autonomy over a person's most basic possession – their identity and personhood. Privacy is also an avenue for achieving empowerment, particularly in the face of power imbalances, which assists in the control of unwarranted interference in one's life.
2. Although no human right is absolute, the starting point to a privacy respectful approach is acknowledging the status of privacy as a fundamental human right. Children and adults, particularly those who have been subject to the most personal of violations, deserve to be protected from unwarranted and potentially adverse interference in their personal lives.
3. Ensuring the privacy of individuals is respected and protected in a way that guards against ambiguities that the current and future technological development present is a critical responsibility of the Federal and State Governments. Given the vastly increased technological capacity for capturing images and large scale digital dissemination of that information, non-consensual sharing of intimate images can have severe impacts on the victims.
4. Non-consensual sharing of intimate images may lead to individuals suffering hurt and embarrassment but also has the potential to adversely affect the victim's reputation, family, friends and employment. As a consequence the starting point to a privacy respectful approach is empowering victims of privacy violations to seek redress.
5. In a recent case, significant number of patients had their privacy breached after their photographs were mistakenly made available to be displayed on health service provider's website.<sup>2</sup> Such cases are particularly concerning as photographs have the special quality of giving information in more vivid form and have the capacity to become even more objectionable. There is ample judicial and academic literature on this topic.<sup>3</sup>
6. Accordingly, I urge the Department to consider the potential limitation of the proposed civil penalty regime and whether the proposed reform does not adequately empower individuals to vindicate their rights by obtaining redress from those who have wrongfully breached their privacy. Without a tort for invasion of privacy in either common law or statute, aggrieved individuals have limited avenues to seek enforceable orders to vindicate their right and obtain redress.
7. I make reference to the need for empowering victims to seek redress against the wrongdoers emphasised by the NSW Attorney General in the media release regarding the *Crimes Amendment (Intimate Images) Bill 2017*.<sup>4</sup> This Bill will make it an offence in NSW to

<sup>1</sup> See, for example, the *Privacy and Personal Information Protection Act 1998 (NSW)*, the *Privacy Act 1998 (Cth)* and the United Nations Universal Declaration of Human Rights 1948, Article 12

<sup>2</sup> Office of the Australian Information Commissioner press release <https://www.oaic.gov.au/media-and-speeches/statements/the-cosmetic-institute-reported-data-breach> (accessed 27/06/2017)

<sup>3</sup> I refer particularly to the following judicial decisions in the United Kingdom: *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [72]; *Douglas v Hello! (No 3)* [2005] EWCA Civ 595, [106].

<sup>4</sup> New Laws Make Intimate Image Abuse a Crime Media Release 21 May 2017

<http://www.justice.nsw.gov.au/Documents/Media%20Releases/2017/new-laws-make-intimate-image-abuse-a-crime.pdf>



intentionally record or distribute an intimate image of a person without their consent. While my Office continues to advocate for the creation of a civil cause of action,<sup>5</sup> if a civil penalty regime is to be introduced, the prohibition against the sharing of intimate images without consent should have the same elements as the offence proposed by the Bill.

8. To ensure Australia is at the forefront of quality protections for victims of revenge pornography, the Department needs to consider alignment with international stances on serious invasions of privacy. In terms of measures that have been taken in other jurisdictions, civil causes of action for serious invasions of privacy exist in New Zealand, the United Kingdom, the United States and some Canadian provinces.<sup>6</sup> The Legislative Assembly of Alberta recently also passed *Protecting Victims of Non-Consensual Distribution of Intimate Images Act SA 2017* which creates a new specific civil cause of action for non-consensual pornography. This approach provides individuals with a simple, clear way to seek a remedy and provides certainty to victims who previously did not have access to a direct remedy.

### **Specific recommendations which detail important considerations in establishing the civil penalty regime**

*How should the new prohibition apply to victims who are minors?*

9. The protection of young people in the context of developing technologies is of pressing importance and worthy of close and urgent examination. Special consideration should be given to the impact of the prohibition on minors, noting that young people under the age of 18 are increasingly at risk of technology-assisted harm. My Office worked closely with the NSW Advocate for Children and Young People to provide comments on the *Crimes Amendment (Intimate Images) Bill 2017*, which are also relevant to the framing of the civil penalty prohibition.
10. It is critical that, where young people are involved they are not, except in exceptional circumstances, criminalised. On many occasions in electronic and social media, material of a personal and intimate nature had been uploaded to the internet by the young people themselves. Unfortunately, these actions can haunt young people for many years as the content can be difficult, if not impossible, to remove from public view. The NSW Privacy Commissioner has previously advocated for the application of 'the right to be forgotten'.<sup>7</sup> The prohibition should be framed in a way that allows courts to be empowered to order both a person and an organisation or carrier to remove or destroy intimate images regardless of whether there was a finding of guilt under the civil penalty regime.
11. While the risk of revenge pornography victimisation is higher for young people, research at RMIT and Monash University shows that one in five Australians have fallen victim to revenge porn abuse. The research also showed one in two Indigenous Australians and one in two people with a disability have been affected.<sup>8</sup>
12. Therefore, it is paramount that improved protections are not just focused on young people but accessible to all members of the community including the disadvantaged. Access to justice, therefore, requires careful consideration of the complaints mechanisms and procedures, as well as how the particular prohibition may be framed. Accordingly, the

<sup>5</sup> OPC Submission to the Inquiry into Remedies for the Serious Invasion of Privacy in NSW, September 2015

<sup>6</sup> ALRC 2014 report, pages 22-23

<sup>7</sup> OPC Submission to the Inquiry into Sexualisation of Children and Young People, 26 February 2016

<sup>8</sup> *Not Just 'Revenge Pornography' Australians' Experiences of Image-Based Abuse*. A summary Report, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, May 2017



expansion of the eSafety Commissioner's responsibilities must not be narrow in scope, to not limit potential benefits of the prohibition. The complaint mechanism must be equally accessible, fair and considerate of all factors including a victim's age, culture, religious beliefs, sexual orientation or disability.

13. I am also mindful at the same time of the potential for confusion of the eSafety Commissioner's role with the role of the Federal Privacy Commissioner and believe it is important there is a clear delineation of roles to avoid further concern to victims.

*What should constitute 'consent to share'?*

14. It is essential that the law be clear on the definition of consent in the proposed civil penalty provisions. The definition of consent should be attentive to factors including disability, age, duress and special circumstances, such as the domestic violence context.
15. The prohibition should specify that any consent to the distribution of intimate images should be express and voluntary, to ensure that consent is clearly and unmistakably communicated and given without coercion or threat.
16. The use of implied consent in the prohibition may place an unnecessary burden on victims to disprove a claim that consent was given. This creates a risk of tilting the power in favour of the distributor to the potential detriment of victims. This is especially the case in close social and/or domestic relationships, where one person may already be affected by an asymmetry of power.
17. Defining consent too broadly in revenge pornography cases also may result in the prohibition favouring the perpetrator. Consent to share a photograph in one context does not confer consent to use it in another context without the individual's permission. Context-specific consent, related to the particular image and the particular distribution or viewing of that image will better represent the policy aims of this type of prohibition.
18. The consent should operate once, so that the individual in the photograph remains empowered to determine each circumstance of viewing or distribution and in control of the particular circumstance and audience.

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

19. The prohibition should not include the fault element of intending to cause harm. The absence of consent should be sufficient to prove the prohibition. Introducing the requirement of intent to cause harm may create an unjustified hierarchy of perpetrators and shift the focus away from the true nature of the wrongdoing, which is the violation of an individual's expectation to keep their image private. For example, Witness A gave evidence to the Inquiry of the NSW Parliament's Standing Committee on Law and Justice and described how a nurse took a photograph of her genital area for non-work related purposes whilst she was under anaesthesia. When she was informed, Witness A feared that the photograph would end up on the internet.<sup>9</sup> Victims need to be able to take action against such an invasion of privacy regardless of the reason for the act.
20. Requiring evidence of intent to cause harm also fails to address the fact that distribution by perpetrators can be driven by a number of other motivations, such as financial gain or

<sup>9</sup> NSW Parliament, Standing Committee on Law and Justice (March 2016) Report - *Remedies for the serious invasion of privacy in New South Wales*, Sydney, 20-21



entertainment, all of which cause equal harm to the victim. As such, the prohibition should prioritise the harm to the victim over the motive of the offender.

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

21. It is necessary that the definition of 'sharing' includes both distribution and showing of images. While non-consequential pornography often involves public sharing of images, the harm of the wrongdoing can result in circumstances where an image is merely shown by the perpetrator to a third party. The viewer may still cause further offence to the victim from having viewed it.
22. The definition should also account for both cyber and physical forms of distribution so as to include, for example, the uploading of images on the internet, sharing by text and e-mail, or showing someone a physical or electronic image. Whether the image is distributed to one person or multiple parties may be an issue relevant to the assessment of the severity of the wrongdoing.
23. Furthermore, technological advancement is now at the stage where computers and other devices can read, analyse and distribute data and other information about individuals. This aspect of sharing intimate information on the "internet of things" should also be examined in any future considerations of topics addressing the risks developing technologies bring about.

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