Civil penalties regime for non-consensual sharing of intimate images

Sexual Assault Support Service Inc. (SASS) Submission

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Sexual Assault Support Service

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Introduction

Sexual Assault Support Service (SASS) is a free and confidential service for people of all ages who have been affected by any form of sexual violence, including intimate partner sexual violence. We also provide counselling to children and young people who are displaying problem sexual behaviour (PSB) or sexually abusive behaviour (SAB), along with support and information for their family members and/or carers.

The range of support options available at SASS includes counselling, case management (including safety planning), and advocacy. We also provide information and support to professionals, and deliver training workshops and community education activities in a range of settings including schools and colleges.

SASS welcomes the opportunity to provide feedback on the proposed civil penalties regime for non-consensual sharing of intimate images.

Issues for consideration

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

The wording provided seems reasonable.

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?)**

In our view, either the person sharing the image or the content host (or both if relevant) should be based in Australia given the challenges with enforcing penalties on a person or an entity based outside Australia. However, we submit that it should not matter where the subject of the image is based. Under the *Criminal Code Act 1995* (Cth), for example, people who reside in Australia can be prosecuted for sexual offences against children that are committed overseas.

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

All of the enforcement measures listed on Page 10 of the Discussion Paper are appropriate, in our view.

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

Yes. At a domestic level, the sharing of information between the Commissioner and law enforcement is likely to be valuable in the planning and coordination of timely responses to e-crimes. At an international level, information sharing may help to build cases against content hosts overseas. The wording of Section 80 of the *Enhancing Online Safety for Children Act 2015* appears to provide clear parameters for the sharing of information between the Commissioner and relevant authorities.

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 submit that if the complainant is a minor and an intimate image of them has been shared by an adult, the Commissioner should inform the police promptly, as a matter of course. The question of whether or not it is appropriate to contact parents/guardians could be considered on a case-by-case basis. Relevant factors might include the minor's age and circumstances (e.g. level of independence).

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?**

This is a complex question, and we note that the NSW Advocate for Children and Young People (ACYP) previously lodged a submission on *The sharing of intimate images without consent – 'revenge porn'*, which offers a detailed appraisal of important factors and issues.[1] It is our view that the Commissioners/Advocates for Children in each State and Territory are best-placed to provide advice in relation to any proposed processes that are likely to affect children and young people.

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)?**

As above.

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.)**

Yes.

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

We do not see why a hierarchy of penalties should lengthen the process significantly.

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

No response submitted.

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

Yes, this sounds worthwhile in terms of taking coordinated action and delivering a strong community message that the behaviour is not acceptable. It would also send a message to social media services

[1] See responses to Questions 7 (a), (b), and (c) on Pages 12-15 of ACYP submission. Submission available at: http://www.justice.nsw.gov.au/justicepolicy/Documents/distribution-of-intimate-images-without-consent/Advocate%20for%20Children%20and%20Young%20People.pdf

that they have a responsibility in this area to uphold the law and to meet and respect community standards.

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

We submit that care should be taken here, as the intent of the image sharer does not necessarily determine the impacts on the victim. For example, an intimate image shared "as a joke" can have just as much detrimental impact as an image shared out of spite or desire to seek 'revenge'.

In our view, considering the scope of distribution may be problematic as well. Even if the offender themselves shares it once only (e.g. in a single Facebook post), modern technology means that that is easy for the same image to be shared repeatedly and widely by others (including non-identifiable parties), using a range of different media. Furthermore, it is reasonable to expect that offenders would be aware of the high probability that the image would be shared widely.

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

No.

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 our view, this option is worthy of consideration. However, we are not aware if there are precedents for it and we recognise that it may be a contentious step.[2] If there are no clear findings from this consultation as to whether the option is feasible and supported, perhaps it could be considered further once the civil penalties regime has been operational for a time (e.g. 12-18 months).

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

Yes – this would appear to be important in terms of giving the Commissioner the means necessary to perform their role effectively.

16. Should the Commissioner be granted search warrant powers?

No response submitted.

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

We are not comfortable with the notion of compelling all victims to use existing complaints processes prior to lodging a complaint with the Commissioner, particularly in situations where:

- the image has already been circulated widely;
- the behaviour has had significant impacts on the victim;
- the offender has a history of similar behaviour; and/or
- the behaviour has occurred (or is still occurring) in the context of other abusive or threatening behaviour, e.g. intimate partner violence.

[2] There may be major concerns about censorship, for example.

An alternative might be putting a notice on the Commissioner's website outlining likely response timeframes, and providing information about other complaint mechanisms (e.g. contacting Facebook) that individuals may wish to try first, particularly if a swift takedown response is all that they are seeking. This approach would enable victims to make informed choices about how to proceed, based on time factors and their individual circumstances.

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?

No response submitted.

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?

Yes. Early response and removal by online platforms is likely to prevent the escalation of cases, and reduce harm on victims.

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?

No response submitted.

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

We support the comprehensive definition included in NSW's recent *Crimes Amendment (Intimate Images) Bill 2017,*[3] as follows:

> **91O Meaning of consent in intimate image offences**
>
> (1) This section applies to all offences under this Division.
> (2) A person consents to the recording of an intimate image if the person freely and voluntarily agrees to the recording of the intimate image.
> (3) A person consents to the distribution of an intimate image if the person freely and voluntarily agrees to the distribution of the intimate image.
> (4) A person who consents to the recording or distribution of an image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the recording or distribution of that image or any other image on another occasion.
> (5) A person who consents to the distribution of an image to a particular person or in a particular way is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image to another person or in another way.
> (6) A person who distributes an image of himself or herself is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.
> (7) A person does not consent to the recording or distribution of an intimate image:
> (a) if the person is under the age of 16 years or does not otherwise have the capacity to consent, including because of cognitive incapacity, or
> (b) if the person does not have the opportunity to consent because the

[3] Bill accessed at: https://www.parliament.nsw.gov.au/bills/DBAssets/bills/BillText/3396/b2016-120-d21_House.pdf

> person is unconscious or asleep, or
> (c) if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
> (d) if the person consents because the person is unlawfully detained.
> (8) This section does not limit the grounds on which it may be established that a person does not consent to the recording or distribution of an intimate image.

We have reservations about the notion of 'implied' consent, and we note that it does not feature in the NSW definition above. It is our view that if the person who shared the image intends to use consent as a basis for defending their actions, they should be required to produce evidence of explicit permission.

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?)

No. Our main concern here is that messages to the public with regard to consent and ethical sexual behaviour should be clear and consistent. If consent to a certain act of behaviour is provided, it should not be assumed that the person consents to any or all other acts of behaviour. The wording used in subsection (5) of 91O in the NSW Bill (see Question 21 above) covers this clearly, in our view.

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

We support the wording used in subsection (7) of 91O above, which lists circumstances (temporary or otherwise) in which people are not considered to be capable of providing consent. The content of the provision does not include the terms 'vulnerability' or 'vulnerable people', which may be (a) open to different interpretations; and (b) perceived as offensive to some people.

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

Yes, in our view the onus of proof should lie with the defendant, not the plaintiff, as per the ALRC's recommendations in *Serious Invasions of Privacy in the Digital Era – Final Report.*[4]

25. 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?

It seems unlikely that there will be a large volume of cases involving clear provision of initial consent to the sharing of intimate images, followed by subsequent withdrawal of consent. Therefore, case-by-case handling based on the facts (e.g. the relevant timeline of events associated with consent, sharing of the image, and pre- or post-sharing withdrawal of consent) may be the best approach. With reference to our response to Question 22 above, we re-emphasise the importance of clear and consistent messaging to the public about consent and what it means in practice. In the context of this question, our main concern is that care should be taken to avoid the inadvertent creation of flawed/problematic messaging about consent (e.g. that once given it cannot be withdrawn).

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

[4] See: https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_123_whole_report.pdf p.199.

We support the definition used in the *Summary Offences Act 1966* (Vic), as follows:

> "intimate image" means a moving or still image that depicts—
>
> (a) a person engaged in sexual activity; or
> (b) a person in a manner or context that is sexual; or
> (c) the genital or anal region of a person or, in the case of a female, the breasts.[5]

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?

We submit that the prohibition should cover identifiable digitally manipulated or created images of individuals, e.g. 'pornographic images that have been photoshopped with the victim's face'.[6]

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

We note that the application of 'community standards' is addressed in the *Summary Offences Act 1966* (Vic), as follows:

> (1) A person (A) commits an offence if—
>
> (a) A intentionally distributes an intimate image of another person (B) to a person other than B; and
> (b) the distribution of the image is contrary to community standards of acceptable conduct.[7]

The Act explains that:

> "community standards of acceptable conduct", in relation to the distribution of an intimate image , includes standards of conduct having regard to the following—
>
> (a) the nature and content of the image;
> (b) the circumstances in which the image was captured;
> (c) the circumstances in which the image was distributed;
> (d) the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image;
> (e) the degree to which the distribution of the image affects the privacy of a person depicted in the image.[8]

The basis for including legislative provisions about community standards was explained by Attorney-General Robert Clark in the Second reading of the *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014*, as follows:

> The court is directed to consider the context in which the image was captured and distributed, the personal circumstances of the person depicted, and the degree to which their privacy is affected by the distribution. The purpose of the community standards test is to ensure that the offences do not unjustifiably interfere with individual privacy and

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[5] See s.40 of the *Summary Offences Act 1966* (Vic).
[6] Henry, N., Powell, A., & Flynn, A. (2015). Submission to the NSW Standing Committee on Law and Justice *Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales*, p.2.
[7] See s.41DA of the *Summary Offences Act 1966* (Vic).
[8] See s.40 of the *Summary Offences Act 1966* (Vic).

freedom of expression, while at the same time targeting exploitative, harmful and non-consensual behaviour.[9]

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

NSW's *Crimes Amendment (Intimate Images) Bill 2017* provides the following definition of the verb 'to distribute':[10]

> **Division 15C Recording and distributing intimate images**
> **91N Definitions**
> (1) In this Division:
> ***distribute*** includes:
> (a) send, supply, exhibit, transmit or communicate to another person, or
> (b) make available for viewing or access by another person,
> whether in person or by electronic, digital or any other means.

This definition is clear and comprehensive, in our view. The verb 'to share' is more colloquial and therefore, it may be more meaningful to the public. If the above definition were used, 'share' could replace 'distribute'; alternatively, it could be made clear in the prohibition that the terms are to be treated synonymously.

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.)

We submit that the definition should encompass both electronic and hard-copy sharing. We support the views of the NSW Advocate for Children and Young People, who noted in a previous submission[11] that:

> The *Sexting and Young People* research found that showing a sexual picture or video to someone else in person was actually far more common than sharing it online or forwarding it by MMS or email. The impact this has on the victim will depend on the context, but there is certainly capacity to cause serious harm without circulating an image online (for example, by posting it on flyers around the victim's school or community). Moreover, both scenarios allow for a third person to re-distribute the images electronically by simply taking a photo and sending it to others.
>
> Another way that an intimate image may be shared is by leaving it in a place where it is likely to be found by others. This type of behaviour can amount to stalking in Victoria, and we suggest that it could be included in the definition of 'distribution' in any new offence/s.[12]

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[9] See p. 2935 at: http://hansard.parliament.vic.gov.au/?IW_DATABASE=*&IW_FIELD_TEXT=HOUSENAME CONTAINS (ASSEMBLY) AND SPEECHID CONTAINS (4397) AND SITTINGDATE CONTAINS (21 August 2014)&Title=CRIMES AMENDMENT (SEXUAL OFFENCES AND OTHER MATTERS) BILL 2014&IW_SORT=n:OrderId&LDMS=Y

[10] See:

[11] The same submission cited in our response to Question 6 above.

[12] See response to Question 2 (b) on Page 6 of submission. Submission available at: http://www.justice.nsw.gov.au/justicepolicy/Documents/distribution-of-intimate-images-without-consent/Advocate%20for%20Children%20and%20Young%20People.pdf

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?

Not necessarily – please see the second part of our response to Question 12 above.

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.)?

Perhaps the ideal approach is for the Commissioner to consider such circumstances on a case-by-case basis, and obtain advice from other experts where necessary. However, we submit that intoxication should not be a defence to a person's ability to understand consent – as per sexual offences under criminal law.

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

No. It may be difficult or impossible to prove intent to cause harm, and as noted by Federal MPs Terri Butler and Tim Watts, "[offenders] may also be motivated by the desire to gain notoriety or to entertain".[13] Financial profit may also be a motive.[14] With a focus on the American legal context, the Legislative and Tech Policy Director of the Cyber Civil Rights Initiative in the United States, Mary Anne Franks, wrote in 2015:

> The folly of requiring intent to harm or harass in nonconsensual pornography laws is made clear by considering how none of these (actual) cases would constitute a crime under such a definition:
>
> - Anonymous posters distributing private, intimate photos stolen from more than a hundred celebrities, in the hopes of obtaining Bitcoin or elevating social status;
>
> - A California Highway Patrol officer passing around intimate pictures obtained from a female arrestee's cellphone as part of a "game" among officers;
>
> - Penn State fraternity brothers uploading photos of unconscious, naked women to a members-only Facebook page for entertainment purposes;
>
> - Revenge-porn site owners like Hunter Moore and Craig Brittain publishing thousands of private, sexually explicit private images for profit and entertainment.
>
> Intent to harm requirements aren't just bad policy; they are also bad law.[15]

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?

In our view, it is reasonable for the Commissioner to consider factors such as the content of the post; the scale of sharing; and the impacts on the victim, when determining what action(s) to take against a perpetrator. However, further to our response to Questions 12 and 33 above, were are not convinced that incorporating 'intent to cause harm' considerations is likely to be helpful.

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[13] Butler, T., & Watts, T. (2015). *Criminal Code Amendment (Private Sexual Material) Bill 2015* Exposure Draft Discussion Paper, p.8.

[14] Franks, MA (2015). "How to Defeat 'Revenge Porn': First Recognize It's about Privacy, Not Revenge" (22 June 2015), *Huffington Post*. Available at: http://www.huffingtonpost.com/mary-anne-franks/how-to-defeat-revenge-porn_b_7624900.html

[15] Ibid.

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?

Likelihood of harm should be the basic test; however, if the victim offers the Commissioner detailed information about harm caused to them, this should also be considered.

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?

Please see our response to Question 35 above.

37. Are the definitions in the EOSC Act suitable for cases involving non-consensual sharing of intimate images?

Yes.

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

This will depend on the definition of 'sharing' or 'distribution' that is ultimately decided upon. If the regime will be focused on electronic sharing only, then the definitions would appear to be sufficient. However, if it is determined that the regime will cover sharing of hard-copy images (e.g. printouts of images in flyer or poster form), then the definitions will need to be expanded.