

# **Tasmanian Government Submission**

## **Civil penalties regime for non-consensual sharing of intimate images**

**July 2017**

## **Introduction**

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The Tasmanian Government welcomes the opportunity to provide a submission to the issues raised in the Commonwealth Department of Communications and the Arts' discussion paper *Civil penalties regime for non-consensual sharing of intimate images* (May 2017).

The non-consensual sharing of intimate images covers a broad range of conduct, relationships, motivations and means of distribution. Sharing or threats to share intimate images (whether express or implied) can be used to coerce, control, abuse, blackmail, humiliate, intimidate or harass another person.

Research evidence observes the potential for the non-consensual sharing of intimate images to have significant impacts on a victim's mental and physical wellbeing, particularly for young people. The use of modern technology has contributed to the prevalence of non-consensual sharing of intimate images in addition to the ease and range of distribution.

The non-consensual sharing of intimate images is a complicated issue and consideration of a proposal for a civil penalties regime is welcomed. It is important to consider measures such as civil and non-legal interventions as well as criminal responses.

The Tasmanian Government acknowledges the significant amount of work being undertaken to address the non-consensual sharing of intimate images, including:

- The Third Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022
- National Statement of Principles Relating to the Criminalisation of the Non-consensual Sharing of Intimate Images
- The Children's eSafety Commissioner
- Women's Safety Package.

## **General comments**

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It appears from the discussion paper and Commonwealth Acts that already use a civil penalty regime that the following are characteristics of a civil penalty regime:

- the applicant for a penalty is a statutory body/officer, not the police or Office of the Director of Public Prosecutions (criminal) or victim (civil);
- there may be a range of possible penalties, including pecuniary penalties, enforceable undertakings, injunctions, formal warnings and take down notices; and
- a pecuniary penalty is enforceable as a judgment debt and is not referred to the enforcement bodies that collect court fines and infringement notice penalties.

The Tasmanian Government notes that the proposed ability for a statutory body to order a take down notice to rapidly remove an image from circulation or to issue a formal warning are potentially very important measures to promptly address the problem of the non-consensual sharing of intimate images. The prevalence of, and harm caused by, non-consensual sharing of intimate images requires a compassionate and effective response mechanisms to support those whose images have been shared.

The Tasmanian Government notes the following general advantages of civil penalties:

- civil penalties may avoid the stigma, community condemnation and punishment associated with criminal penalties or criminal convictions. For example, there may be little difference in the amount between a criminal sanction such as a fine and a civil pecuniary penalty, however there is a significant difference in the potential stigma that may attach to an offender. This is an important consideration when the offender is young.
- a civil penalty may have a deterrent effect and provide a mechanism to ensure compliance with the proposed prohibition against sharing of intimate images.
- a civil penalty may benefit the victim in three ways: firstly, the action is taken by a statutory officer not the victim, secondly, as a civil standard of proof applies, it will be easier to establish a wrongdoer's liability, and thirdly a statutory body may be able to respond promptly to a complaint with appropriate action such as an order to take down an intimate image.

The Tasmanian Government notes the following general disadvantage of civil penalties:

- there is a potential overlap with the criminal justice system. Any proposed civil penalty regime should be compatible with and complement the existing State based criminal law processes, including the above-mentioned National Statement of Principles Relating to the Criminalisation of the Non-consensual Sharing of Intimate Images, avoiding any duplication or the possibility of double punishment.
- alleged offenders facing the equivalent of a criminal charge and penalty, but without the protection of the criminal burden of proof.
- there is potential inequality where similar offending behaviour may be prosecuted criminally, civilly or both and two similar perpetrators may be treated in quite different ways.

## **Specific comments on Issues for consideration**

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### **A prohibition against sharing of intimate images**

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?)*

The inclusion of an Australian link in a prohibition for the non-consensual sharing of intimate images for the prohibition against the distribution of an intimate image by Australians or Australian content host appears practical for enforcement of the prohibition.

### **Civil penalty regime**

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

The actions of individuals are motivated by different factors and a range of enforcement actions needs to be available to provide a variety of responses.

The Commonwealth's proposed civil penalty system would sit alongside existing criminal penalties and provide additional options to encourage compliance with the prohibition against the sharing of intimate images without consent.

Civil penalties may provide a more appropriate range of responses for young people, particularly where no exploitation is involved. Where the non-consensual sharing of intimate images is possibly malicious or exploitive however, it is noted that the involvement of the police may be preferable.

To avoid the civil penalty regime duplicating the criminal law, consideration would need to be given to principles such as the National Statement of Principles Relating to the Criminalisation of the Non-consensual Sharing of Intimate Images. Each Australian jurisdiction is to consider these Principles in the review and development of its criminal law to provide for nationally consistent criminal offences for the non-consensual sharing of intimate images.

### **Issues relating to pecuniary penalties**

With the proposed inclusion of pecuniary penalties in the civil regime, it appears that one key aim is to penalise persons who share images. However, punishment clearly falls within the remit of the criminal law. The difficulties arising from the potential overlap with the criminal law are addressed in the "General Comments" section of this submission.

In terms of the sharing of intimate images without consent, the discussion paper focuses on what is colloquially called 'revenge porn', that is, sharing of intimate images of a former partner in order to cause them embarrassment or distress. However, the proposed civil prohibition would apply equally in the context of 'sexting' where the recipient of an image freely sent shares it without consent. In many cases, the offending party in such circumstances will be a young person who, in an exercise of poor judgement, has shared an image not out of malice but as a joke or to boast.

Careful consideration needs to be given to the implications of imposing a pecuniary penalty on a minor. Pecuniary penalties may not be appropriate for young people, who are likely to be some of the most prolific offenders.

Young people may have no capacity to pay a monetary penalty. It is noted that under existing State criminal law there are measures to divert youth from the courts and to impose a range of sanctions more proportionate and appropriate to their circumstances.

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

The ability for the Commissioner to share information with domestic and international law enforcement agencies is necessary to prevent any overlap. As noted above, the proposed civil penalty regime should be compatible with existing State based criminal law processes and avoid any possibility of double punishment.

Consideration should be given as to how the Commonwealth civil penalty regime will operate if a State decides to pursue a criminal prosecution for the same matter.

State police agencies are not well equipped to achieve the take down of offending images that are shared on social media or published on websites or other online services and the provision of complementary support from the Commonwealth to do this is welcome. This would support law enforcement responses to situations of the non-consensual sharing of intimate images and benefit victims.

*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?*

There are likely to be circumstances where a minor may request that their image be taken down from a website but may not want his/her parents to know, or want the police to become involved.

Any regime should provide guidance on the considerations to be taken into account by the Commissioner when deciding whether or not a referral should be made to police and/or a parent or guardian in these circumstances.

Careful consideration and clarity is needed on who may request the take down of an image of a minor. Can a parent request the Commissioner take action where a minor has consented to posting of an intimate image?

Any civil penalty regime ought to be compatible with actions taken by police in response to complaints by victims regarding the non-consensual sharing of intimate images. For example,

action by the Commissioner on enforcement measures such as takedown notices, as police have no power to order images to be taken down.

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?*

Where an intimate image of a minor is shared without consent by another minor, different processes and responses are considered appropriate. Responses should remain mindful and respectful of the needs of all victims at all times.

Where a perpetrator is minor, the level of intent, maturity and awareness of consequences must be considered and balanced against their actions.

Introducing a young person to the criminal justice system may result in stigma and other negative impacts for their future prospects. From this perspective, a civil penalty regime may offer a more appropriate legal framework to deal with some cases of intimate image sharing without consent by minors. However, there may be cases of severe harm or malice where referral of a minor to the criminal justice system is deemed to be appropriate.

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)?*

Civil penalty responses, such as a take down order and a formal warning may protect the victim and sanction the perpetrator without the need to impose a pecuniary penalty on a minor who may have no ability to pay.

Greater detail is sought on the potential restorative justice or educative options among the enforcement tools that the Commissioner may be equipped with under the proposed civil penalty regime.

Careful consideration needs to be given to the interaction of any civil penalty regime not only with state and federal criminal legislation but with disciplinary and support processes, particularly in the education sector. For example, are there risks that establishing a civil legal framework for non-consensual sharing of intimate images may act as a disincentive for young people to participate in school based restorative processes? Furthermore, how might these different processes be coordinated or aligned to maximise positive outcomes?

Civil penalties may provide a more appropriate range of responses for young people, particularly where no exploitation is involved. However, where the non-consensual sharing of intimate images is deliberately malicious or exploitive there should be the option of referring the matter to police.

- 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.)*

The escalation of penalties may achieve a deterrent effect generally and may also be suitable for persistent offenders who continue to cause harm. Consideration should be given to whether several penalties should increase simultaneously, such as an increase in the amount of a pecuniary penalty. There may come a point, particularly with persistent offending where it is more suitable for criminal processes to take over.

If a fine is to be part of the civil penalty regime, what is the range of a fine for breach of the prohibition? Will the government authority take action to pursue the judgement debt? Will the fine stay with the authority that imposed it or is there an avenue whereby the victim may claim some or all the fine?

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

Consideration should be given to the technological tools used by the Commissioner in relation to addressing cyberbullying pursuant to the *Enhancing Online Safety for Children Act 2015 (Cwth)*.

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

The Commissioner's experience supporting the cyber safety of children and young people under the existing cyberbullying complaints scheme provides a useful basis for establishing a cooperative arrangement with social media services.

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

Penalties should be flexible depending on the intent of the image sharer. Another factor that may be taken into account could be whether the images were initially taken and/or shared with consent or not.

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

Further detail of what other parties might be involved would be appreciated.

### **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 discussion paper does not address what capacity the Commissioner will have to investigate alleged misconduct before commencing action. As a consequence, this may limit the ability of the Commissioner to take appropriate action.

Consideration should be given to any overlap with State criminal legislation.

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

Consideration should be given to any overlap with State criminal legislation.

### **Complaints process**

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

The complaints process needs to be responsive to victims. Victims should have the option to use both, but there should be a system of notification so that the Commissioner and State police are aware of the extent of the other's involvement.

The potential benefits of a civil penalty regime administered by the Commissioner include: the expertise of the Commissioner's office, established contacts with social media services, and the ability for the Commissioner to be an authorised applicant to the Federal Court for civil penalties, as currently provided for the civil penalty regime for cyberbullying.

The discussion paper is relatively silent on the procedural aspects of how a victim makes a complaint and the interaction between a victim, the Commissioner and the wrongdoer. Will the Commissioner be centralised or have branches in each jurisdiction? Will there be a court hearing? If so, will victims be required to attend the Federal Court? Further detail would be assist in understanding how the complaints process would work in practice.

The Tasmanian Government notes that the Commissioner is continuing efforts to build awareness of its role in the community, which will be important for the continued uptake of its support and response mechanisms to address cyberbullying and for the proposed civil penalty regime.

- 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?*



The complaints process needs to be responsive. Any delay may result in further pain and suffering of a victim. The problematic nature of images on the internet is that they can spread extremely quickly in a short period of time.

**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?*

If within jurisdiction, a legal obligation on content hosts to remove the images identified by the Commissioner as requiring removal is appropriate.

**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?*

Either criminal or civil penalties may be applicable to content hosts that refuse to comply with a directive from the Commissioner to remove images.

The operation of the civil penalty regime for cyberbullying under the *Enhancing Online Safety for Children Act 2015 (Cwth)* may assist with the formation of a civil penalty regime for the non-consensual sharing of intimate images?

### **Definition of terms**

#### **Consent**

**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?)*

Consideration should be given to the relative liability of each person where the one shares an intimate image without consent in a one-to-one message and then a second person distributes the image very widely, such as over the internet.

The extent of the sharing should be one of several factors taken into account in assessing the level of any civil penalty.

#### **Sharing**

**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?*

Generally yes, although any specific relationship between the victim and the final recipient of the image may affect any assessment of harm.

## **Other related issues**

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Jurisdictions have recently agreed a national statement of principles relating to the criminalisation of the non-consensual sharing of intimate images. Tasmania is considering the appropriateness of its legislation in view of these principles.

Tasmanian schools and school staff are amongst those at the frontline engaging with the non-consensual sharing of intimate images by young people. Some of the Tasmanian Department of Education's educational frameworks and initiatives in relation to this area:

- The Tasmanian *Education Act 2016* (effective 10 July 2017) requires all Tasmanian State Schools to develop a comprehensive behaviour management policy outlining the process to be followed in response to unacceptable student behaviour. The Act requires development of a Secretary's instructions to provide schools with greater guidance on content and development of school-based policies (s128). The intent is a strong emphasis on restorative justice approaches to school-based behaviour management wherever safe and appropriate.
- *Protocol for dealing with inappropriate images of students on electronic devices at school* – a clear protocol for staff who become aware of inappropriate images of students on electronic devices at school. The protocol outlines a series of reporting, support and follow-up requirements, including the mandatory requirement for principals to contact Tasmania Police for advice on any incident of which the school becomes aware.
- Preventative and educational responses – the 2016-17 Tasmanian budget allocated \$3 million over four years to combat bullying (including cyberbullying) in schools and further strengthen the Respectful Schools and Workplaces Framework, under which Respectful Relationships education is provided in all Tasmanian school. Tailored resources for teachers and school staff include the *Respectful Use of Digital Technologies* which supports teachers and other school staff to educate students about how to respectfully communicate on digital platforms, responding particularly to issues of sexting and circulation of inappropriate images.



Tasmanian  
Government

Department of Justice

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