



# TOP END WOMEN'S LEGAL SERVICE INC.

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The Director  
Online Content Section  
Department of Communications and the Arts  
GPO Box 2154  
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*By email to [onlinesafety@communications.gov.au](mailto:onlinesafety@communications.gov.au)*

Dear Sir or Madam,

## **Submission to the civil penalty regime for non-consensual sharing of intimate images Discussion Paper – Department of Communication and the Arts, Australian Government**

Thank you for inviting submissions to the civil penalty regime for non-consensual sharing of intimate images Discussion Paper issued by the Department of Communication and the Arts, Australian Government ("the Discussion Paper"). The Top End Women's Legal Service Inc. ("TEWLS") welcomes the opportunity to make submissions to the Discussion Paper, and note that we have previously made submissions to similar consultations, being the Commonwealth Senate Inquiry into the phenomenon colloquially referred to as 'revenge porn' ("the Inquiry") and to the *Criminal Code Amendment (Private Sexual Material) Bill 2015* ("the Bill"). Our submission to the Discussion Paper will reference and in part build on our previous submissions to the Inquiry and the Bill, which we **attach** to this submission for your reference.

### About TEWLS

TEWLS is a community legal centre focused on the advancement of women's rights. We are funded by the Commonwealth Attorney General's Department to provide referrals, legal advice, casework and community legal education to women in the Top End of the NT. TEWLS provides assistance in a number of areas of law, including domestic and family violence, sexual assault, family law, compensation for victims of crime, housing, credit and debt, discrimination, workplace health and safety, and employment law. We provide outreach services for culturally and linguistically diverse women, Aboriginal women in the town communities surrounding Darwin, and women incarcerated in the Darwin Correctional Precinct.

### Our Submission

TEWLS approaches this submission from our front-line experience in the Northern Territory. We note that as we have not had the benefit of reviewing draft legislation, our submission is

based on the conceptual questions posed in the Discussion Paper. Further, we submit that the operation of the proposed civil penalty regime will be inadequate without criminal penalties and sanctions; it is our view that the issue requires both criminal and civil processes working in tandem to appropriately respond to the non-consensual sharing of intimate images.

## **A The gendered context of non-consensual sharing of intimate images**

Our submission to the Discussion Paper builds upon the discussion of the impact of non-consensually sharing intimate images contained in our submission to the Inquiry. This section will briefly summarise the salient points made in that discussion.

In our experience, the non-consensual sharing of intimate images is a highly gendered activity that is primarily committed by males and disproportionately targets women.<sup>1</sup> As evidence suggests, domestic and family violence offenders currently use private sexual material as a tool to intimidate, harass and/or control current and former partners;<sup>2</sup> technology has been harnessed as a new method of facilitating violence and control. The threat of using such material can cause similar harms to the actual distribution of images<sup>3</sup> in that victims may feel powerless, vulnerable, fearful, ashamed, self-harm and/or or anxious.<sup>4</sup>

We submit that technologically facilitated intimate violence occurs in situations including;

- Women 'agreeing' to intimate images being taken in the context of an already violent relationship, where refusing may not be safe;
- Partners recording intimate partner sexual assaults; and
- Situations where a partner threatens to distribute private material, including sexual material (whether originally taken with consent or not) to third parties such as the children of the relationship, extended family, or employers, as a means of punishment and control.<sup>5</sup>

Further, we note that the non-consensual production and distribution of intimate images also occur outside of a relationship context, including third party sharing and the victimisation of males. Notably, in these instances as well as in the context of a personal relationship, material may not be initially obtained with the consent of the subject of the relevant image; instead, intimate images are acquired through hacking into the subject's personal technological hardware, and subsequently distributed to selected third parties or the general public.

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<sup>1</sup> See also Janice Richardson, 'If I Cannot Have Her Everybody Can: Sexual Discourse and Privacy Law' in *Feminist Perspectives on Tort Law*, ed. Jane Richardson and Erica Rackley (Routledge, 2012) 145.

<sup>2</sup> Danielle Citron and Mary Anne Franks, 'Criminalising Revenge Porn' (2014) 49 *Wake Forest Law Review* 345, 351.

<sup>3</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 18, 35-36.

<sup>4</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 20.

<sup>5</sup> Nicola Henry and Anastasia Powell, 'Beyond the 'Sext': Technology Facilitated Violence and Harassment Against Adult Women' (2015) *Australian and New Zealand Journal of Criminology* 48, 104, 113.

## **B The development of a civil penalty regime**

As expressed in previous submissions on this topic, TEWLS encourages policy development in both criminal and civil law to appropriately respond to the practice of non-consensually sharing intimate images. We endorse the proposals made in the Discussion Paper regarding the range of civil penalties to be made available to a decision-maker, including enforceable undertakings, injunctions, and take down notices. However, TEWLS submits that any future policy response must recognise the power of criminalising behavior, where there are significant questions as to the extent to which civil regulation can comprehensively deter people who share intimate images without consent. We note that we are concerned that, if the proposed civil penalty regime were to stand without corresponding criminal sanctions, that the non-consensual sharing of intimate images would be at risk of being characterised as a misuse of technology. Based on our experience of non-consensual sharing of intimate images as a technologically facilitated form of sexual and/or intimate partner violence, we submit that a criminal offence would appropriately capture the legal wrong attached to the act, with civil provisions providing support to remove the relevant images from an external source, such as a website.

Further, we note that the proposed civil penalty regime is prefaced on the provision of efficient action/powers to have images removed, as well as limiting the further distribution of the relevant material. It is our submission that having the primary focus of removing content potentially sidelines the responsibility for the abusive conduct, as well as the fundamental breach of trust and agency at the heart of non-consensual sharing of intimate images; it is the actual behaviour to be deterred. While removing and preventing further distribution of material may allow the subject of the intimate image to regain some sense of control, it does not attempt to impose a criminal conviction and/or sanction. The proposed regime does include civil sanctions and TEWLS understands that the civil penalty regime is intended to complement state and territory criminal offences, however our submission is that this falls short of what is required to fully address this phenomenon.

### *I The role of the Commissioner*

As detailed in the Discussion Paper, it is proposed that the administration of the proposed civil penalty regime would lie with the office of the Commissioner. TEWLS endorses this role, on the provision that the office of the Commissioner is adjunct to the criminal law, and holds or requires appropriate expertise in family and domestic violence.

In the Commissioner's current role, the role of technology is communicated as the cause and facilitator of both cyber bullying and the non-consensual sharing of intimate images. TEWLS acknowledges that unique difficulties arise when non-consensual sharing of intimate images occurs via text message, email, uploading images to pornography websites, to social media, message board websites;<sup>6</sup> however, we are concerned that should the office of the Commissioner continue to emphasise technology in this way, this may obfuscate that the non-consensual sharing of intimate images is a method of exerting control, power and manipulation over others. This could result in artificial distinctions between complaints, which arise through distributions in the digital space, and those physically distributed.

We endorse the existing expertise within the Commissioner's office, including its work in the education of young persons, as one of the key benefits of a civil penalty regime. However,

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<sup>6</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 3.

we submit that given the intersection between non-consensual sharing of intimate images and domestic violence, expertise in gender disparity and power and control dynamics beyond the technological will also be required effectively operate the proposed regime. We submit that the Commissioner should also be conferred with the Australian Communications and Media Authority information gathering powers, as this would be a useful extension of their ability to navigate technological enforcement difficulties. In addition, on our reading, it appears that the benefits of the regime would be largely contingent on the ability to engage with content hosts, as well as individuals, in order to remove content. We submit that this contingency must be addressed through the office of the Commissioner, where our experience is that content hosts are typically reluctant, if not hostile towards requests to remove material that has been non-consensually shared.

Further to the Commissioner's current role, we submit that while education must be an integral part of a policy response to non-consensual sharing of intimate images, this should not overshadow the societal denunciation of this behaviour; hence the need for criminal sanctions. It is critical that an appropriate balance is found between providing information about protective measures that can be adopted by those concerned about the potential non-consensual sharing of their intimate images, and reiterating that only the perpetrator is responsible for this conduct.

## *II Formulation of a prohibition*

The formulation of a prohibition is key to the imposition and enforcement of subsequent penalties; it must frame the issue at hand. As proposed in the Discussion Paper, the prohibition put forward for comment notably excludes occasions where a subject of an intimate image may have the relevant image used against them as a threat or leverage. In our experience, the threat of distributing intimate images can be a significant tool for manipulation and the exertion of control, particularly in inter-personal and family relations affected by domestic and family violence.<sup>7</sup> An example of this is the use of an intimate image as leverage by one party to force the other party to remain in a violent and/or abusive relationship. Individuals may be assisted not only by injunctions prohibiting a perpetrator from re-uploading or continuing to distribute images, but by preventing the distribution in the first place, where this is possible. If the prohibition is articulated in a way that extends to threats, we foresee that the Commissioner (which we will assume will be the appropriate decision-maker) could impose a restraining injunction to prohibit a potential perpetrator from carrying out their threat of distributing the intimate images.

## *III Consent to share*

In the context of formulating a consent-based defence for a cause of action, TEWLS supports the elements of consent articulated by the Australian Law Reform Commission ("ALRC") in their 2014 report;<sup>8</sup> consent to share an intimate image must be freely given and may be express or implied from conduct or circumstances.<sup>9</sup> As each expression of consent must be specific to the particular disclosure complained of, we submit that consent to share will not apply where the distribution is of a materially different nature than the original

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<sup>7</sup> See also Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (2016) 18-20.

<sup>8</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 195-202.

<sup>9</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 198.

consent.<sup>10</sup> The consent to share must relate to the extent of the actual distribution so that consent to disclose an image to one audience cannot be exchanged with another.<sup>11</sup> Similarly, TEWLS submits that a distribution method (for instance email, social media, or access to cloud) cannot be alternated without a further expression of consent that relates to that relevant method. Consent should be non-transferable and each instance of distribution requires consent. In this way, TEWLS conceptualises consent to share as being similar to consent to sexual activity; consent to participate in one sexual act does not automatically equate to consent to any other sexual act.

In circumstances where consent is given but is later withdrawn, TEWLS advocates that these cases should be treated the same way as sexual activity. We submit that there is a continuing obligation to obtain consent and ensure that consent is being freely given on the part of the party sharing an intimate image. We submit that the burden of proof should lie with the sharer of an intimate image, as it is this person who is best placed to put forward reasons as to why the autonomy and trust of the subject was not breached.

#### IV Definition of an “intimate image”

We submit that the definition of an “intimate image” should encompass all visual recordings including photographs, films and video recordings. In addition, we submit that the definition should also extend to digitally altered images, such as where the subject of the intimate image’s face has been superimposed on another body, or where attempts have been made to conceal the relevant subject’s identity, but the subject is still able to identify themselves.

In order to encompass culturally and linguistically diverse community values, we would suggest that the compilation of a civil penalty regime take note of the United Kingdom’s understandings of “private” and “sexual” under the *Criminal Justice and Courts Act 2015* (UK) (“the Act”). Section 33(1) of the Act creates an offence for a person to disclose a private sexual photograph or film if the disclosure is made “without the consent of the [subject] with the intention of causing that individual distress”.<sup>12</sup> Although TEWLS disagrees with centering the provision around the perpetrator’s intent, we note that the pairing of discrete understandings of private and sexual are helpful. Section 35 of the Act provides that a private image or recording is one which reveals something, “not of a kind ordinarily seen in public”,<sup>13</sup> and that a sexual photograph or recording is one that, “shows all or part of an individual’s exposed genitals or pubic area; it shows something that a reasonable person would consider to be sexual because of its nature, or its content, taken as a whole, is such that a reasonable person would consider it to be sexual”.<sup>14</sup> In the context of creating a civil penalty regime in Australia, we would suggest making the understandings of private and sexual as alternatives, rather than cumulative definitional elements. If an intimate image only has to be characterised as private or sexual this would more fully encompass what may be capable of constituting an intimate image. We note that previous inquiries have highlighted that examples such as showing a Muslim woman without her hijab could constitute an intimate image, where the hijab was forcibly removed.<sup>15</sup> Although this would not necessarily be

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<sup>10</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 198.

<sup>11</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 198.

<sup>12</sup> *Criminal Justice and Courts Act 2015* (UK) s 33(7)(a).

<sup>13</sup> *Criminal Justice and Courts Act 2015* (UK) s 35(2).

<sup>14</sup> *Criminal Justice and Courts Act 2015* (UK) s 35(3).

<sup>15</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as ‘Revenge Porn’* (2016) 2, 31.

characterised as a sexual image under current Australian criminal offence provisions, it would be captured if an intimate image were to be defined as one that is private or sexual.

#### V *Intent to cause harm and seriousness*

TEWLS endorses the proposals made in the Discussion Paper that “intent to cause harm” and “seriousness” should not be included as elements in the prohibition for the purpose of the proposed civil penalty regime. On a practical level, we submit that it may be difficult to prove that the relevant intimate images were shared to cause harm. This is particularly relevant in the digital age, where “memes” have become an integral part of popular culture. In support of “intent to cause harm” and “seriousness” not being included as elements in the prohibition, we submit that orientating the prohibition around these elements would limit its potential to uphold the sexual autonomy and integrity of potential subjects of intimate images. If behavior were to be denounced only in situations where the sharer of the intimate image deliberately intended to cause harm rather than recognising the innate harm, which results from violating a subject’s trust and agency, the prohibition would be rendered effectively useless.

Further, TEWLS suggests that it would be appropriate to incorporate the “intent to cause harm” and “seriousness” elements as factors, which may be considered by the Commissioner when determining whether or not to pursue a civil penalty or other enforcement, measure. For instance, in a similar manner to the aggravation of an offence, evidence of malicious intent and the seriousness of the harm caused could suggest that the Commissioner pursue a more severe penalty or action. In our experience, the Commissioner, in their determination of the appropriate penalty, could consider circumstances such as where an estranged partner publishes intimate images without their former partner’s consent as an act of revenge. Further, we endorse the proposal of the Discussion Paper that there would exist a scaled remedy process to account for the particular context of the non-consensual sharing of the intimate image.

With regard to the conceptualisation of “actual harm” in the context of non-consensual sharing of intimate images, TEWLS supports the position of the ALRC, where “the harm is inherent in the wrong”;<sup>16</sup> harm occurs the moment an intimate image is shared without the relevant subject’s consent. It is our submission that any penalty regime, ideally criminal and civil, that is established to address the phenomenon of non-consensual sharing of intimate images should not be orientated around establishing the damage suffered to the complainant, but rather the interference with their personal autonomy and freedom. This means that subjects of intimate images shared without consent would not be burdened by substantiating the actual harm done to them; instead, there would be an acknowledgement that harm is inherent in the act of non-consensually sharing the relevant image/s. TEWLS also notes that this would address the practical consequences of online distribution, in that once an image is disseminated it may be impossible to ensure it is no longer available in the public sphere.<sup>17</sup> As such the actual harm suffered can never be definitely assessed as images or videos may reappear after the initial distribution of material has been ceased or removed. In light of the above, we submit that any consideration of harm should be framed in terms of the likely degree of harm, rather than “actual harm” as typically conceptualised.

#### VI *Sharing of intimate images*

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<sup>16</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report No 123 (2014) 138.

<sup>17</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon Colloquially Referred to as ‘Revenge Porn’* (2016) 25.

As noted in the Discussion Paper, “sharing” is a term that can be interpreted both broadly and narrowly. In our experience, the “sharing” of intimate images can be through a variety of different methods, where it would be arbitrary to limit the interpretation of “sharing” in an environment that is constantly evolving. Consequently, we submit that “sharing” should be defined broadly to include both one-to-one personal communications, as well as wider distribution which may occur through uploading the image to a website, through a group of individuals, printing leaflets, etc. As previously noted, TEWLS believes that central element of the non-consensual sharing of intimate images is the breach of trust and autonomy of the subject of the relevant intimate image. As this behaviour can be perpetrated beyond the digital space, such as through the distribution of leaflets and posting images in the mail, we believe that it would be arbitrary to exclude sharing beyond the digital space from the proposed civil penalty regime.

With respect to the “harm” incurred by the non-consensual sharing of intimate images, we note that the sharing of intimate images may be targeted at particular individuals in order to obtain the greatest degree of reputational damage or leverage attempts to extort the subject of the relevant intimate image, among others. It is a misnomer to suggest that the non-consensual sharing of an intimate image with one person will cause less harm to the subject of the intimate image than a situation where the intimate image is shared with a wider audience; such a generalisation excludes the reality of the subject of the intimate image, where an intimate image shared with an individual employer may be more harmful than the same intimate image being shared with an unknown, larger audience. We submit that generalisations about which situations are more or less harmful based on the number of people the image is distributed to should be avoided.

#### VII *“Romeo and Juliet” circumstances*

The provision of intimate images to a partner has become a common aspect of many modern relationships, particularly in the context of young Australians. The inadequacy of existing criminal laws to address these situations have been a topic of discussion in both the public and political arenas, where it is clear that lesser sanctions and penalties are generally more appropriate to be imposed on persons under the age of 16, rather than adults. Similar to current practice regarding persons under the age of 16, TEWLS submits that the civil penalty regime should include guidelines about the exercise of discretion, particularly to reflect the serious impacts of penalties on this age group. We submit that these “Romeo and Juliet” guidelines could operate to reduce the penalties awarded to a minor, where the issue has previously been fleshed out in the findings of the Parliament of Victoria’s 2013 Inquiry into Sexting.<sup>18</sup> We note that while there may be situations where it is appropriate for the actions of the young person to be held at the same standard of an adult, it will often be the case that reduced penalties, such as cautions and warnings, are more appropriate to address the legal wrong.

### C Conclusion

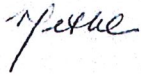
We appreciate the opportunity to make this submission. We support ongoing policy and legal development in responding to the non-consensual sharing of intimate images in Australia, and note that we would be glad to be consulted regarding any proposed changes.

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<sup>18</sup> Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting* (2013) xxiii-xxiv.

Should you require further information, please contact Caitlin Weatherby-Fell, Solicitor of our office on

Yours faithfully,  
**TOP END WOMEN'S LEGAL SERVICE INC.**



Vanessa Lethlean  
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