



7 July 2017

The Director, Online Content  
Department of Communications and the Arts  
By email: [onlinesafety@communications.gov.au](mailto:onlinesafety@communications.gov.au)

## WESNET Safety Net Australia Submission on the proposed civil penalties regime for non-consensual sharing of intimate images

Thank you for the opportunity to make a submission as part of the Commonwealth's consultation on a new civil penalties regime for the non-consensual sharing of intimate images, and related matters.

The Women's Services Network (WESNET) is the national peak organisation for domestic and family violence services in Australia. WESNET works to promote the prevention or control of human behaviour that is harmful or abusive to human beings, specifically the reduction of domestic and family violence against women and their children.

One of our signature projects is the Safety Net Project, which looks at the intersection of technology and violence against women. Since 2011, Safety Net Australia has been training front-line agencies on the intersection of technology and violence against women issues; these trainings range from how abusive individuals misuse technology to how survivors can use their technology safely and privately. WESNET worked closely with the eSafety Commission (the Commission) in providing expert content for the two-hour "Empowering women to take control online," training, which we deliver to front-line agencies in partnership with the Commission. WESNET also provides technical expertise to practitioners, policy makers, and technologists on technology-facilitated abuse issues that impact women, including the misuse of images and video to harass, abuse, and harm.

For many victims of domestic violence and sexual assault, the act or threat of unauthorised sharing of intimate images can be used to humiliate, intimidate, and control victims. When images are shared, victims feel extreme levels of trauma and isolation, which is often the intention of abusers who share the images. Victims are further traumatised when images are shared online and through social media and seen by the strangers. In many cases, those images are distributed further by strangers, unknown to the victim; some survivors even have strangers contact them, increasing their fear. For these reasons, efforts to reduce violence against women can be strengthened by legal sanctions against the non-consensual sharing of intimate images.

Criminal legislation is vital in addressing this issue to hold offenders accountable and achieve justice for victims. However, we recognise there may be circumstances in which a civil penalties regime that is intended to complement emerging criminal law at the State and Territory level, as well as offences under the Commonwealth Criminal Code Act (1995) relating to misuse of telecommunications services, may be helpful for some survivors. We support the position of Women's Legal Services Australia that any civil penalty regime must be accompanied by consistent and uniform criminal legislation enacted in each Australian State and Territory jurisdiction, mirroring any Commonwealth offences.

In developing the civil penalty regime, we urge for clarification on the scope and purpose of the civil penalty regime and to clarify when it would be appropriate for victims to access the civil regime, whether in lieu of or in addition to, the criminal justice system; and ensure that its powers and purpose do not duplicate what already exists in the criminal justice process. A duplicative civil and criminal process for the same purpose, with similar investigative powers, but different types of penalties for offenders could be confusing for survivors and practitioners. Although one of the stated benefits of a civil regime is to lessen the burden on the criminal justice system, victims of image-based abuse should not be diverted to a different process with potentially less severe offender accountability. If there are concerns that the criminal justice system cannot handle the burden, rather than creating a separate avenue, there should be more resources provided to the criminal justice system.

Ideally, the civil regime path should become an option under specific circumstances. Our suggestions for these circumstances are as follows:

- (1) When the survivor requires fast and immediate take down of images. A criminal justice investigation is often slow, and for victims whose images are published online, time is of the essence. Once images are online, they are re-shared and re-posted on multiple websites, often making it impossible for survivors to get their images removed. Removal needs to be immediate, so the images don't have time to spread across the internet. A role that the civil regime could play is to facilitate the quick removal of these non-consensual images. The Commissioner could work with social media sites, some which already has a process to take down non-consensual images, to expedite the process. The Commission should also work with companies that are working on technology tools to recognise and limit the distribution of known images being shared without the consent of the subject.
- (2) When the survivor chooses to pursue civil remedies rather than a criminal justice investigation. For some survivors of abuse, working with the criminal justice system may not be preferable. While we encourage practitioners to work with those individuals so they can attain the appropriate remedies for crimes that have been perpetrated against them, we also recognise that as a result of trauma, abuse, and fear, some survivors may just want the images quickly removed. In this case, a civil route could allow them to quickly remove the images, without engaging in a criminal investigation and prosecution.
- (3) When current state criminal law does not apply to a unique case. The criminal legislation landscape on image-based abuse is still emerging. How the laws will be interpreted and applied is still unknown. Likewise, a thorough understanding of

image-based abuse is also emerging as practitioners and scholars grapple with motivations of perpetrators, impact to victims, and subsequent policy implications. Image-based abuse challenges traditional understanding of crime, in which one person, through abuse or greed, harms another person. With image-based abuse, there are some perpetrators who disseminate images purely for gratification or financial reasons; they may not even know the victim at all. Yet the harm to the victim is still very real. Although state criminal legislation has tried to take into account all aspects of this emerging type of crime, as new technology emerges, there may be instances in which current state legislation doesn't apply. Yet, victims will still want their images removed as quickly as possible. A civil regime could address this interim gap, while legislation and the criminal justice system catches up with interpreting and addressing this crime.

The remainder of this submission will focus on the questions in the Discussion Paper and our perspectives.

#### **Framing the prohibition and defining the issue:**

Regarding the prohibition definition, the prohibition should define what it means by "causes an image to be shared." This could be interpreted in a variety of ways. For example, one may argue that an account that lacks basic security could "cause an image to be shared." We also suggest not including the limitation of where the image is shared: "on a relevant electronic service or social media service," unless the scope of the civil penalty regime is only to address images that have been uploaded via an electronic service. With that inclusion, this prohibition will not include images that are published in print form or shared in any way that doesn't involve a carriage service (such as sharing images on a hard drive).

Regarding defining "intimate image," the definition of the offence should recognise that there are cultural and other differences in understandings of what is intimate or sexual. The definition should also include images that have been digitally manipulated or created.

Regarding establishing an Australian link, from a practical standpoint, there should be at least one Australian link; however, the online distribution of intimate images is a borderless issue, where distributors, content hosts, and even victims may not be Australian or be in Australia. Because of that, it should not be required that the person sharing the image, the subject of the image, and the content host *all* be in Australia.

#### **Information sharing and minors:**

Regarding sharing information with domestic and international law enforcement, unless there is a legal requirement that information be shared, we urge the Commission to use victim centric practices, which acknowledge that informed consent from the victim is the cornerstone of safe and appropriate exchange of information. We refer the Department to the recent report by Women's Legal Services NSW, *Sense and Sensitivity: Family Law*,

Family Violence and Confidentiality for further expansion on recommendations regarding information sharing.<sup>1</sup>

It should also be recognised that in some cases, if there is a concurrent criminal investigation, survivors may want certain information shared with domestic law enforcement. However, sharing of this information should be requested by the survivor or shared with the survivor's informed consent.

With regards to minors, the Commissioner should consider the context of how that image was shared – whether it was shared by the minor to another minor consensually or whether the minor was coerced into sharing that image. If it is determined that the images were shared consensually but distributed without consent, the Commissioner should involve the minor in determining the most appropriate next step, whether that is informing the police or parents/guardian. It is important to recognise that for some minors, particularly those from very conservative communities, telling their parents that they are in a sexual relationship – even if it's just sexting – could be problematic without the appropriate support.

We also refer the Department to the submission by the Young Women's Advisory Group of Equality Rights Alliance, who emphasise that "the sharing of intimate images is considered a normal part of contemporary sexual activity, relationships and dating for young people." We reiterate their point of the importance of ensuring that "laws on the sharing of intimate images are reflective of this reality, and do not lead to the prosecution of young people for normal, healthy and consensual sexual behaviours, for example with child pornography and child exploitation material charges."

We urge the Commission to clarify in its policy when the distribution of images of minors is legally categorised as child sexual exploitation material, since this impacts their legal obligations in handling such cases. Without this clarity, some minor victims may not come forward in fear that they will be prosecuted with the creation of child sexual exploitation material.

#### **Defining consent, harm, intent and penalties:**

Regarding defining consent, we support a definition of the offence in which the threshold is that a perpetrator has been "reckless as to a subject's lack of consent." Further, we support the notion that consent to make an image or consent to share an image with one person does not constitute consent to distribute or share an image beyond that one person, and that an onus to prove such consent was given should rest on the perpetrator.

Regarding interpreting harm, we refer the Director to the submission by Women's Legal Services Australia, who points out that "absence of consent should be sufficient to give rise to the prohibition, and proof of 'actual harm' to the victim should not be required for the purposes of the Commissioner (or other decision-maker) determining what action to take against the perpetrator."

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<sup>1</sup> <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Sense-and-Sensitivity-web.pdf>

Without an understanding of the scope of the civil regime, who will be penalised, and the type of penalties applied, it's difficult to comment on what a hierarchy of penalties would look like or whether penalties should be assessed based on intent, harm, or breadth of distribution. It may be helpful to refer to the purpose of the civil regime, which – based on the *Senate Inquiry into the phenomenon colloquially referred to as 'revenge porn'* recommendation – is to take down non-consensually shared intimate images; and the prohibition, which is defined as the non-consensual distribution of intimate images. Whatever penalties scheme is developed, it needs to be in line with that purpose and goal and should not create a set of penalties or standards that duplicates or is different from what would be imposed via a criminal justice system.

### **Technological tools, social media, and information gathering powers:**

The Commissioner should work with technology companies that are already working on developing technology tools to “hash” known non-consensual intimate images. After an image has been “hashed,” when that image is uploaded onto a website, it will be flagged as a known non-consensual intimate image and reported. This technology has been used for years for child sexual exploitation material.

In addition, many social media companies already have reporting processes to quickly remove non-consensual images, and the Commissioner should work with these social media companies to streamline efforts. However, it should be noted that although many websites offer a process to take down non-consensual images, each website has its own policies and processes, from determining what type of content they will remove to how long they will take to remove that content. The Commission should understand the policies and process of each of these websites and provide appropriate information to victims so they understand the process and what to expect. The Commission should also understand that in some circumstances, particularly when non-consensual intimate images are spread across multiple websites, asking survivor to report to each site at a time can be incredibly time consuming and traumatic. In which case, the Commission should look at how to support victims in requesting take-down from websites. In some situations, reporting directly to the website might elicit a quick take down; in other cases, it may not be the best solution for victims.

When images are shared online, they often get re-shared and re-posted without any actions from the original person who shared it. For many survivors, their desire is to remove all those images from the internet. The Commissioner should be granted the ability to request that all images of victim are removed, whether that is to make the request to third parties sharing the victim's image, the content host, or the Internet Service Provider (ISP). In certain cases, where it is impossible to remove an image – such as the content host is in another country – requesting that local Internet Service Providers block those websites might be a possibility; although all efforts to remove the images should be made.

In some cases, the Commissioner may need information-gathering powers, including search warrant powers to identify how an image is shared. If so, the policies should clearly specify the circumstances, when, and how information gathering powers will be used.

## General comments

WESNET welcomes the Commonwealth and States' recognition of image-based abuse as a problem in Australia and its commitment to ensure that victims of this type of abuse are given support and perpetrators are held accountable. However, it needs to be recognised that image-based abuse does not encompass all forms of technology-facilitated abuse. The proposed civil penalty regime addresses a narrow aspect of technology-facilitated abuse: the non-consensual distribution of intimate images.

Technology-facilitated abuse, which is a broader form of abuse, is increasingly becoming the way in which offenders perpetuate sexual assault, domestic violence, and harassment. For these victims, their abuse can include non-consensual distribution of intimate images and other types of technology-facilitated abuse, as well as other forms of abuse, such as emotional, physical, sexual, or even financial abuse. Meeting victims' needs should include working with existing sexual assault services and women's specialist services, as well as experts on the broader intersection of technology-facilitated abuse and violence against women. It is critical that survivors are offered holistic support to address the wide-range of abuse perpetrated against them. We encourage the Commission to work collaboratively with the domestic violence and sexual assault sector and experts on the intersection of technology-facilitated abuse and violence against women, such as WESNET.

Thank you for the opportunity to make a submission to this consultation. If you would like to discuss the contents of this submission further, please contact Karen Bentley, Director of WESNET Safety Net, using the details below.



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