



Australian Government

Department of Communications and the Arts

Civil penalties regime for non-consensual sharing of intimate images

Discussion paper

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Call for submissions—Public consultation on a civil penalty regime for non-consensual sharing of intimate images

On 23 November 2016, the Minister for Communications, Senator the Hon Mitch Fifield, and the Minister for Women, [Senator the Hon Michaelia Cash, announced](#)¹ that the Government would conduct a public consultation process on a proposed civil penalty regime for the non-consensual sharing of intimate images.

The purpose of this consultation is to assist in providing advice to the Government on establishing a new prohibition at the Commonwealth level on the non-consensual sharing of intimate images, and implementing a civil regime designed to deter and penalise persons and content hosts who share intimate images or videos of a person without their consent. It is proposed that the (Children's) eSafety Commissioner² (the Commissioner) be given additional powers to enforce the prohibition.

Scope of the consultation

This consultation is seeking views on:

- a) how a proposed civil penalty regime might best complement existing regulation and other initiatives, and how it might be framed;
- b) the expansion of the role of the Commissioner to administer the new scheme, and how the Commissioner might enforce the civil penalty regime; and
- c) definitions of key terms and behaviours.

Views are not being sought on the effectiveness or operation of existing criminal offences, but rather on the proposed civil penalty regime that will complement them.

Background information

The issue of non-consensual sharing of intimate images

The term 'non-consensual sharing of intimate images' refers to the sharing or distribution by electronic service of an image or video of a person or persons portrayed in a sexual or otherwise intimate manner, which may have been obtained with or without the consent of the person and has been shared without consent. This behaviour is colloquially referred to as 'revenge pornography'. The Office of the Children's eSafety Commissioner refers to this behaviour as 'image-based abuse'.³ The phrase 'non-consensual sharing of intimate images' is the preferred term for describing this significant act of abuse and will be used throughout this document.

¹ 'New eSafety Commissioner appointed in expanded role to combat non-consensual sharing of intimate images' (Joint Media Release, 23 November 2016) available: http://www.minister.communications.gov.au/mitch_fifield/news/new_esafety_commissioner_appointed_in_expanded_role_to_combat_non-consensual_sharing_of_intimate_images#.WJzmm41f2U.

² The Enhancing Online Safety for Children Amendment Bill 2017 was introduced into the Australian Parliament on 9 February 2017, and seeks to rename the 'Children's eSafety Commissioner' to the 'eSafety Commissioner', and expand the role and function of the Commissioner beyond the protection of Australian children to Australians more generally, available here: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5794%20.

³ Office of the Children's eSafety Commissioner, *Image-based abuse*, <https://www.esafety.gov.au/esafety-information/esafety-issues/image-based-abuse>.

Intimate images may be obtained with or without consent of the subject(s) and can come from:

- recording from hidden devices;
- hacking into personal electronic storage such as a computer, hard drive, cloud-storage or an email account;
- a vulnerable person not able to understand 'consent', such as a person who is intoxicated or a person with a physical or intellectual disability;
- images shared with an individual with consent, and subsequently distributed without consent; or
- an image doctored to falsely portray an individual.

The sharing of images can occur over various media, including: email or text/multimedia messaging (SMS/MMS or other messaging services such as WhatsApp, Kik, etc.); uploading images onto social media services which can quickly reach wide audiences (often including people known to the victim); or uploading images to websites including mainstream pornography sites, message boards and forum websites, or websites specifically designed to host image sharing without consent of the person in the image.

While the non-consensual sharing of intimate images can often occur as a result of the ex-partner of a victim distributing images of the victim for the purposes of seeking revenge, it can also involve mere acquaintances or complete strangers distributing the images. The practice is generally intended to cause harm, distress, humiliation and embarrassment, whether through the actual sharing and distribution of intimate images, or a threat to share intimate images, often in an attempt to control, blackmail, coerce or punish a victim (commonly referred to as, 'sextortion'). Other motives may include sexual gratification, fun, social notoriety and/or financial gain⁴.

The psychological impact on victims can be significant, and negative implications (whether perceived or actual) can affect their reputation, family, employment, social relationships and even personal safety.

The non-consensual sharing of intimate images is of increasing concern for policymakers globally. In the past, the distribution of intimate images would have been narrower as a result of the limitations of the physical world, such as limited access to recording devices and to methods of transmitting images to others. However, as noted by academics from Bond University, 'as a result of movement to the digital world, globalisation and society's reliance on technology, many more of our lifestyle activities are conducted in the digital world'. While the true extent of the problem is not well known, the rise of social media, advances in technology for capturing and uploading still pictures and videos (compounded by the size of actual or potential audiences) and the ease and speed of their distribution, have all contributed to a rise in the number of victims.

The 'Digital Harassment and Abuse of Adult Australians'⁵ project undertaken by researchers from the Royal Melbourne Institute of Technology (RMIT) and La Trobe University to gauge the prevalence of digital harassment and abuse surveyed 3,000 Australian adults, aged 18 to 54. The findings revealed

⁴ Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, Submission No 13 to the NSW Standing Committee on Law and Justice to the Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales, September 2015, available:

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/49194/0013%20Dr%20Nicola%20Henry,%20Dr%20Anastasia%20Powell%20and%20Dr%20Asher%20Flynn.pdf>.

⁵ Dr Anastasia Powell and Dr Nicola Henry, 'Digital Harassment and Abuse of Adult Australians: A Summary Report' (RMIT University) available: http://research.techandme.com.au/wp-content/uploads/REPORT_AustraliansExperiencesofDigitalHarassmentandAbuse.pdf

that one in 10 adults surveyed reported that a nude or semi-nude picture of themselves had been posted online or sent to others without their consent.

The following sections will outline current measures working to address this issue, and lay out the case for a civil penalties regime to complement criminal law in the prohibition of non-consensual sharing of intimate images.

Current measures

There are currently a number of government-wide initiatives working to address the issue of non-consensual sharing of intimate images. The references in this discussion paper to campaigns on behalf of women and children should not suggest that the issue is confined to those cohorts alone. Similar concerns are shared across the population as a whole.

The (Children's) eSafety Commissioner

The (Children's) eSafety Commissioner (the Commissioner) helps to protect Australian children from cyberbullying harm and takes a national leadership role in enhancing online safety for children. A key function of the Commissioner is to administer a complaints system, backed by legislation, to ensure the quick removal of material from social media sites that is targeted at, and harmful to, an Australian child. The Commissioner also administers the Online Content Scheme established under Schedules 5 and 7 to the *Broadcasting Services Act 1992* (BSA) and certifies providers of online safety programs for schools.

On 23 November 2016, the Government announced the appointment of Ms. Julie Inman Grant as the new Commissioner. Also announced was an expansion of the Commissioner's responsibilities to include online safety issues affecting adults and to play a lead role in combatting the non-consensual sharing of intimate images. The title of the statutory office of the Children's eSafety Commissioner will also be renamed to the eSafety Commissioner to reflect these changes. The Commissioner is developing a national online portal for non-consensual sharing of intimate images, which will act as a reporting tool and provide access to support. This portal is being developed concurrently with the release of this discussion paper and is planned to be operational in the second half of 2017. The mechanics of the portal may be updated pending the outcomes of this discussion paper and the Government's response. The portal will be delivered under the Third Action Plan of the *National Plan to Reduce Violence against Women and their Children 2010–2022* (Third Action Plan), discussed below.

Women's Safety Package

In September 2015, the Government announced a [\\$100 million package](#)⁶ to provide a safety net for people, primarily women and children, experiencing or at risk of experiencing family or domestic violence. This package also included \$2.1 million for the Commissioner to develop online resources and tool kits targeted at people at risk as well as front-line staff, such as staff in crisis centres and women's shelters, who support and respond to at-risk people and situations. As part of this funding package, the Commissioner launched the '[eSafetyWomen](#)' website in March 2016 and has been delivering workshops to front line workers on technology-facilitated abuse since July 2016. The eSafetyWomen website is designed to empower Australian women to manage technology risks and abuse, including the sharing of intimate images without consent.

⁶ 'Women's Safety Package to Stop the Violence' (Joint Media Release, 24 September 2015) available: <http://www.malcolnturnbull.com.au/media/release-womens-safety-package-to-stoptheviolence>.

The Third Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022 (the Third Action Plan)

On [28 October 2016, the Government announced](#)⁷ that \$4.8 million would be provided to the Commissioner to develop a national online portal to help counter the effects of non-consensual sharing of intimate images. This funding is part of the \$100 million package of the Commonwealth Government to support the implementation of the Third Action Plan of the *National Plan to Reduce Violence against Women and their Children*. It is anticipated that the portal will be live in the third quarter of 2017. Ahead of the portal's launch, the Commissioner is conducting research to help inform its development and related resources, as well as engage with local and international stakeholders to ensure that it is positioned to best meet the needs of affected Australians.

National statement of principles relating to the criminalisation of the non-consensual sharing of intimate images

In December 2016, the Council of Australian Governments took a further step towards preventing online abuse of women by agreeing to develop principles for nationally consistent criminal offences relating to non-consensual sharing of intimate images. The principles will provide guidance to all jurisdictions regarding the development of state-based criminal offences relating to the non-consensual sharing of intimate images, which will work in concert with other responses including civil penalties, education, prevention and support measures.

The case for a federal civil penalty regime

Recommendation of the Senate Inquiry into the phenomenon colloquially referred to as 'revenge porn'

On 12 November 2015, the Senate referred the non-consensual sharing of intimate images to the Senate Legal and Constitutional Affairs References Committee (the Committee) for inquiry and report.

The [Committee's report](#)⁸ was tabled on 25 February 2016 and outlined eight recommendations, suggesting that a range of measures be introduced to combat the growing incidence of non-consensual sharing of intimate images. The measures included 'criminal and civil law penalties, public education and awareness campaigns, and professional training for police'⁹.

Of particular relevance to this Discussion Paper is Recommendation 4:

Recommendation 4—The committee recommends that the Commonwealth government consider empowering a Commonwealth agency to issue take down notices for non-consensually shared intimate images.

⁷ 'New online reporting tool to tackle non-consensual sharing of intimate images' (Joint Media Release, 28 October 2016) available:

http://www.minister.communications.gov.au/mitch_fifield/news/new_online_reporting_tool_to_tackle_non-consensual_sharing_of_intimate_images#.WKOePI1f1eU.

⁸ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon colloquially referred to as 'revenge porn'* (2016) available:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/Report.

⁹ Ibid.

Civil penalties precedents

There are a number of precedents in other legislation for Government agencies having the power to apply to a court for civil penalty orders against wrongdoers. The following portfolio Acts contain civil penalties targeting the conduct of 'persons', which could include individuals and bodies corporate:

- *Enhancing Online Safety for Children Act 2015* under which the Commissioner may apply for a civil penalty, may accept an enforceable undertaking, or apply for an injunction;
- *Broadcasting Services Act 1992* (BSA), *Spam Act 2003* and *Do Not Call Register Act 2006* under which the ACMA may apply for civil penalty orders, and authorised staff of the ACMA can issue infringement notices;
- *Telecommunications Act 1997*, under which the Minister, the ACMA and the Australian Competition and Consumer Commission (ACCC) can apply for a pecuniary penalty for contravention of a civil penalty provision, and staff of the ACMA who are appointed as authorised infringement officers can issue infringement notices;
- *Resale Royalty Right for Visual Artists Act 2009*, under which the collecting society appointed by the Minister may apply for a civil penalty order.

Potential benefits of a civil penalty regime

The introduction of a civil penalty regime related to the non-consensual sharing of intimate images and administered by the Commissioner would have the following merits:

- take advantage of existing expertise within the Commissioner's Office;
- ability to take fast, effective action to have images removed and limiting further distribution with minimal additional stress to victims;
- clear and consistent regulation at the Commonwealth level to penalise persons who share intimate images without consent, and deter this behaviour;
- potentially reduce the burden on the criminal justice system by providing a complementary avenue for victims to pursue; and
- address issues around the borderless nature of online distribution channels by targeting both content hosts and individuals that share images without consent.

However, it must be noted that the nature of the internet means that there may remain some instances where a civil penalty regime (and existing criminal laws) will still be ineffective in having all images removed.

Existing federal criminal offences

The *Criminal Code Act 1995* (Cth) (the Code) provides for offences relating to the misuse of telecommunications service(s) to menace, harass or cause offence with a maximum penalty of three years imprisonment and/or fine of up to \$32,400.

Under this offence, there have been over 884 charges proven against 432 defendants, including a number of cases in relation to 'revenge porn' conduct. For example, a successful prosecution in 2015 resulted in a 7-year prison sentence for a man who encouraged teenage girls on social media to send intimate photos of themselves, then threatened to disclose the photos to the victim's family and school. The laws were also used in the prosecution of a member of the so-called 'Jedi Council' case, which resulted in a 15 month prison sentence.

There are also a range of existing state-based laws which have been used in cases involving the non-consensual sharing of intimate images. For example, in February 2017, a Brisbane man was

sentenced to four and a half years in jail for superimposing his ex-girlfriend's head on images of naked women and posting information on adult websites and other pages, including her phone number and address, inviting men to rape and torture her.

Proposed civil penalty regime

This discussion paper suggests the establishment of a prohibition against the sharing of intimate images without consent and the introduction of a civil penalty regime targeted at those involved in the sharing of these images, as well as the content hosts. The prohibition would be included in legislation, such as within the *Enhancing Online Safety for Children Act 2015* (Cth) (EOSC Act).

Currently, the Commissioner administers a civil penalty regime for cyberbullying which is set out in the EOSC Act. This work includes formal cooperation with key social media services as part of the Office's social media service tier scheme. The regime establishes the Commissioner as an authorised applicant to the Federal Court of Australia for:

- civil penalties;
- enforceable undertakings; and
- injunctions.¹⁰

A prohibition against sharing of intimate images

Should a prohibition against the sharing of intimate images without consent be established, it could be framed along the following lines:

'A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, without that other person's consent on a relevant electronic service or social media service'.¹¹

The prohibition could also make reference to an 'Australian link', and could draw on a precedent in the *Spam Act 2003* (Spam Act). The Spam Act sets up a scheme for regulating commercial email and other types of electronic messages, and prohibits the sending of unsolicited commercial electronic messages.¹²

Issues for consideration

1. Are there options for an alternative framing of the prohibition?
2. Should an Australian link should 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?)

¹⁰ Part 6, *Enhancing Online Safety for Children Act 2015* (Cth)

¹¹ The definitions of these services are included in the Glossary.

¹² Section 7 of the Spam Act sets out the definition of the Australian link, and may be found in the Glossary.

Civil penalty regime

A civil penalty regime would complement the online complaints portal to be implemented by the Commissioner and existing Commonwealth and state and territory criminal offences. This civil penalty regime would see the Commissioner be given additional powers to investigate complaints, in a similar manner to the cyberbullying complaints scheme.

The regime to combat the non-consensual sharing of intimate images could similarly include enforcement measures such as:

- civil penalties (including scaled points for first time offenders to repeat offenders);
- enforceable undertakings; and
- injunctions.

In addition, it could include:

- infringement notices;
- formal warnings;
- take down notices; and
- other actions that the Commissioner thinks appropriate.¹³

The civil penalty regime is also likely to include a penalty for persons who have knowledge of, or participate in, the sharing of non-consensual sharing of intimate images. For example, the *Regulatory Powers (Standard Provisions) Act 2014* sets out ancillary civil penalty provisions for persons who, among other things, are 'in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision'.¹⁴

Issues for consideration

3. What would be the best mix of enforcement tools to make available to the Commissioner?
4. Should the Commissioner be able to share information with domestic and international law enforcement agencies?
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?
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?
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)?
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.)
9. Would a hierarchy of penalties lengthen the complaint process, and what effect might that delay have on a victim?

¹³ Information on these actions may be found in the Glossary.

¹⁴ Section 92, *Regulatory Powers (Standard Provisions) Act 2014*.

10. What technological tools could the Commissioner use in order to combat the sharing of intimate images without consent?
11. Should a cooperative arrangement with social media services be established, in a similar manner to the existing cyberbullying complaints scheme?
12. Should penalties differ depending on the intent of the image sharer, or on how widely the image is shared?
13. Should the range of enforcement actions be applicable to parties other than the person sharing the image or the content host?
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?

Information gathering powers

Under the *Telecommunications Act 1997* (Cth), the Australian Communications and Media Authority (the ACMA) may obtain information from carriers, service providers and other persons if the information is relevant to the ACMA's functions or powers.¹⁵ The ACMA may require a carrier, provider or person to provide information or produce documents. This legislation sets out that an individual is not excused from providing information or evidence or producing a document on the ground that doing so will incriminate that individual or expose them to a penalty.

Such an information gathering power would allow the Commissioner to gather information or evidence of the non-consensual sharing of intimate images.

The Commissioner currently has the power to give written directions to a carrier or service provider in connection with performing their functions and exercising their power.¹⁶

Issues for consideration

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

Complaints process

The non-consensual sharing of intimate images may, in some cases, occur through the use of social media services or other sites with an established complaints process such as the [social media safety centres](#)¹⁷ listed on the Commissioner's website. Social media safety centres provide advice and help to deal with online safety issues and could potentially provide a quick and effective solution for victims of non-consensual sharing of intimate images.

As is the case with the cyberbullying complaints scheme administered by the Commissioner, victims of the non-consensual sharing of intimate images could, as an initial step, lodge a complaint with sites that operate established complaints mechanisms, and have been approved by the Commissioner, through those existing complaints processes. If an image was not removed or if there was no response within 48 hours, victims would then proceed to complain to the Commissioner.

¹⁵ Part 27, *Telecommunications Act 1997* (Cth).

¹⁶ s581 (2A), *Telecommunications Act 1997* (Cth).

¹⁷ Office of the Children's eSafety Commissioner, 'Social media safety centres', available: <https://www.esafety.gov.au/complaints-and-reporting/cyberbullying-complaints/social-media-services-safety-centres>.

Issues for consideration

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

Definition of terms

Consent

The issue of consent is a complex one. The Australian Law Reform Commission's report on *Serious Invasions of Privacy in the Digital Era* (ALRC Report) set out that complexities may arise as consent may be withdrawn, may be unclear, or may have been given for similar conduct (such as consent to publish something similar).

The ALRC considered that, in a civil action, the defendant would have to prove that the plaintiff had consented to the conduct that is the subject of the complaint.¹⁸

Issues for consideration

21. What should constitute 'consent to share'? Can consent be implied, or should explicit verbal or written permission be required?
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?)
23. Should special consideration be given regarding consent from vulnerable people? If so, how can 'vulnerable people' be defined?
24. Should the person sharing the image be required to prove consent?
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?

Intimate image

The definition of what constitutes an intimate image is likely to be wide and subjective. The Senate Legal and Constitutional Affairs References Committee inquiry into the *Phenomenon colloquially referred to as 'revenge porn'* considered this and found that the non-consensual sharing of intimate images encompasses a range of behaviours which may include:

- images obtained (consensually or otherwise) in an intimate relationship;
- photographs or videos of sexual assault/s;
- images obtained from the use of hidden devices to record another person;
- stolen images from the Cloud or a person's computer or other device; and

¹⁸ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (2014), p. 197.

- pornographic or sexually explicit images that have been digitally manipulated or created to include the victim's face.

One example of a definition is from Canada, where an intimate image means a visual recording of a person made by any means including a photographic, film or video recording:

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Issues for consideration

26. What should the definition of 'intimate images' be for the purpose of the prohibition?
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?
28. How might community standards be applied in the consideration of whether an image is intimate?

Sharing

Sharing is a term that can be interpreted broadly as in the case of distributing, publishing, and posting online, or more narrowly, such as sending to one person by email or text.

Issues for consideration

29. What should the definition of 'sharing' be for the purpose of the prohibition?
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 should consider sharing beyond this? (For example, a still digital image that is printed and then shared in physical form.)
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?
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.)?

Intent to cause harm

The ALRC report discussed issues around harm and seriousness in the context of invasions of privacy.

The ALRC noted that "in many cases a serious invasion of privacy will cause emotional distress, rather than a type of harm traditionally treated by the law as 'actual damage'".¹⁹ The ALRC also noted that serious invasions of privacy can be followed by offence and distress, and that 'the privacy and dignitary interests of a person may be harmed without that person's knowledge'.²⁰

While the discussion around harm in the ALRC Report focussed on the issue of whether a breach of privacy should be considered 'serious' before a victim can take action, it is not proposed to include

¹⁹ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, (2014), p. 131.

²⁰ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, (2014), p. 135.

‘intention to cause harm’ or ‘seriousness’ elements in the prohibition for the purposes of the proposed civil penalty regime. Intent to cause harm and seriousness are, however, important factors that need to be considered as part of the regime. It is proposed that, once it has been established by the Commissioner that an intimate image of a person (the victim) has been shared by a second person (the perpetrator), without the consent of the victim, that any malicious intent of the perpetrator, or harm caused to the victim, be relevant factors to be considered by the Commissioner in determining what action should be taken against the perpetrator.

Issues for consideration

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

Electronic service, social media service and relevant electronic service

The *EOSC Act* contains definitions of the terms ‘electronic service’, ‘social media service’ and ‘relevant electronic service’ in broad terms that can be readily used by the Commissioner. It is proposed that the Commissioner would draw on the existing definitions for the purposes of the prohibition.²¹

Issues for consideration

37. Are the definitions in the *EOSC Act* suitable for cases involving non-consensual sharing of intimate images?
38. Should any other technologies or distribution methods not covered by these definitions be included?

²¹ These definitions may be found in the Glossary.

Consultation process

Submissions do not need to be confined to responses to the questions raised in this consultation paper. Other issues relevant to the review should be discussed, where considered appropriate by any respondent.

Submissions are invited by **5.00 pm AEST on Friday 30 June 2017** and may be lodged in the following ways:

WEBSITE: www.communications.gov.au/have-your-say

EMAIL: onlinesafety@communications.gov.au

POST: The Director, Online Content Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

Submissions must include the respondent's name, organisation (if relevant) and contact details. Submissions with no verifiable contact details will not be considered.

Respondents should be aware that submissions will generally be made publicly available, including on the Department's website. The Department reserves the right not to publish any submission, or part of a submission, at its absolute discretion. No correspondence will be entered into with respondents in relation to any decisions by the Department not to publish a submission in whole or in part.

All submissions will be treated as non-confidential information, and therefore able to be made publicly available by the Department, unless a respondent specifically requests its submission, or a part of its submission, is kept confidential, and acceptable reasons accompany the request. Email disclaimers will not be considered sufficient confidentiality requests. The Department is subject to the *Freedom of Information Act 1982* and submissions may be required to be disclosed by the Department in response to requests made under that Act.

The *Privacy Act 1988* establishes certain principles with respect to the collection, use, and disclosure of information about individuals. Any personal information respondents provide to the Department through their submission will be used for purposes related to consideration of issues raised in this paper in accordance with the Privacy Act. If a submission, or any part, is made publicly available by the Department the name of the respondent will be included with that submission, or part. Respondents should clearly indicate in their submission if they do not wish to have their name included in any publication relating to the review that the Department may publish.

Questions about the submission process can be directed to onlinesafety@communications.gov.au.

Next steps

This consultation will establish whether there is public support for the Government to implement a prohibition on non-consensual sharing of intimate images together with a civil penalty regime and to empower the eSafety Commissioner to enforce such a regime. Following the consultation, the Department will provide advice to the Government on the outcomes, and the Government will consider an appropriate response with a view to introducing any legislative changes required by the end of the year.

Glossary

Australian link (example from the *Spam Act 2003*)

For the purposes of the *Spam Act 2003*, a commercial electronic message has an Australian link if, and only if:

- (a) the message originates in Australia; or
- (b) the individual or organisation who sent the message, or authorised the sending of the message, is:
 - (i) an individual who is physically present in Australia when the message is sent; or
 - (ii) an organisation whose central management and control is in Australia when the message is sent; or
- (c) the computer, server or device that is used to access the message is located in Australia; or
- (d) the relevant electronic account-holder is:
 - (i) an individual who is physically present in Australia when the message is accessed; or
 - (ii) an organisation that carries on business or activities in Australia when the message is accessed; or
- (e) if the message cannot be delivered because the relevant electronic address does not exist—assuming that the electronic address existed, it is reasonably likely that the message would have been accessed using a computer, server or device located in Australia.

Civil penalty

A civil penalty is one which is imposed otherwise than through criminal proceedings. Civil penalties can resemble fines, and can be complemented with other sanctions such as infringement notices, injunctions, banning orders, licence revocations and orders for reparation and compensation.

Electronic service (in the *Enhancing Online Safety for Children Act 2015*)

Electronic service means a:

- (a) service that allows end users to access material using a carriage service; or
- (b) service that delivers material to persons having equipment appropriate for receiving that material, where the delivery of the service is by means of a carriage service;

but does not include:

- (c) broadcasting service (within the meaning of the *Broadcasting Services Act 1992*); or
- (d) datacasting service (within the meaning of that Act).

Enforceable undertaking

An enforceable undertaking is a legally binding written agreement in which a person, or organisation, agrees to undertake tasks or actions to rectify, or prevent, a contravention of a law. Entering into an enforceable undertaking is voluntary but is enforceable by a court. It is an administrative alternative to civil or criminal proceedings. Failure to comply with the terms of an enforceable undertaking may result in civil penalties, or court orders such as directions to comply with the undertaking, compensation or other appropriate orders.

Formal warning

A formal warning may be issued by an authority if there are reasonable grounds to believe that a person has contravened a law. These are usually provided prior to issuing of an infringement notice.

Infringement notice

An infringement notice is a notice issued by an authority which sets out the particulars of an alleged contravention of an offence or civil penalty provision. An infringement notice can be issued in person or through the post, and will give the person to whom it is issued the opportunity to pay the fine specified in the notice or have the offence heard by a court.

Infringement notices are generally issued for minor offences such as failure to respond to a notice or provide information.

Injunction

An injunction is a court order requiring a person to do, or refrain from doing, a particular action.

Relevant electronic service (in the Enhancing Online Safety for Children Act 2015)

Relevant electronic service means any of the following electronic services:

- (a) a service that enables end-users to communicate, by means of email, with other end-users;
- (b) an instant messaging service that enables end-users to communicate with other end-users;
- (c) an SMS service that enables end-users to communicate with other end-users;
- (d) an MMS service that enables end-users to communicate with other end-users;
- (e) a chat service that enables end-users to communicate with other end-users;
- (f) a service that enables end-users to play online games with other end-users;
- (g) an electronic service specified in the legislative rules.

Note 1: *SMS* is short for short message service.

Note 2: *MMS* is short for multimedia message service.

Social media service (in the Enhancing Online Safety for Children Act 2015)

- (1) For the purposes of this Act, social media service means:
 - (a) an electronic service that satisfies the following conditions:
 - (i) the sole or primary purpose of the service is to enable online social interaction between 2 or more end-users;
 - (ii) the service allows end-users to link to, or interact with, some or all of the other end-users;
 - (iii) the service allows end-users to post material on the service;
 - (iv) such other conditions (if any) as are set out in the legislative rules; or
 - (b) an electronic service specified in the legislative rules;but does not include an exempt service (as defined by subsection (4) or (5)).

Note: Online social interaction does not include (for example) online business interaction.

- (2) For the purposes of subparagraph (1)(a)(i), online social interaction includes online interaction that enables end-users to share material for social purposes.

Note: Social purposes does not include (for example) business purposes.

- (3) In determining whether the condition set out in subparagraph (1)(a)(i) is satisfied, disregard any of the following purposes:
- (a) the provision of advertising material on the service;
 - (b) the generation of revenue from the provision of advertising material on the service.