



# Civil Penalty Regime for Non-Consensual Sharing of Intimate Images

## Submission

June, 2017



**Alannah & Madeline  
Foundation**

Keeping children safe from violence



# Contents

Introduction .....	3
Discussion .....	4
Background .....	4
Young people and the sharing of intimate images .....	4
Complaints process .....	6
Consent .....	6
Sharing .....	6
Intent to cause harm .....	7
Conclusion .....	8
References .....	9

## CONTACT

Lesley Podesta  
CEO, Alannah & Madeline Foundation  
PO Box 5192  
South Melbourne, 3205

The Foundation approves this submission to be made public.

# Introduction

The Alannah & Madeline Foundation is a national charity established in memory of Alannah and Madeline Mikac, aged six and three who were tragically killed with their mother and 32 others at Port Arthur, Tasmania on 28th April 1996.

The Foundation believes that no child should feel unsafe and that confident, secure, resilient and inspired children are our hope for the future. The Foundation works across the spectrum of prevention and care, identifying issues that adversely affect the wellbeing of children and work to recover and protect them from bullying and violence through state-of-the-art, evidence-based programs and products.

The Foundation works mostly with children aged 16 and under in their homes, schools and in the community to care for those who have experienced or witnessed serious violence; reduce the incidence of bullying, cyber bullying and other cyber risks.

The work is undertaken collaboratively with the best minds to identify and reduce significant threats **to children's safety through** innovation and partnerships. The Foundation speaks out on the need for systemic change to build a supportive and safe society. To date the Foundation has over 2.1 million children through its work.

**The Foundation's work** is underpinned by a set of guiding principles:

- Child centred
- Innovation driven
- Evidence based
- Values led
- Ethical partners.

The Foundation commenced its work in the area of cyber safety almost ten years ago when it became increasingly apparent that the development of online information created a new challenge. Technology created both risks and opportunities and there were very few guidelines for addressing the risk. **"Children of all age groups inhabit a world that seamlessly flows between on and offline. In order to thrive they need the protections and privileges that they enjoy offline. Digital technologies are the present and the future of these 21st century children"** (House of Lords Select Committee on Communications, 2017). So while digital technology has created many wonderful opportunities, it has also increased the potential for harm.

All children need digital skills and critical thinking tools to successfully navigate this future. Families and schools today are only beginning to consider these challenges and many need the right help and support. The Foundation will continue to be at the forefront of this work and this submission contributes to our mission to speak out on the need for systemic change to build a supportive and safe society.

The Foundation welcomes the opportunity to comment on the development of a civil penalties regime for non-consensual sharing of intimate images. The topic of image based abuse is a complex one and it is important to note that this submission only comments on the areas we can offer expertise in. This submission only considers Australian young people aged under the age of 18 and the behaviours relating to the consensual and non-consensual sharing of intimate images often referred to as **'sexting'**. This submission does not respond to all of the questions for consideration outlined in the discussion paper but as a **children's** charity we felt it was important to represent this cohort in the discussion.

# Discussion

## BACKGROUND

In 2002, the Foundation recognised bullying as a major form of violence experienced by children and set up the National Centre Against Bullying (NCAB). NCAB is a peak body working to advise and inform the Australian community on the issue of childhood bullying and the creation of safe schools and communities, including the issue of cyber safety. Through NCAB, the Foundation has advocated and has developed a number of whole-of-community responses to bullying and cyber bullying.

**The Foundation's programs** were developed to create positive, respectful relationships in different settings. The key prevention programs relevant to this submission include eSmart Schools, eSmart Libraries, Digital Licence and Connect. eSmart Schools and Libraries use a cultural change approach to improve cyber safety, increase digital literacy and reduce cyber bullying within schools and public libraries and the Digital Licence is an online challenge which uses quizzes, videos and games to teach school age children how to play, learn and socialise online. **Connect is the Foundation's speaking and consultancy service** that up skills communities in relation to cyber safety, bullying and the impact violence has on children and young people.

In addition to these programs the Foundation advocates for strength based approaches to the smart, safe and responsible use of digital technologies. Work in this area has included responses to the **Coalition's discussion paper on Enhancing Online Safety for Children**; as well as submissions to the Victorian Government on the impact of pornography on Australian children and the inquiry into **Child Pornography Laws, as well as contributed to the Queensland Government's inquiry into** improving the delivery of respectful relationships and sex education relevant to the use of technology in Queensland state schools. The Foundation is also a member of the Online Safety Change Working Group (OSCWG), the Telstra Technology and Wellbeing Roundtable and the Victorian Education Department's LGBTI Reference Group.

Most recently, the Foundation worked with Our Watch on a project titled Digital Environments and Young **People's** Relationships. The project aimed to improve understandings of youth relationships and how they manifest in online environments; and explore the best ways to support young people to develop healthy, consensual, equal and respectful relationships. Together Our Watch and the Foundation explored secondary research within the area and conducted a number of interviews with key Australian experts including; academics and representatives from the Australian Federal Police and the eSafety Commissioner, Julie Inman-Grant. This project and the work outlined above have contributed to the formulation of the responses below.

## YOUNG PEOPLE AND THE SHARING OF INTIMATE IMAGES

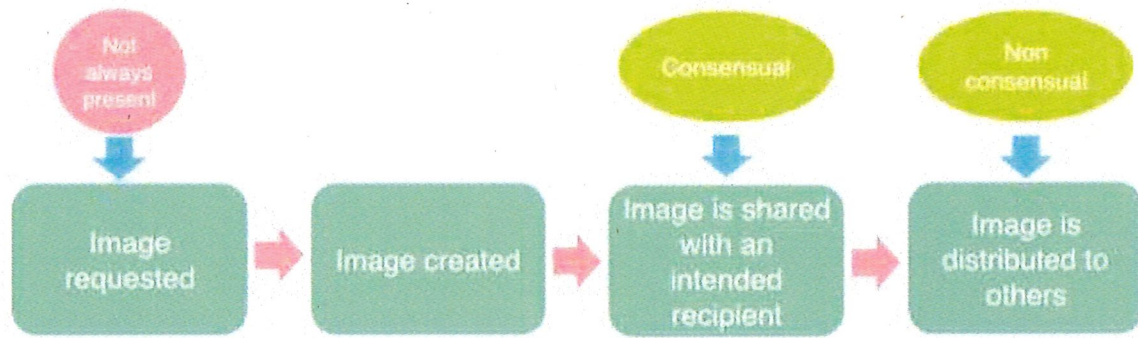
The term sexting is viewed by most young people as an adult generated term, however given it is the term most commonly used in public discourse relating the sharing of images, text or video of a sexual nature via technology it will be the term used in this paper when referring to such behaviours.

When developing a civil penalty regime for the sharing of intimate images it is important to understand the complex context in which the sharing of images takes place, particularly amongst young people who are active users of technology. Mixed data exists around the prevalence of sexting, however there is consistency across several studies that show prevalence could range from 40% - 70% of Australian teens engaging in the practice (Lee et al., 2016; Patrick et al., 2015; Yeung et al. 2014).

Sexting does not refer to one single activity but rather to a range of activities. Legal Aid NSW (2012) describe at least four stages of sexting that need to be explored. Figure 1 provides an overview of these four stages.



Figure 1: Four stages of sexting



It is important to note that all steps are not always present, for example an image may be created and shared with the intended recipient without request or pressure to do. In most cases the final stage or the non-consensual sharing does not occur and no harm is experienced in consensual sexting scenarios (Gordon-Messer, 2013). However, when non-consensual sexting or what could be referred to as image-based abuse occurs young people are at risk of harm.

Some experts, including Albury and Crawford (2012), argue consensual sexting can be a valuable and healthy way for young people to express their sexual agency. It has become an increasingly common practice in the digital lives of young people. The Foundation is careful to emphasise that we believe there is more harm than good in criminalising young people who engage in this practice. The issue of informed consent is the critical threshold issue. However the Foundation welcomes a civil penalties regime that would support to reduce the reputational, social and emotional harm can be experienced when non-consensual sexting occurs.

Although the scope of the proposed regime does not consider child pornography laws it is important to note that both the consensual and non-consensual sharing of images finds young people in conflict with a number of state and federal laws. These criminal laws act as a potential barrier for young people or the adults they go to for help reporting cases of image abuse to an online complaints portal as they contribute to the victim-blaming culture experienced by young people who share images. Any regime must more broadly challenge this culture as it excuses perpetrator behaviour and prevents victims seeking help (Henry et al., 2017).

The discussion paper asks if a triaging process should be considered by the Commissioner for the handling of complaints. The Foundation believes that given the prevalence and that consensual sexting practices are seen as common practice (fun, flirty, part of growing up) amongst young people alternative triaging channels should be considered when an image/s has been shared as a result of self sexting, how an image has been shared e.g. in person or online and with whom it has been shared e.g. minors or adults. In less severe cases for example if a takedown order is issued and followed the young person who made the complaint can potentially avoid further victimisation if they have the option to not have their parents or the police are notified.

In addition, it is recommended that an alternative process is followed in cases where an intimate image of a minor is shared without consent by another minor compared to cases where an image of an adult is shared by another adult. Revenge has been cited as the main reason young people engage in the non-consensual sharing of intimate images (Albury et al., 2017), which can be described as impulsive behaviour that lacks maturity. Research into decision-making in the adolescent brain shows that impulse control develops more slowly compared to the reward section (Blakemore and Robbin, 2012). Meaning young people are more likely to act based on emotional and social factors and are less inhibited than adults. Young people may also require a more coordinator support approach involving parents, carers and school that need to be considered.

Cases dealing with minors should be addressed based on severity and within a framework that considers age of both the person in the image and perpetrator, the method in which the image was

shared, consent and prior offences. Young people in long term relationship are most likely to engage in consensual sexting (Lee et al., 2015) and research shows they do not condone the non-consensual sharing of images. Salter et. al. (2013) found there is a strong belief amongst young people that sharing of sexts is a serious breach of trust and socially unacceptable. This indicates that young people possess a strong ethical stand point on the issue of image-based abuse that should be considered in cases where an intimate image of a minor is shared without consent by another minor.

This framework would inevitably lengthen the complaints process and given the serious psychological distress linked to image-based abuse support needs to be offered to the victim from the offset and throughout the process as part of a holistic response from the Office. Any introduction of a civil penalty regime needs to be supported by significant investment in digital literacy, ethics and civics. Young people should receive up-to-date, contemporary education in digital engagement that encourage bystanders to take action; challenges existing social dynamics relating to victim-blaming and gender; and builds a sense of civil responsibility.

## COMPLAINTS PROCESS

In the Foundation's experience the existing complaints system offered by the Office has been well received by the Australian public. However, some adjustments are recommended to suit the nature of image-based abuse. Firstly, as young people get older they are less likely to report directly to a social media platform directly as they don't think any action will be taken (Plan International Australia and Our Watch, 2016). In addition, given the viral nature of the internet waiting the recommended 48 hours after reporting to the platform can increase chances of further victimisation and wider distribution of the image.

The Foundation supports formal obligations being placed on content hosts to speedily remove the images identified by the Commissioner as requiring removal and that penalties are applied to those who refuse to remove images.

## CONSENT

Consent to share should be different for minors and adults. As stated early sexting behaviour is seen **as a common place in a young person's sexual agency and in most cases no harm is experienced** when the act occurs in a consensual, respectful manner. The Foundation recommends that the civil penalties regime follow the approach of the Victorian law reform in relation to minors consenting to the sharing images they have shared of themselves. Victorian law **allows for consensual "self-sexting"** between two minors within 24 months of age but deems that a minor is incapable of given consent for peer-to-peer sharing or distribution of a self sext more broadly (Civil Liberties Australia, 2014). We recommend that the Victoria legislation be seen as the model legislation in this matter, it practices the right balance of consent, intent and consequence.

Special consideration should also be given regarding consent from vulnerable people. A definition should align with the Australian Department of Social Services definition of vulnerable people, which **includes, 'children and individuals aged 18 years or over who is unable to take care of themselves, or is unable to protect themselves against harm or exploitation'** (Department of Human Services, 2017). Research showed that vulnerable young people were more likely to engage in sexting practices and were at greater risk of image-based abuse (Henry et al., 2017). Therefore careful consideration needs to be made when developing processes and supporting resources to ensure they are relevant to all genders, cultures and sexual orientation.

The Foundation recommends establishing a clear definition of consent that fits with Australia's diverse population but also considers the non-consensual creation of images not just distribution. Henry et al. (2017) found a large cross-over between the non-consensual creation and distribution of images.

## SHARING

A definition of sharing needs to consider the methods in which images are shared. One Australian study showed that in young people aged 13 – 18 the most common method employed by those who



shared sexual pictures/videos was showing somebody in person (20%), with only 6% saying they shared online and 7% through forwarding emails, MMS etc. (Lee et al., 2016). It is recommended that the current sharing practices inform the development of a clear set of parameters around the civil penalties regime in relation to online and offline sharing of images.

## INTENT TO CAUSE HARM

The Foundation is yet to come across any research that shows a correlation between the level of harm experienced by a victim of image-based abuse and the volume of the audience who have seen the image. What we do know is that young people can experience a range of negative consequences when there is a breach of privacy and an image is distributed further than the intended recipient. Consequences can include; poor self-esteem and self-image, isolating behaviours, school avoidance, eating disorders, self-harm and suicidal ideation and behaviours (Parliamentary Joint Committee on Cyber-Safety, 2012). More recently Henry et al. (2017) reported that victims of image-based abuse were twice as likely as non-victims to experience high levels of psychological distress and that women were more likely to report that they feared for their safety.

The Foundation supports the notion that intent to cause harm or seriousness should be considered and established by the Commissioner in determining the action to be taken against a perpetrator with a few conditions. Firstly, in cases where the perpetrator is a minor the intent to cause harm should be viewed differently to adult perpetrators based on the information provided above regarding development of the adolescent brain and impulse control. Secondly, where actual harm has been experienced by the victim care must be taken to ensure that secondary victimization **doesn't occur** during the complaints process. In some cases, criminal proceedings have been proven to further violate the rights and entitlements of victims (Orth, 2002).

# Conclusion

In closing, the Alannah & Madeline Foundation supports the introduction of a civil penalties regime for non-consensual sharing of intimate images given provisions are included that meet the needs and image sharing practices of Australian young people. The consensual sharing of intimate images is becoming a normal part **of a young person's courtship practices but on the** occasion there is a breach of privacy and trust, and the non-consensual sharing of images occurs, supports are needed to minimize the reputational, social and emotional harm experienced by the victim.

The development of the regime needs to take a holistic approach to the issue that not only authorizes the Commissioner to hand down enforcement measures but also support for victims and community education campaigns and resources that support victims; encourage bystanders to take action; challenge existing social dynamics relating to victim-blaming and gender; and build a sense of civil responsibility. Changing the public discourse around the sharing of intimate images and victim-blaming will reduce the prevalence of image-based abuse and help eliminate a reporting barrier for victims of image-based abuse.

Image-based abuse complaints dealing with minors should be addressed within a framework that considers how the image is shared e.g. online or offline; consent and intent to cause harm needs to be considered in relation to the decision making capability of the adolescent brain and that Young people need support developing a repertoire of values, emotional, social skills and higher order thinking skills to navigate cyber safety risks.



# References

Albury, K., & Crawford, K. (2012). Sexting, Consent and Young People's Ethics: Beyond Megan's Story. *Journal of Media & Cultural Studies*, 26(3), pp. 463-471.

Albury, K., Hasinoff, A. A., & Senft T. (2017). From Media Abstinence to Media Production: Sexting, Young People and Education. *The Palgrave Handbook of Sexuality Education*, pp. 529.

Blackmore, S.J., & Robbins, T., W. (2012). Decision-making in the adolescent brain. *Nature Neuroscience*, 15(9), pp. 1184-1197.

Civil Liberties Australia (2014). Victoria passes 'sexting' laws. Retrieved from <http://www.cla.asn.au/News/victoria-passes-sexting-laws/>

Department of Human Services. (2014, July). Vulnerable Persons, Police Checks and Criminal Offences. Retrieved from <https://www.dss.gov.au/about-the-department/doing-business-with-dss/vulnerable-persons-police-checks-and-criminal-offences>

Henry, N., Powell, A., & Flynn, A. (2017, May). Not Just Revenge Pornography: Australians Experiences of Image-Based Abuse – A Summary Report. Retrieved from [https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge\\_porn\\_report\\_2017.pdf](https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf)

House of Lords Select Committee on Communications (2017, June). Growing up with the Internet. Retrieved from <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldcomuni/130/13002.htm>

Gordon-Messer, D., Bauermeister, J. A., Grodzinski, A., & Zimmerman, M. (2013). Sexting among young adults. *Journal of Adolescent Health*, 52(3), pp. 301-306.

Legal Aid NSW. (2012, November). *New Voices/New Laws; Law Reform Research Report*. Retrieved from [http://www.lawstuff.org.au/data/assets/pdf\\_file/0009/15030/New-Voices-Law-Reform-Report.pdf](http://www.lawstuff.org.au/data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf)

Lee, M., Crofts, T., McGovern A., & Milivojevic, S. (2016). Sexting and Young People. *International Journal for Crime, Justice and Social Democracy*, 5(2), pp. 127-129.

Parliamentary Joint Committee on Cyber Safety. (2012). Chapter 4 – Cyber-stalking, online grooming and sexting. Retrieved from [http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=jscs/report/chapter4.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jscs/report/chapter4.htm)

Patrick, K., Heywood W., Pitts M. K., & Mitchell A. (2015). Demographic and behavioural correlates of six sexting behaviours among Australian secondary school students. *Sexual Health*, 12, pp. 480-487.

Plan International Australia & Our Watch. (2016, March). Don't Send Me That Pic. Retrieved from <https://www.plan.org.au/~media/plan/documents/reports/dont-send-me-that-pic.pdf>

Orth, U. (2002). Secondary Victimization of Crime Victims by Criminal Proceedings. *Social Justice Research*, 15(4), pp. 313-325.

Salter, M., Crofts T., & Lee M. (2013). Beyond criminalisation and responsabilisation: Sexting, gender and young people. *Current Issues in Criminal Justice*, 24(3), pp. 312.

Yeung, H. T., Horyniak, D. R., Vella A. M., Hellard M. E., & Lim, M. (2014). Prevalence, correlates and attitudes towards sexting among young people in Melbourne, Australia. *Sexual Health*, 11, pp. 335.



**THANK YOU.**



Alannah & Madeline  
Foundation

[amf.org.au](http://amf.org.au)