29 June 2017

Dear Sir/Madam,

**Discussion Paper - Civil Penalty Regime for Non-Consensual Sharing of Intimate Images**

Thank you for the opportunity to make a submission on the establishment of a Commonwealth civil penalty regime concerning the non-consensual sharing of intimate images.

I am a New South Wales lawyer and am currently researching for my Master of Laws (Criminal Practice) thesis, the working title of which is: *What remedy or remedies should our law provide to a person whose sexual images are distributed without his or her consent?* I wish to provide the following contribution based on my research.

**Introduction**

The rise of the non-consensual sharing of intimate images is of growing international concern. While such conduct has primarily been answered by the creation of criminal offences in Australia and abroad, the establishment of a federal civil penalty regime presents an opportunity to give victims a timely, accessible and effective means of redress not possible through the court system.

It also presents an opportunity to provide guidance to the Australian States in what has so far been an uncoordinated response. It is anticipated that further legislative intervention will occur in both the criminal and civil jurisdictions and before this occurs it is desirable that a uniform approach is agreed.

In my view, the focus of the prohibition and enforcement powers should be directed towards the immediate protection of victims and the minimisation of harm. An intimate image can easily be shared at the touch of a button and cause significant harm. In most cases the victim’s main concern is simply to have the image removed from circulation, however once shared this can be extremely difficult. Following the initial sharing of an intimate image a further issue is the need to stop it going “viral”. The viral distribution of an intimate image can greatly exacerbate the initial harm caused by making it recurring, irrevocable and unconstrained by time or place. For this reason it is preferable that the regime adopt an approach that is focused on quickly preventing and ceasing distribution rather than on proving an absence of consent or the existence of harm. The starting point for this is to recognise that the non-consensual sharing of intimate images irrevocably damages a person’s sexual privacy and therefore the making of a complaint should be enough to warrant the removal of the images from content hosts. Punitive and compensatory measures are better pursued through criminal and civil means whereby any issues of consent and harm can be given detailed and reasoned consideration.

Thank you for your consideration. I welcome any further enquires you may have.

***Aurhett James Barrie***

Contents

[**1.** **Are there options for an alternative framing of the prohibition?** 4](#_Toc486440816)

[**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?)** 4](#_Toc486440817)

[**3.** **What would be the best mix of enforcement tools available to the Commissioner?** 5](#_Toc486440818)

[**4.** **Should the Commissioner be able to share information with domestic and international law enforcement agencies?** 6](#_Toc486440819)

[**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](#_Toc486440820)

[**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?** 6](#_Toc486440821)

[**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)?** 7](#_Toc486440822)

[**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 who or which (as in the case of corporate offenders) have sought to impose additional harm by intentionally seeking to maximise the exposure of the images through various forums.)** 7](#_Toc486440823)

[**9.** **Would a hierarchy of penalties lengthen the complaint process, and what effect might that delay have on a victim?** 8](#_Toc486440824)

[**10.** **What technological tools could the Commissioner use in order to combat the sharing of intimate images without consent?** 8](#_Toc486440825)

[**11.** **Should a cooperative arrangement with social media services be established, in a similar manner to the existing cyberbullying complaints scheme?** 8](#_Toc486440826)

[**12.** **Should penalties differ depending on the intent of the image sharer, or on how widely the image is shared?** 9](#_Toc486440827)

[**13.** **Should the range of enforcement actions be applicable to parties other than the person sharing the image or the content host?** 9](#_Toc486440828)

[**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?** 10](#_Toc486440829)

[**15.** **Should these information gathering powers be made available to the Commissioner in order to administer the proposed civil penalty regime?** 10](#_Toc486440830)

[**16.** **Should the Commissioner be granted search warrant powers?** 10](#_Toc486440831)

[**17.** **Should victims be compelled to use established complaints processes (where available) prior to lodging a complaint with the Commissioner?** 10](#_Toc486440832)

[**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?** 11](#_Toc486440833)

[**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?** 11](#_Toc486440834)

[**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?** 11](#_Toc486440835)

[**21.** **What should constitute ‘consent to share’? Can consent be implied, or should explicit verbal or written permission be required?** 11](#_Toc486440836)

[**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?)** 11](#_Toc486440837)

[**23.** **Should special consideration be given regarding consent from vulnerable people? If so, how can ‘vulnerable people’ be defined?** 12](#_Toc486440838)

[**24.** **Should the person sharing the image be required to prove consent?** 12](#_Toc486440839)

[**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?** 12](#_Toc486440840)

[**26.** **What should the definition of ‘intimate images’ be for the purpose of the prohibition?** 13](#_Toc486440841)

[**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?** 14](#_Toc486440842)

[**28.** **How might community standards be applied in the consideration of whether an image is intimate?** 15](#_Toc486440843)

[**29.** **What should the definition of ‘sharing’ be for the purpose of the prohibition?** 16](#_Toc486440844)

[**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.)** 16](#_Toc486440845)

[**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?** 17](#_Toc486440846)

[**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.)?** 17](#_Toc486440847)

[**33.** **Should ‘intent to cause harm’ or ‘seriousness’ be included as elements of the prohibition?** 17](#_Toc486440848)

[**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?** 17](#_Toc486440849)

[**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?** 18](#_Toc486440850)

[**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?** 18](#_Toc486440851)

[**37.** **Are the definitions in the EOSC Act suitable for cases involving non-consensual sharing of intimate images?** 18](#_Toc486440852)

[**38.** **Should any other technologies or distribution methods not covered by these definitions be included?** 18](#_Toc486440853)

1. **Are there options for an alternative framing of the prohibition?**

Subject to my responses below, I find the proposed framing of the prohibition to be appropriate.

1. **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?)**

No. The non-consensual distribution of intimate images is an internationally cross-jurisdictional issue and as such it is undesirable that an Australian link be required in any form. Such a link would impose further limitations upon the already frustrated investigatory and prosecutorial processes of cross-jurisdictional activity.

Importance must be given to Australia’s status as a hub of international activity, especially in regard to migration (both temporary and permanent). Individuals enter and leave Australia routinely. These individuals may engage in conduct while overseas that will have consequences in Australia. For example, a person, perhaps an international student, may live in Australia but regularly return to his country of origin to visit his family. This student may have an ongoing relationship with a woman who lives in Australia. While overseas, he may non-consensually share intimate images of this woman to her friends and family in Australia. In these circumstances, an “Australian link” of the kind contained in the *Spam Act 2003* may provide a liability loophole for the man due to his not being “physically present” in Australia or other criteria not being met. Consequently he may avoid liability despite that the victim resides in Australia, the conduct causes harm in Australia and he will return to Australia. Conversely, the subject of an intimate image may also be affected by conduct occurring within Australia whilst he or she is overseas.

In relation to content hosts, there is little utility in limiting liability based on their links to Australia. While usually first instance distributors are based within the same jurisdiction as the victim, images can end up on internationally hosted sites where there is potential for mass distribution. This is the critical point before the distribution to a small group (that may be contained) becomes widespread, irrevocable and uncontrollable. And yet it is also the point at which the conduct often steps outside of jurisdictional boundaries. So far as possible, these sites need to be brought within our jurisdiction - to require an “Australian link” would only frustrate this.

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

The enforcement tools available to the Commissioner must primarily be focused on ceasing distribution. For this reason it is suggested that the primary enforcement tools available to the Commissioner be the ability to impose injunctions, take-down orders and deliver-up orders applicable to both natural persons and content hosts.

It is critical that these remedies be provided expeditiously. A significant issue in regard to non-consensual sharing is the potential for images to go “viral”. Once intimate images are shared on the internet it is impossible to have confidence that they have been effectively removed or contained. Illustrative of this is the research of the Internet Watch Foundation which tracked the redistribution of 7,147 images and 5,077 videos containing self-generated content[[1]](#footnote-1) of people between 13 and 20 years of age and concluded that within a period of 4 weeks 88 per cent of the images and videos had been reproduced on parasite websites.[[2]](#footnote-2)

It is also advisable that these measures be made available on an interim basis following the receipt of a threat to distribute an image. A failure to comply with an interim injunction or take-down order could be a further offence (similar to interim orders imposed in relation to ADVOs) and be an aggravating factor in relation to any punitive order.

Enforcement measures also need the ability to deter and prevent further offending. In this respect the availability of infringement notices, banning orders, licence revocations and enforceable undertakings is appropriate.

However not all enforcement tools ought to be compulsive or punitive. There is also value in encouraging self-regulation. Regulation of the internet is notoriously difficult, even by content providers themselves. This is particularly so following the surge of websites such as Facebook and Myspace which facilitate user-generated content (Web 2.0). For this reason there ought to be provision for the giving of formal warnings and requests prior to further action. Often content hosts will unknowingly facilitate the distribution of illegal material, despite internal efforts to prevent this. The issuance of formal warnings and requests would provide an avenue to allow content hosts to address prohibited behaviour without necessarily imposing an unrealistic expectation that they monitor all activity on their sites. Further, the liability of content hosts ought not to be triggered by *actual* knowledge of an invasive image but rather by the receipt of notification concerning that image. This is preferable because liability based on actual knowledge may discourage self-monitoring in an attempt to remain ignorant of the material, whereas liability based on notification will allow a content host to actively search for prohibited material without necessarily increasing its potential liability.[[3]](#footnote-3)

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

Yes. As a phenomenon which may take place across international jurisdictions it is essential that the Commissioner have the ability to meaningfully cooperate with both domestic and international law enforcement agencies.

1. **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?**

In relation to children there ought to be a positive requirement to not report images of a minor to police, parents or guardians unless there is a reasonable suspicion that the circumstances in which the image was created or distributed are in themselves illegal, for example, where the circumstances of the sharing or the content of the image suggests that the child is engaged in sexual activity with an adult. Children must feel free to report the non-consensual distribution of intimate images without fear of being punished themselves (legally or otherwise). A significant deterrent concerning the reporting of image based abuse is the fear of being judged or risking criminal prosecution.[[4]](#footnote-4) Further, the intervention of police and/or parents/guardians may exacerbate the harm caused by drawing further attention to a child’s private sexual activity.[[5]](#footnote-5) A requirement not to report such conduct except in limited circumstances would facilitate reporting while ensuring more serious underlying conduct would not be overlooked.

1. **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?**

Other than a requirement against reporting the conduct to parents/guardians/police in the absence of reasonable suspicion of serious criminal activity and a requirement that punitive measures ought to be used as a last resort, I believe there is no reason why the resolution *process* ought to be different between adults and children.

That being said, whatever approach the Commissioner adopts, it ought not to be unduly difficult for minors to use and should account for their presumably limited resources and familiarity with formal processes.

1. **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)?**

Both civil and criminal remedies ought to be available; however, which are used and in what circumstances are different concerns. There is a significant incidence of image-based abuse amongst young persons. Recent research suggests that 1 in 3 persons aged 16-19 have suffered at least one form of image-based abuse victimisation.[[6]](#footnote-6) Such a high level of incidence requires a strong message of deterrence which, in my submission, can only be achieved by the threat of criminal penalties, particularly conviction and imprisonment. Nevertheless, account must be given for the fact that children and young adults “vary in their maturity, and may on occasion act impulsively and spontaneously, to their own detriment”.[[7]](#footnote-7) For this reason, civil penalties ought to ordinarily be the preferred course. On the other hand, where the prohibited conduct is demonstrative of a particularly high degree of malice or causes a significant degree of harm it may be appropriate that criminal punishment follows. I wish to observe the comments of the Victorian Parliament Law Reform Committee when it remarked in relation to child sexting:

“a person who acts maliciously, or even carelessly, in sexting conduct, while not being exploitative, can still cause serious harm to the victim depicted in the image or footage. Given the harm that can result from non-consensual sexting, and general community recognition that this is not appropriate behaviour, it is strongly arguable that non-consensual sexting should be considered criminal behaviour.”[[8]](#footnote-8)

I also note that the Children’s Court of New South Wales[[9]](#footnote-9) and the Department of Family and Community Services (NSW)[[10]](#footnote-10) have previously supported the application of criminal offences to children as defendants.

1. **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 who or which (as in the case of corporate offenders) have sought to impose additional harm by intentionally seeking to maximise the exposure of the images through various forums.)**

Consistent with sentencing principles of criminal law, it is appropriate that a hierarchy of penalties be established to promote specific and general deterrence and give greater weight to penalties where the conduct is particularly harmful or callous. I suggest that the following factors are relevant in this regard:

* Intention to distribute the image;
* intention to cause harm;
* intentionally encouraging the victim to self-harm (especially suicide);
* the type of harm intended;
* the intended level of distribution;
* the method of distribution;
* the extent of distribution;
* the recurrence of distribution;
* the incitement of further distribution;
* the distribution for profit or personal gain;
* any threat(s) or blackmail accompanying distribution;
* the provision of personal information related to the subject of the image; and,
* the repeated commission of prohibited conduct.

A hierarchy of penalties should also account for circumstances that could contribute to a lesser penalty, for example, the timely compliance with a take-down request, the provision of an apology and reckless (rather than intentional) distribution.

1. **Would a hierarchy of penalties lengthen the complaint process, and what effect might that delay have on a victim?**

A hierarchy of penalties would necessarily delay the complaints process given that more evidence and investigation would be required to categorise the appropriate severity of the penalty. A delay in the process would most likely cause distress to the victim and, importantly, allow the further dissemination of the material, perpetuating the harm. While I reiterate that it is preferable that the Commissioner be able to take action to remove pictures following the receipt of a complaint, if this approach is not adopted, it is suggested that the power to grant interim injunctions be provided to prevent further sharing while the complaint is being resolved.

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

The use of photomatching software, such as that used by Facebook, will be of assistance. This software compares photos against a pre-existing database of reported images. However, while it is useful in detecting previously reported images, it cannot pre-empt the uploading of a previously unreported image and is therefore limited to a role as a reactionary measure.[[11]](#footnote-11)

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

It is highly desirable that a cooperative arrangement be developed with social media providers. Given that most internet service providers and content hosts are located offshore, there are obvious jurisdictional obstacles that will frustrate the Commissioner’s ability to regulate prohibited content. Therefore self-regulation and cooperation will be critical. The two-tier system contained within Part 4 of the *Enhancing Online Safety for Children Act 2015* (Cth) may be a useful model, however the availability of enforcement measures against only Tier 2 social media services limits the scheme’s effectiveness. As outlined above, the availability of timely remedies is critical. Yet there appears to be a significantly bureaucratic process involved in declaring a social media service a Tier 2 service and hence the provision of any enforcement mechanisms: If the service was never registered as a Tier 1 service the process will take at least 28 days[[12]](#footnote-12) (unless the service consents). If the service is a registered Tier 1 service the Commissioner must first revoke that registration[[13]](#footnote-13) and then seek Ministerial approval for the service to be registered as a Tier 2 service. This is further stymied by the requirement that a Tier 2 social media service be a “large” social media service.[[14]](#footnote-14). I note that while there are at least 26 social media providers operating in Australia (with subscriber numbers ranging from an estimated seven thousand to seventeen million users[[15]](#footnote-15)) there are currently only four Tier 2 social media providers registered with the Office of the eSafety Commissioner (Facebook, Google+, Instagram and YouTube).

A preferable system of “compellable cooperation” would be based not on the size or registration of a social media provider but on its willingness to cooperate with victims and the Commissioner. This could be achieved by making all content hosts *prima facie* liable for hosting prohibited content (once notified) and providing immunity from civil and criminal prosecution where they take all reasonable measures towards the timely removal of the content from their websites and platforms. In this regard the *Harmful Digital Communications Act 2015 (NZ)[[16]](#footnote-16)* may provide a suitable model.

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

Penalties should take into account both a person’s intended level of distribution and, as a separate consideration, the actual level of distribution. Both should be capable of aggravating a penalty.

There will be situations in which a person non-consensually shares an image intending that it is received only by certain third parties and it nevertheless makes its way to a wider audience. Where the further distribution of the image was a reasonably foreseeable consequence of the person’s sharing it that should be taken into account in imposing a penalty. Take, for example, the following scenario: A man shares an intimate image of a co-worker whom he is dating with another co-worker. That second co-worker then non-consensually shares the image to third co-worker and it is eventually circulated throughout their workplace. In these circumstances the man ought arguably to have reasonably foreseen that the image could be shared throughout the workplace and therefore this consequence should be taken into account in imposing a penalty.

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

Assuming “parties other than the person sharing the image or content host” to mean persons who merely receive and do not further share the image (“passive receivers”), I believe protective and compulsive measures ought to be available but not punitive measures. The harm being regulated is the non-consensual *sharing* of an image. A person who receives, but does not share, such an image has, without more, not caused or facilitated harm and ought not to be punished (though the situation would be different if the person requests the image). That being said, because the passive receiver represents a continuing loss of control over the image, his or her possession of it may perpetuate the harm caused by the initial distribution. For this reason there is merit in providing, at least, the power to make deliver-up orders.

1. **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?**

Yes. An ISP must appreciate its status as a digital citizen is a privilege not a right. If it causes or facilitates harm by allowing prohibited websites to function it ought to be compellable to block those sites.

1. **Should these information gathering powers be made available to the Commissioner in order to administer the proposed civil penalty regime?**

Please see my response to question 16 below.

1. **Should the Commissioner be granted search warrant powers?**

The Commissioner ought to be empowered to require a carrier, provider or person to provide information or produce documents and, additionally, to make preservation orders concerning such information and documents. The ability to execute search warrants (and confiscate relevant materials) would also prove useful in that it would allow access to stored data. If the stored data is not repossessed it is possible for a person or content provider to reproduce images using different websites. The provision of search warrants should be supervised by judicial officers.

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

Given the need for intimate images to be removed from distribution channels as quickly as possible, it is undesirable to compel the use of established complaints processes as a pre-condition to seeking the Commissioner’s assistance to remove a picture. Further, complaints directly to the sharer or a content host are in many cases futile or met by extortive or coercive behaviour.[[17]](#footnote-17)

That being said, there is merit in encouraging cooperation between victims and content hosts. It is therefore suggested that content hosts operating in Australia be required to provide a self-reporting mechanism as a condition of operation (in a similar form to the Basic Online Safety Requirements[[18]](#footnote-18)). Alternatively, the provision of a self-reporting mechanism could be used as a condition of immunity if immunity were provided to content hosts who take all reasonable measures to facilitate self-reporting and the removal of intimate images.[[19]](#footnote-19)

1. **What is an appropriate length of time for a victim to wait to hear the result of a complaint prior to contacting the Commissioner?**

As explained in response 17, the making of a complaint to the Commissioner ought not to be conditioned on the making of a prior complaint to a content host/sharer.

1. **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?**

Yes. As explained above, the preferential system for imposing a legal obligation on content hosts it to make content hosts *prima facie* liable for hosting prohibited content (once notified) and to then provide immunity from civil and criminal prosecution where they take all reasonable measures to assist in the timely removal of the content from their websites and platforms.

1. **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?**

The imposition of fines, operating restrictions and bans would provide appropriate penalties in response to a failure to comply with a directive from the Commissioner.

1. **What should constitute ‘consent to share’? Can consent be implied, or should explicit verbal or written permission be required?**

Evidence suggests that the sharing of intimate images often takes place in the context of a relationship or former relationship[[20]](#footnote-20) where a person’s indication of consent may be nuanced and informed by past negotiations and understandings.[[21]](#footnote-21) There is therefore value in recognising implicit and oral consent. Nevertheless, because lack of consent is the core issue surrounding the non-consensual sharing of intimate images, it is important that a clear message be sent that if a person intends to share an intimate image, they must be sure that they have consent to do so. For this reason explicit consent ought to be required. This is the better approach because it encourages would-be sharers to think twice, requires little effort on their part (the simple asking of a question) and avoids situations where harm is caused because of miscommunications.

1. **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?)**

Consent given in one context ought not to impute consent in another. Consent is contextual and may be conditional. A person may consent to an image being shared among a group of friends but not to a larger audience. Take, for example, a situation where a young woman shares partially nude images of herself with a group of close friends for the purpose of seeking advice on a perceived abnormality. She gives her consent to her friends for this purpose, but, if the images were distributed further (perhaps to ridicule her or for a sexual purpose) the distribution would not resemble the conditions of her consent, in terms of the audience or its purpose. Such an approach would be consistent with principles concerning breach of confidence.[[22]](#footnote-22)

Further, consent to distribute an image via one medium ought not to equate to consent to distribute via another medium. This is so because the sharing of an image through one means (e.g. a website) may expose the subject of the image to a far greater audience than was intended if consent was given only for the purpose of a different means (e.g. one-on-one messaging).

1. **Should special consideration be given regarding consent from vulnerable people? If so, how can ‘vulnerable people’ be defined?**

Generally, consent ought to be valid if the person has the capacity to give, and in fact gives, free and voluntary agreement. It is, in my view, unnecessary to introduce a qualification of consent for the benefit of vulnerable people beyond this.

1. **Should the person sharing the image be required to prove consent?**

Yes. An intimate image is, by its nature, an image that exposes a private aspect of a person. Therefore such an image will ordinarily attract an understanding that it is not to be shared.[[23]](#footnote-23) In the context of relationships, victims of the non-consensual sharing of intimate images have often said that they permitted the image to be created *only* because they were assured that the images would remain private.[[24]](#footnote-24) Outside of the context of a relationship (or former relationship), for example where images have been obtained from a stolen or lost phone, the implication that the intimate images are confidential is almost irrefutable. It follows that an absence of consent to share intimate images should be presumed and consent ought to be proved by the sharer.

1. **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?**

A person ought to be able to seek restrictive measures (take-down orders and the like) at any time, whether or not consent was previously given.

In relation to punitive measures, consent must coincide with the act of distribution. If X consented to Y sharing an image, X should not be permitted to make a complaint seeking punitive action so long as that consent had not been withdrawn at the time Y’s sharing. However, once consent has been withdrawn (and Y has been so advised) it is immaterial that X previously consented if Y continues to share the image.

In the context of relationships, it is preferable that the prohibition states that consent given during a relationship automatically ends with the termination of that relationship. Such a presumption would provide a clear demarcation of the period of consent and would therefore provide a clear message to the public concerning the limits of consent, despite what understanding may have been reached or believed during the course of the relationship. This would be a position more favourable to a complainant but would also allow a potential sharer to be unambiguously aware of his or her liability. It is also advisable that the prohibition makes it clear that the existence of a relationship does not, in itself, imply the giving of consent to share intimate images.[[25]](#footnote-25)

1. **What should the definition of ‘intimate images’ be for the purpose of the prohibition?**

The definition of an “intimate image” could resemble that contained in section 40 of the *Summary Offences Act 1966* (Vic):

“intimate image means a moving or still image that depicts—

(a)    a person engaged in sexual activity; or

(b)    a person in a manner or context that is sexual; or

(c)    the [genital or anal region](http://www.austlii.edu.au/au/legis/vic/consol_act/soa1966189/s40.html#genital_or_anal_region) of a person or, in the case of a female, the breasts

Where genital or anal region, in relation to a person, means the person's [genital or anal region](http://www.austlii.edu.au/au/legis/vic/consol_act/soa1966189/s40.html#genital_or_anal_region) whether bare or covered by underwear.”

This definition is flexible enough to cover all foreseeable situations that fall under the umbrella of the non-consensual sharing of intimate images and, importantly, includes images which are intimate by virtue of their context. To this definition I would add, to avoid uncertainty and to recognise the equality of transgender and intersex persons, that breasts ought not to be categorised by reference only to female breasts, but should also explicitly include the breasts of a transgender or intersex person.[[26]](#footnote-26)

To effectively stop further distribution, it is critical that definition of an intimate image include not only a still or moving image but also the negative version of an image and data stored by any means that is capable of conversion into an intimate image.[[27]](#footnote-27) The definition should also include a reproduced image, for example a “screenshot”. This would address a situation where a person shares an intimate image on a temporary basis through an application such as Snapchat and the receiver “screenshots” that temporary image to create a permanent image.

It is also desirable that an intimate image not be defined by reference to whether or not it is created in a public place (as is the case in South Australia).[[28]](#footnote-28) This would cause interpretive difficulties where the image is created by conduct such as “upskirting” (which typically occurs in a public place) or where the public/private divide is ambiguous, for example where an image is taken from a platform such as Facebook and subjects’ privacy settings and number of “friends” or “followers” may differ.[[29]](#footnote-29)

I encourage the Department to also take this opportunity to consider whether “images” ought to be the only medium regulated or whether there is also merit in regulating text and audio. In my view, significant harm of the same nature may also be caused by the sharing of sexually explicit text and voice messages, especially where the author is identifiable.

1. **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?**

Yes. Even if a victim is not readily identifiable he or she may feel violated by the non-consensual sharing of an intimate image. It represents a loss of control of sexual privacy and may be accompanied by a fear that he or she will eventually be identified. Threats (and by extention, fear) that an intimate image will be shared commonly causes significant psychological harm.[[30]](#footnote-30)

The prohibition should also include images (whether originally intimate or not) which are combined with sexually explicit photos. This phenomenon – known as “morph porn” – though involving originally innocuous images, similarly represents a loss of control of sexual privacy as the person’s image is used for sexual purposes beyond his or her control. Further to this, it may be the case that where a sexually explicit image is well-doctored with an innocuous image it produces a result that appears genuine and is therefore capable of effecting the same harm as an unedited intimate image.

An emerging issue worth serious consideration is the rise of virtual reality technology and digitally authored pornography, where a person’s likeness, rather than a person’s image, forms the content.[[31]](#footnote-31) When combined with 3D imaging tools virtual reality technology has the capability to produce “do-it-yourself” pornography which may feature highly realistic images of persons who have not given consent for their likeness to be used. It allows users to experience extreme, degrading or even abusive imagery in a realistic way and, like morph porn, represents a loss of control of sexual privacy as a person’s likeness is used for sexual purposes beyond his or her control.[[32]](#footnote-32)

It is also worthwhile considering whether images, though not sexual in nature, if used for sexual gratification, ought to be prohibited. This issue was considered by the Standing Committee of Attorneys-General in response to images of young sportsmen taken non-consensually in public places being uploaded to fetish websites.[[33]](#footnote-33)

1. **How might community standards be applied in the consideration of whether an image is intimate?**

The application of community standards is an important consideration that has been applied differently amongst different jurisdictions. South Australian legislation stipulates that an *image* that “falls within the standards of morality, decency and propriety generally accepted by reasonable adults in the community will not be taken to be an [invasive image](http://www.austlii.edu.au/au/legis/sa/consol_act/soa1953189/s26a.html" \l "invasive_image) of the person.”[[34]](#footnote-34) Victorian legislation requires that the *distribution* of the image be contrary to community standards of acceptable conduct (taking into account, amongst other things, its nature and content and the circumstances in which it was captured and distributed). [[35]](#footnote-35) The offence proposed by the *Crimes Amendment (Intimate Images) Bill 2017* (NSW) requires the *image* be of a “person’s private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy”.

In my submission the most appropriate method of applying community standards is to require that a reasonable person in the position of the complainant had a reasonable expectation of privacy *at the time the image was shared with or obtained by* the offender. This approach has two key advantages. First, it prevents victim-blaming by removing the focus from the content of the image and the circumstances of its creation and instead places it on the wrongful distribution. This sends the message that the conduct is prohibited not because of the actions of the victim but because of the actions of the offender. It also avoids the exclusion of situations where the victim arguably did not have a reasonable expectation of privacy but nevertheless the images created would be of an intimate nature, for example, images obtained during a public sexual assault,[[36]](#footnote-36) the unintended exposure of a woman’s areola during a sporting competition or images of a topless (or even swimwear-clad) sunbather (noting that consent to be temporarily observed by a limited audience in public does not equate to consent to the creation of permanent images, nor their distribution).[[37]](#footnote-37) The second advantage is that it avoids the use of unwieldy standards such as “morality, decency and propriety” and “community standards of acceptable conduct” (which are vague and likely to cause inconsistencies in application)[[38]](#footnote-38) and instead focuses on the reasonable expectations of a reasonable person in the position of the complainant.

1. **What should the definition of ‘sharing’ be for the purpose of the prohibition?**

Please see my response to question 30 below.

1. **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.)**

Because the non-consensual sharing of images is so closely tied to technology, and technology is ever-changing, it is preferable that a medium-neutral definition of sharing be used. To this end, a definition similar to that used by the *Criminal Justice and Courts Act 2015* (UK) to define “disclose” is appropriate:

“A person ‘discloses’ something to a person if, **by any means**, he or she **gives or**

**shows** it to the person **or makes it available** to the person.[[39]](#footnote-39) (My emphasis.)

This ought to be accompanied by a non-exhaustive list of means of sharing.

Any definition also ought to include the sharing of temporary images such as those captured through live-streaming platforms (such as Facebook Live) and transient image applications (such as Snapchat).[[40]](#footnote-40) These mediums, though producing temporary images, are capable of facilitating and exacerbating the harms associated with non-consensual sharing of intimate images. Live streaming through Skype has, for example, been used as a means of non-consensually broadcasting sexual activity.[[41]](#footnote-41) Mass social media platforms such as Facebook, and particularly Facebook Live, present a significant problem in this regard. The “live” nature of these platforms means that they are extremely difficult to regulate in real time.[[42]](#footnote-42) This combined with high numbers of active users (1.28 billion daily active users in Facebook’s case)[[43]](#footnote-43) means that there is significant potential for harm.

So far as possible, I support a definition that includes non-digital sharing. While in the apparent majority of reported cases the non-consensual sharing of intimate image occurs by mobile phone or computer, people also share images physically and to overlook this would provide a loophole to perpetrators.[[44]](#footnote-44)

1. **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?**

Not necessarily. An image that is distributed to thousands of strangers on the internet may not cause as high a degree of harm as an image distributed to a small group of persons who are close to the victim (e.g. the victim’s children, partner or employer). Conversely, an image distributed to thousands of strangers may cause significant distress whereas the same image distributed to an empathetic partner or family member may have little impact at all.

1. **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.)?**

If a person who shares an intimate image claims to have lacked the ability to understand whether the complainant consented at the relevant time, that person ought to be required to demonstrate his or her lack of understanding. Where demonstrated it ought to be a full defence. In the case of a person under 18 years of age, the question of whether he or she was capable of understanding that the complainant did not consent ought to be determined in a manner consistent with the *Criminal Code*.[[45]](#footnote-45)

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

Please see my response to question 34 below.

1. **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?**

Given the diverse range of intentions motivating the non-consensual sharing of intimate images (including but not limited to sexual gratification, profit, personal notoriety, control and humour)[[46]](#footnote-46) it is preferable that there not be an element of intention to cause harm, nor any qualification as to the seriousness of any intended harm.

Nevertheless, an approach that takes into account any malicious intent of the perpetrator, or harm caused to the victim, in determining what action should be taken against the perpetrator would facilitate the most appropriate action being taken in each case.

1. **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?**

Please see my response to question 36 below.

1. **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?**

Whether actual or likely harm (or the degrees thereof) ought to be considered should depend upon the nature of the action to be taken.

In relation to the Commissioner’s protective and compulsive powers (injunctions, take-down orders etc.) there ought only to be a requirement that a request has been made to have the image removed.

In relation to the Commissioner’s punitive powers (penalty notices etc.), it is preferable that there be a requirement of actual harm prior to action being taken. Further, it is suggested that the actual, rather than likely, degree of harm be used to determine the appropriate punitive measure.

This approach will provide a means of balancing the need for evidence-based regulation and the need for the Commissioner to be a timely, accessible and effective avenue for redress.

1. **Are the definitions in the EOSC Act suitable for cases involving non-consensual sharing of intimate images?**

The definitions of ‘electronic service’, ‘relevant electronic service’ and ‘social media service’ appear appropriate for proposed prohibition.

1. **Should any other technologies or distribution methods not covered by these definitions be included?**

Please refer to my responses provided in relation to questions 26, 27 and 30.

END OF SUBMISSION

1. Defined as nude or semi-nude images or videos created by a young person knowingly engaging in erotic or sexual activity. [↑](#footnote-ref-1)
2. Internet Watch Foundation, ‘Study of Self-Generated Sexually Explicit Images & Videos Featuring Young People Online’ (Report, November 2012). [↑](#footnote-ref-2)
3. Amanda Cecil, ‘Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography’ (2014) 71(4) *Washington and Lee Law Review* 2531, 2549-2550. [↑](#footnote-ref-3)
4. Victorian Parliament Law Reform Committee, Victorian Parliament, *Inquiry into Sexting* (2013), 136. [↑](#footnote-ref-4)
5. Murray Lee, Thomas Crofts, Alyce McGovern, and Sanja Milivojevic, ‘Sexting and Young People’ (Report to the Criminology Research Advisory Council, Criminology Research Grants, 2015), 71. [↑](#footnote-ref-5)
6. Anastasia Powell, Nicole Henry, Asher Flynn, ‘Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse a Summary Report’ (Report, RMIT University, May 2017), 7. [↑](#footnote-ref-6)
7. Victorian Parliament Law Reform Committee, Victorian Parliament, *Inquiry into Sexting* (2013), 103. [↑](#footnote-ref-7)
8. Victorian Parliament Law Reform Committee, Victorian Parliament, *Inquiry into Sexting* (2013), 150. [↑](#footnote-ref-8)
9. Children’s Court of New South Wales, Submission No 5 to Department of Justice, *The Sharing of Intimate Images without Consent – “Revenge Porn” Discussion Paper*, 21 October 2016. [↑](#footnote-ref-9)
10. Department of Family and Community Services, Submission No 7 to Department of Justice, *The Sharing of Intimate Images without Consent – “Revenge Porn” Discussion Paper,* (Undated), [4.5]. [↑](#footnote-ref-10)
11. <https://www.theguardian.com/technology/2017/apr/05/facebook-tools-revenge-porn> [Accessed 23 May 2017]. [↑](#footnote-ref-11)
12. s 31(4). [↑](#footnote-ref-12)
13. s 31(2). [↑](#footnote-ref-13)
14. s 31(3)(a). [↑](#footnote-ref-14)
15. Statistics compiled by [SocialMediaNews.com.au](https://www.socialmedianews.com.au/) for May 2017. Statistics and research provided by the Vivid Social – [Social Media Agency](https://www.vividsocial.com.au/). Figures correct as of 31/05/17. [↑](#footnote-ref-15)
16. s 24. [↑](#footnote-ref-16)
17. Anastasia Powell, Nicole Henry, Asher Flynn, ‘Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse a Summary Report’ (Report, RMIT University, May 2017), 9. [↑](#footnote-ref-17)
18. *Enhancing Online Safety for Children Act 2015* (Cth), s 21. [↑](#footnote-ref-18)
19. See for example, *Harmful Digital Communications Act 2015* (NZ), s 25(2). [↑](#footnote-ref-19)
20. Anastasia Powell, Nicole Henry, Asher Flynn, ‘Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse a Summary Report’ (Report, RMIT University, May 2017), 5; Australian Institute of Criminology, “Sexting among Young People: Perceptions and Practices” (November 2015) 508 *Trends and Issues in Crime and Criminal Justice, 6.* [↑](#footnote-ref-20)
21. Anastasia Powell, “Sexual Pressure and Young People’s Negotiation of Consent”, (2007) 14 *Australian Centre for the Study of Sexual Assault Newsletter*, 10. [↑](#footnote-ref-21)
22. See *Doe v Australian Broadcasting Corporation* [2007] VCC 281, 120 -122 [↑](#footnote-ref-22)
23. *Wilson v Ferguson* [2015] WASC 15, 56. [↑](#footnote-ref-23)
24. Danielle Keats Citron and Mary Anne Franks, ‘Criminalizing Revenge Porn’ (2014) 49 *Wake Forest Law Review* 345, 355. [↑](#footnote-ref-24)
25. Anastasia Powell, Nicole Henry, Asher Flynn, Submission No 8 to Department of Justice, *The Sharing of Intimate Images without Consent – “Revenge Porn” Discussion Paper,* 21 October 2016, 8. [↑](#footnote-ref-25)
26. See for example, *Crimes Amendment (Intimate Images) Bill 2017* (NSW), s 91N(b). [↑](#footnote-ref-26)
27. See *Criminal Justice and Courts Act 2015* (UK), s 33(8). [↑](#footnote-ref-27)
28. *Summary Offences Act 1953* (SA), s 26A. [↑](#footnote-ref-28)
29. Jessica Lake, ‘Watching women: Past and present legal responses to the unauthorised circulation of personal images ’ (2016) 21 *Media and Arts Law Review* 383, 399. [↑](#footnote-ref-29)
30. Anastasia Powell, Nicole Henry, Asher Flynn, ‘Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse a Summary Report’ (Report, RMIT University, May 2017), 5. [↑](#footnote-ref-30)
31. [Sony Corp](http://cnbc.com/quotes?symbol=6758.T-JP) has sold more than one million units of its virtual reality headset globally: <http://www.cnbc.com/2017/06/07/sonys-playstation-vr-headset-sales-top-1-million-units.html> [Accessed 28 June 2017]. [↑](#footnote-ref-31)
32. <http://www.telegraph.co.uk/science/2017/05/18/future-revenge-porn-will-see-spurned-exes-create-3d-sex-avatars/> [Accessed 28 June 2017]. [↑](#footnote-ref-32)
33. Standing Committee of Attorneys-General, Discussion Paper (Unnumbered), *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005), 2.1. [↑](#footnote-ref-33)
34. *Summary Offences Act 1953* (SA), s 26A. [↑](#footnote-ref-34)
35. *Summary Offences Act 1966 (VIC), s* 41DA(1)(b). [↑](#footnote-ref-35)
36. This appears to be an increasing occurrence: Anastasia Powell & Nicola Henry (2016): Policing technology-facilitated sexual violence against adult victims: police and service sector perspectives, Policing and Society, 5; see for example: <http://www.smh.com.au/nsw/cranbrook-student-accused-of-sexually-assaulting-girl-at-bellevue-hill-party-as-friend-filmed-attack-20170321-gv2rs1.html> (accessed 19 June 2017); see for example: *R v Haralabidis, Lazaros and Petropoulos, Timotheos* [2010] NSWDC 175. [↑](#footnote-ref-36)
37. Standing Committee of Attorneys-General, Discussion Paper (Unnumbered), *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005), [40]. [↑](#footnote-ref-37)
38. Children’s Court of New South Wales, Submission No 5 to Department of Justice, *The Sharing of Intimate Images without Consent – “Revenge Porn” Discussion Paper*, 21 October 2016. [↑](#footnote-ref-38)
39. s 34(2). [↑](#footnote-ref-39)
40. See answer to Question 26 above. [↑](#footnote-ref-40)
41. *R v Daniel McDonald and Dylan Deblaquiere* [2013] ACTSC 122 [↑](#footnote-ref-41)
42. Facebook Live has been used to broadcast the murder of a baby in Thailand, the suicide of a man in India and the gang-rape of a woman in Sweden. In the case of the Thai murder-suicide the footage of these events was unable to be removed for 24 hours and was reposted to YouTube. <http://www.cnbc.com/2017/04/26/facebook-thailand-baby-murder-livestream.html> [Accessed 20 June 2017]. [↑](#footnote-ref-42)
43. Statistics provided by Facebook: <https://newsroom.fb.com/company-info/> [Accessed 20 June 2017]. [↑](#footnote-ref-43)
44. See for example *Giller v Procopets* [2008] VSCA 236 where the defendant attempt to physically distribute copies of videotapes of the plaintiff engaged in sexual activity. [↑](#footnote-ref-44)
45. *1995* (Cth), ss 7.1 – 7.2. [↑](#footnote-ref-45)
46. Henry, N., Powell, A. & Flynn, A. (2017) *Not Just ‘Revenge Pornography’: Australians’ Experiences of Image- Based Abuse. A Summary Report*. Melbourne: RMIT University, 3. [↑](#footnote-ref-46)