

# **Civil Penalties Regime for Non-Consensual Sharing of Intimate Images**

## **Parliamentary Submission**

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The authors consent to this submission being made public.

## Introduction

In a globalised world, the exchange of images can occur instantaneously. Content can transcend time and space to arrive at its destination at the command of a single user. The internet is vast and the cloak of anonymity that it provides means that community standards of behaviour are routinely violated. The 'devolution of computer network access' provides 'unprecedented opportunities' for users to exploit the virtues of the internet for nefarious means, such as the non-consensual sharing of intimate images.<sup>1</sup> This, coupled with the ease at which content can be transferred between devices, enables the widespread distribution of such images. A 'lack of a police or criminal justice response' lends weight to the proposition that a civil law framework is most fitting as a deterrent and a source of penalty in instances where intimate images are shared without the consent of the person depicted.<sup>2</sup> It will be contended that the primary goal of a federal civil regime should be to remove such images from the location at which they have been shared, with a secondary goal of penalising the offender as a method of deterrence. In addition, there must be an avenue for recourse against third party hosts. That is, large social media providers, for example, must be obliged to remove images in instances where the original poster refuses to comply with an order to remove it or where it has strayed beyond the control of the original poster.

As an international issue, this is an opportunity for Australia to take the lead in an area that lacks clear direction. That is, lawmakers around the world have floundered in their attempts to assert their disapproval of this type of abuse and provide a pathway of action for victims, displaying a tendency for 'ad hoc' responses leading to varied and 'limited success'.<sup>3</sup> The implementation of a nationwide strategy for the removal of intimate images shared without

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<sup>1</sup> Lennon Chang and Peter Grabosky, 'The Governance of Cyberspace' in Peter Drahos (ed), *Regulatory Theory* (Australian National University Press, 2017) 535.

<sup>2</sup> Michael Salter, 'Responding to Revenge Porn: Gender, Justice and Online Legal Impunity' (Paper presented at Whose Justice? Conflicted Approaches to Crime and Conflict, University of Western Sydney, Sydney, September 27 2013) <[https://www.researchgate.net/publication/294787472\\_Responding\\_to\\_revenge\\_porn\\_Gender\\_justice\\_and\\_online\\_legal\\_impunity](https://www.researchgate.net/publication/294787472_Responding_to_revenge_porn_Gender_justice_and_online_legal_impunity)>.

<sup>3</sup> Jason Haynes, 'Legislative Approaches to Combating "Revenge Porn": A Multijurisdictional Perspective', (2017), *Statute Law Review*, 5.

consent, and the imposition of penalties for non-compliance, will serve to correct this deficit in the legal landscape. It will also distinguish Australia as a global leader in regulating cyberspace in accordance with accepted standards of behaviour. We propose this initiative consist of three facets:

- 1) A Scheme that can be invoked to compel offenders to remove non-consensually shared intimate images from the location at which they have been shared. It should be comprised of a multi-step process which escalates threat of sanction; and
- 2) A Civil Penalties Regime that works in conjunction with the multi-step mechanism to penalise offenders who refuse to remove images that lack consent; and
- 3) The empowerment of the Commissioner to compel third party hosts to remove images shared without the consent of the individual depicted if the above two points fail or are not adequate to address the complaint.

This paper will consider the above issues separately. Section A contains a basic construction of how the prohibition of non-consensual sharing of intimate images may be expressed within legislation. Section B will address how the Scheme can be used as a sword to force the removal of an image from the public forum where it has been shared. Section C will explore potential measures to penalise individuals engaging in the prohibited conduct. The efficacy of said measures will in turn present implications for their use as a deterrent. Finally, section D will consider whether there should be a legal obligation on third party hosts to remove intimate images.

## **A. Construction of the issue**

The following is a basic blueprint for the proposed Commonwealth statute, titled in this example the *Prohibition of the Non-Consensual Sharing of Intimate Images Act 2017* (Cth).

### **Part 1 – prohibited behaviour:**

- (1) 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.

(a) For the purposes of section (1), the person depicted in the image must be based in Australia at the time the image is shared; and

(b) A person who, at the time of engaging in a prohibited act per section (1), is outside of Australia, will still be liable for civil penalty, to be imposed upon their return to Australia.

(i) An image shared by a person who is outside of Australia per section (1)(b) may be forcibly removed from the location at which it has been shared where practicable.

(ii) Removal per s (1)(b)(i) may occur if it is within the capacities of the Commissioner to compel the third party hosting the image to remove it.

## **Part 2 – enforcement:**

(2) Civil penalty – to include provisions pertaining to the issue of infringement notices and enforceable undertakings

(3) Intervention order – state courts shall be granted the ability to issue an intervention order against a person who engages in prohibited behaviour per section (1) to compel that person to remove the image from the location(s) at which it has been shared.

(4) Injunction – at his/her discretion, the Commissioner may apply to a relevant court to grant an injunction requiring that the person remove the image from the location(s) at which it has been shared.

(5) Third party obligations – if, in his/her evaluation of an image shared pursuant to section (1), the Commissioner finds that its continued existence at the location(s) that it was shared undermines community standards, and its removal can only be performed by a third party, then the Commissioner can oblige that third party to do so.

(a) A failure of a third party to comply with an order made by the Commissioner under section (5) constitutes an unlawful act and renders the third party liable for sanction.

## **B. How can the Scheme be used as a sword to force the removal of non-consensually shared intimate images?**

It is our contention that the priority of the Scheme should be the prompt removal of a non-consensually shared intimate image as opposed to the punishment of offenders. That is, its principal objective should be putting an end to the harm caused by the sharing of an intimate image without consent through the issue of warnings and the escalating threat of sanction. This view is governed by the notion that ‘increasing criminalisation and penalization will not help most victims’.<sup>4</sup> Rather, seeking a remedy for the victim materially, (removal of the image) and symbolically (admissions to offending and apologies) should be the preferred strategy. This framework has both “carrot” and “stick” elements, the threat of a civil penalty or criminal sanction is the stick compelling removal of the image and the possibility of a lesser penalty incentivises the offender to acknowledge wrongdoing.

As it gathers momentum, it is our hope that knowledge of the Scheme and its accompanying Civil Penalties Regime will deter would-be offenders from the non-consensual sharing of intimate images. Deterrence theory posits that a sanction must be ‘certain, severe and swift’ to effectively discourage an individual from committing an act.<sup>5</sup> *Severity* in this context requires that prospective punishment is of a high level (with the option of mitigation through offender cooperation), *certainly* necessitates that the Commissioner is aptly resourced to ensure a high likelihood that action will be taken and *swiftness* refers to the quick despatch of a response (aligns with the primary objective of the Scheme to promote rapid removal of the image).

We recognise that a limitation of this approach is that the image may be taken up by third parties and move beyond the scope of the control of the original poster. That is, once images are shared, it is difficult to ‘ensure they are gone forever and not reposted by

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<sup>4</sup> Kathleen Daly, ‘Reconceptualising Sexual Victimisation and Justice’ in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahinda (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge, 2014) 381

<sup>5</sup> Ronald L Akers, *Criminological Theories: Introduction, Evaluation and Application* (Roxbury Publishing Company, 4<sup>th</sup> ed, 2004) 33

other...users'.<sup>6</sup> This is where the Commissioner's powers pertaining to the entities that host images are crucial.

### **1. Issue of a formal warning by the Commissioner to the distributor of the image:**

This is the first action open to the Commissioner under the Scheme. That is, after the victim, using an online portal, has outlined their complaint and provided details of the person they suspect is responsible for the non-consensual sharing of an intimate image, the Commissioner can issue that person with a formal warning to remove the image from the location(s) at which it has been shared.

#### **i) Composition of formal warning:**

This will set out the civil penalties applicable (see section 3) if the person refuses to comply within a set time frame as well as the subsequent steps in the process (outlined below) that could leave him/her liable for criminal sanction. This operates on the assumption that the offender has left a traceable digital footprint (a social media account, for example), evidence of which is ascertainable to the complainant and convertible by the Commissioner into a residential address for the purpose of sending a formal warning. In cases where the perpetrator is known to the victim, the acquisition of his/her residential address should not require a great expenditure of resources by the Commissioner. A challenge arises, however, in cases where an acquaintance of or stranger to the victim has shared an intimate image without consent. This will be subject to the capacities of the Commissioner under the Scheme. It is our view that that the Commissioner must be equipped with the ability to identify such persons to hold them to account under the Scheme.

### **2. Assessment of outcome by the Commissioner:**

#### **i) The imposition of civil penalty:**

If the image is removed within the time frame stipulated by the Commissioner the offender may receive a lesser civil penalty or avoid receiving a civil penalty. This is subject to the discretion of the Commissioner, who may impose a reduced penalty on an apologetic first-

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<sup>6</sup>Scott Stroud, 'The Dark Side of the Online Self: A Pragmatist Critique of the Growing Plague of Revenge Porn', (2014) *Journal of Mass Media Ethics* 29, 3, 171

time offender, for example. Other external factors deemed relevant by the Commissioner may also be considered.

**ii) Non-compliance and deciding whether to escalate:**

If the offender has failed to remove the image in the time stipulated by the Commissioner, the Commissioner can advise the victim to escalate proceedings in accordance with the subsequent steps in this process.

**3. Issue of an intervention/protection order or injunction by the Commissioner against the distributor of the image**

**i) Intervention/protection order:**

Victims of capacity (adulthood and requisite decision making ability), will be given the option to apply to a relevant state/territory court for an intervention/protection order that imposes a duty on the offender to remove the image. In this endeavour, the Commissioner will make available to the victim a state/territory specific step-by-step process detailing how to complete this undertaking. The proposed statute could authorise the introduction of a specific order with conditions tailored to the non-consensual sharing of intimate images, simplifying the application process and subsequent proceedings. Alternatively, this could be built into existing infrastructure. For example, the grant of a protection/intervention order under existing state and territory family violence legislation. We favour the former, however, as this delineates the non-consensual sharing of intimate images from other types of offending, ensuring that victims who do not experience this in a broader theatre of domestic violence, for example, have an avenue of recourse available to them.

In addition, it is our view that the grant of an intervention/protection order should be favoured over seeking an injunction, unless issue of an injunction is necessitated by the circumstances (see below). According to the Australian Law Reform Commission, ‘the processes for seeking a protection order...are generally quicker and cheaper than an application for an injunction’.<sup>7</sup> That is, it is less onerous for victims to seek an

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<sup>7</sup> The Australian Law Reform Commission, *Family Violence – Improving Legal Frameworks*, Consultation Paper No 9 (2010)

intervention/protection order. An added virtue is that this serves to ease the burden on the Commissioner by diverting some complaints to the judicial system.

## **ii) Injunction:**

Alternatively, in instances where an intervention/protection order is not appropriate, for example in instances where the victim does not have the capacity to act autonomously due to minority status, the Commissioner must be empowered to apply for an injunction under s 121 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) on behalf of that person.

The argument for implementing strategies that carry with them the possibility of criminal sanction is twofold. Firstly, the potential severity of the punishment is elevated, increasing the likelihood that the Scheme will operate as an effective deterrent. Secondly, victims gain valuable 'leverage' through the 'threat of criminal sanctions' that increase the likelihood of the desired outcome.<sup>8</sup>

## **4. Reassessment of outcome by the Commissioner:**

If, in his/her reassessment of the complaint, the Commissioner finds that the removal of the image has still not been achieved, Commissioner can, where practicable, compel third party hosts to ensure that this occurs.

## **C. Penalties for the non-consensual sharing of intimate images**

In a recent Australia-based study, researchers found that 70% of respondents thought that victims should know better than to send nude pictures to another person and 62% believed that the victim in instances of non-consensual sharing of intimate images was at least partly to blame.<sup>9</sup> Therefore, countering this victim-blaming mentality is of paramount importance in developing a civil regime to address the non-consensual sharing of intimate images. A civil regime that appropriately penalises individuals that engage, or are complicit, in such conduct will go some way to establishing a new social standard where blame falls on

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<sup>8</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999) 167

<sup>9</sup> Nicola Henry, Anastasia Powell and Asher Flynn, "Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse" (RMIT University, 2017).



perpetrators, rather than on victims. It will serve the dual purpose of deterring would-be offenders and preventing others from being subjected to this type of behaviour.

Due to the harmful nature of the non-consensual sharing of intimate images and the erosion of community standards and violation of an individual's autonomy inherent to this behaviour, the Scheme should take a strict liability approach to sanction. By adopting elements of fault, the regime would open itself up to defences, such as the victim's conduct (if he/she initially consented to the sharing of intimate image, for example), consequently promoting a culture of victim blaming. The Commissioner will retain powers of discretion in relation to factors deemed to be relevant, such as; whether the perpetrator is a first-time or repeat offender or the offender's age at the time the image was shared without the consent of the person depicted.

This section will discuss the practicality and limitations of utilising infringement notices and enforceable undertakings.

***(i) Infringement notices***

Infringement notices will be used as the proverbial stick, compelling offenders to remove a non-consensually shared intimate image from the location at which it has been distributed. It is our view that infringement notices should be used irrespective of irrevocable proof of fault or state of mind. Therefore, the threshold for the issuing of an infringement notice under the Scheme would be purposefully low. If a complaint is received through the online portal and can be verified, the perpetrator will receive a notification to remove the image. Non-compliance will result in the swift issuing of a pecuniary fine of a sum that reflects the seriousness of the prohibited behaviour and the harm caused, to penalise that person and deter others. This approach may be challenged by the ease at which anonymity is acquired on the internet or the use of one person's device for a prohibited act by another. However, individuals penalised under the Scheme will have the option to appeal and a chance to provide exculpatory evidence.

***(ii) Enforceable Undertakings***

Enforceable undertakings serve a restorative purpose by encouraging the perpetrator to acknowledge wrongdoing and integrating the victim into the justice process. The nature of

an enforceable undertaking (to prevent the prohibited behaviour from continuing and requiring actions to prevent future occurrence) offers benefits for both the offender and the victim by working towards an outcome that heals the hurt but is not overly punitive. A perpetrator may be required to engage in community service or programs centred on education and reform that, ideally, assist in fostering long-term change in their behaviour. The detriment of this type of enforcement measure is that it is limited by the willingness of an offender to take responsibility for their actions and adhere to the conditions of an agreement.

It is our view that an enforceable undertaking would be an appropriate penalty for individuals threatening to release the intimate image of another person without their consent. In these circumstances, because the threat has not yet eventuated, an admission of guilt coupled with an apology may be sufficient. Implicit here is the willingness of the perpetrator to abstain from carrying out the threat, an outcome that could be achieved by making him/her aware of the harsher penalties that apply, should they engage in prohibited behaviour. Thus, the use of enforceable undertakings may be appropriate as a pre-emptive method where threats to share an intimate image without the consent of the person depicted are made. However, enforceable undertakings are unlikely to be effective in compensating victims for harm already suffered.

## **D) Placing a legal obligation on content hosts to remove intimate images**

How the civil penalty regime deals with third party content hosts must also be considered. This section will specifically discuss whether there should be a legal obligation on content hosts to remove images identified by the Commissioner as requiring removal. Despite potential for censorship, placing some level of responsibility on content hosts is appropriate given the nature of the conduct and its associated harms. However, this must be coupled with a mechanism that allows for swift action by the Commissioner.

### ***(i) The shortcomings of a perpetrator focused regime***

A failure to consider the role of content hosts in the non-consensual sharing of intimate images misconstrues the nature of the conduct and key aspects of the associated harms.

Measures aimed solely at *individuals* who share intimate images are of little utility if the victim does not know the perpetrator.<sup>10</sup> Indeed, while the colloquial term ‘revenge porn’ implies that jilted ex-partners are the perpetrators of such conduct, anonymous individuals may also engage in the practice via cloud hacking or up-skirting, for example. Even in instances where the perpetrator is known to the victim, taking action against a particular individual does nothing to address the continued dissemination of an image already posted online if that image has strayed beyond the control of the original poster.<sup>11</sup>

Furthermore, directing the response exclusively at the perpetrator does not adequately capture the nature and scope of the harm caused by the non-consensual sharing of intimate images. The impact on the victim of such conduct can be severe. Victims are more likely to suffer from psychological distress (including anxiety and depression), and often report fearing for their safety.<sup>12</sup> Victims may also suffer from harassment and abuse as a result of the image being published, especially if they are women.<sup>13</sup> These harms are compounded by the continued distribution of the image by online third parties. Thus, taking action against an individual will do little to ameliorate the psychological distress and harassment experienced by victims if the image remains online. This highlights how facilitating the removal of an image from the online sphere is crucial to a comprehensive civil regime. Given the serious nature of the harm, some form of obligation on content hosts to remove the image is appropriate.

### ***(ii) Implications for freedom of expression***

Placing a legal obligation on content hosts to remove unlawful material has the potential to curb freedom of expression. The Manila Principles on Intermediary Liability highlight how ill-considered policies in this area have resulted in impermissible instances of censorship.<sup>14</sup> A

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<sup>10</sup> Nicolas Suzor, Bryony Seignior and Jennifer Singleton, ‘Non-Consensual Porn and the Responsibilities of Online Intermediaries’ (2017) 40 *Melbourne University Law Review* 1057, 1065.

<sup>11</sup> *Ibid.*

<sup>12</sup> Anastasia Powell, Asher Flynn and Nicola Henry, *The Picture of Who is Affected by ‘Revenge Porn’ is More Complex than We First Thought* (8 May 2017) The Conversation <<https://theconversation.com/the-picture-of-who-is-affected-by-revenge-porn-is-more-complex-than-we-first-thought-77155>> .

<sup>13</sup> Suzor, Seignior and Singleton, above n 12, 1059-1060.

<sup>14</sup> Electronic Frontier Foundation et al, *Manilla Principles on Intermediary Liability* (2015) [https://www.eff.org/files/2015/10/31/manila\\_principles\\_1.0.pdf](https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf).

legal obligation that is too onerous may drive content hosts to take a broad brushstroke approach to removal, resulting in the censorship of lawful material. Given that freedom of expression is a human right,<sup>15</sup> any law that potentially restricts it must be carefully considered. However, the right to freedom of expression is not absolute, and may be limited in certain circumstances.<sup>16</sup> In the context of non-consensual sharing of intimate images, the relevant expression (i.e. the intimate image) may be limited to protect the victim's right to privacy.<sup>17</sup>

Alternatively, a moral argument may be made for the curbing of freedom of expression in this context.<sup>18</sup> It is imperative that we place some level of obligation on content hosts, in order to shift the gendered 'victim-blaming' mentality embedded in dominant narratives surrounding the non-consensual sharing of intimate images. A commonly held view is that if a woman does not want an image to be disseminated online, she should not have taken the image in the first place, and is therefore to blame for any resulting harm.<sup>19</sup> Framing the issue in terms of censorship reflects this 'victim-blaming' mentality, in that it is easy to prioritise the "virtue" of freedom of expression when the harm experienced by the victims is conceived of as being due to their own recklessness. Placing an obligation on content hosts to remove intimate images will go some way to dislodging this paradigm of victim blaming.

Thus, the potential issues relating to freedom of expression are not so great to preclude placing an obligation on content hosts to remove non-consensual intimate images.

### ***(iii) Feasibility***

Moral and social arguments aside, it is necessary to consider the feasibility of placing an obligation on content hosts to remove images.

Whether this will be practically possible will depend on the onerousness of the obligation placed upon content hosts. For example, requiring content hosts to independently identify all instances of non-consensual sharing of intimate images in a timely manner, could result

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<sup>15</sup>International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

<sup>16</sup> Ibid 19(3).

<sup>17</sup> Ibid 19(3)(a); 17.

<sup>18</sup> Ibid 19(3)(b).

<sup>19</sup> Sozur, Seignior and Singleton, above n 5, 1067-1068.

in practical impossibility. As discussed above, too high a burden may have human rights implications in that it has the potential to encourage censorship by content hosts. However, as suggested by Discussion Paper, the Commissioner would be undertaking the evaluative role in relation to whether an image falls within this prohibition. This substantially reduces the weight of the obligation on content hosts. Content hosts would merely be required to comply with a directive to remove an image already deemed inappropriate. There would be no burden to monitor for prohibited content, thus fears of censorship are rendered immaterial. In weighing this relatively low burden against the serious harms associated with non-consensual sharing of intimate images, it appears that placing such an obligation on content hosts is appropriate.

While such an obligation is justifiable in this respect, whether it will in practice bring about desirable outcomes for victims must also be considered. As discussed above, the harm associated with the publication of intimate images is compounded by continued distribution online. Therefore, a desirable outcome from a victim's perspective is the removal of the relevant image without delay. This will depend on the Commissioner's ability to quickly determine whether an image falls within the prohibition. If placing such an obligation on content hosts is to be of any utility, it must occur swiftly to facilitate the efficient resolution of complaints by the Commissioner.

## **Conclusion:**

It is our view that the Federal Government take urgent action on the issue of non-consensual sharing of intimate images. This is a phenomenon that strikes right at the heart of individual privacy and autonomy, in addition to the upholding of community standards of human dignity. It is imperative that Australia acts quickly and courageously to ensure that the myriad of virtues associated with technological advancement in the contemporary world are not used to cause harm.