# Submission regarding a civil penalties regime for non-consensual sharing of intimate images from the South Eastern Centre Against Sexual Assault and Family Violence

The South Eastern Centre Against Sexual Assault (SECASA) provides sexual assault and family violence services in Victoria within the Mornington Peninsula, Frankston, Bayside, Port Phillip, Stonnington, Glen Eira and Kingston local government areas. We also work in the Greater Dandenong, Casey and Cardinia growth corridor.

Non-consensual sharing of intimate images is a growing problem that causes much distress to victims. We welcome any efforts to help send the message that it is not an acceptable behaviour. We believe that a civil penalty regime would help send this message and discourage this behaviour.

## A prohibition against sharing of intimate images

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

* This should not just be for online or electronic sharing. “relevant electronic service or social media service” does not cover sharing in other ways – eg Share the image by showing mates on a phone OR work colleagues on a work computer or printing it out to distribute or printing it in a publication such as a book or calendar (in particular via a vanity printing service). It also does not cover if you get someone else to distribute it on your behalf.
* Also this does not cover sextortion (threatening to share an image) – should add “or threatens to share” or this could be a separate offence as in Victorian law.
* This is covered well by the Victorian legislation (Summary Offences Act)  
  **Sect 41DA** - A person (A) commits an offence if A intentionally distributes an intimate image of another person (B) to a person other than B.  
  **Sect 41DB** - A person (A) commits an offence if A makes a threat to another person (B) to distribute an intimate another person (C)

**2. Should an Australian link 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?)**

* If any Australian link is needed it should only be that the subject of the image is resident or located in Australia at the time the image was taken/created. If you require the person be an Australian citizen then it is a free for all on visitors from OS.
* Given that most sites people would think to use to distribute an intimate image on are overseas hosted/based limiting this to Australia would be ridiculous.

## Civil penalty regime

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

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

* Yes. Some complaints may involve a range of offences including 'Using a carriage service for child pornography material”, “Blackmail or extortion”, “Defamation” etc. These may involve multiple jurisdictions.

**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?**

Triage process:

* Is there a threat to a child's safety or is it evidence of child sexual abuse?

If YES: Mandatory reporting to police

* In the case of a minor, parent/guardians should be notified unless such contact puts the child at further risk. Notification should be on a case by case basis in consultation with the child.

**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?**

* Yes. Giving of a fine would have less impact on this age group than a respectful relationship or SABTS program for both the offending child and their family to try to correct the anti-social behaviour.
* Parents or caregivers to be given a supervision order which would last for several months, depending upon the severity of the offence. If the child does not reoffend during this period the order is lifted. If they offend again, it becomes a criminal matter.
* A mandated restorative justice option.

**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)?**

* In some cases civil penalties would provide enough of a deterrent to discourage the behaviour in young people. Repeat offenders or severe cases should be referred to the criminal justice system.

**8. Should a hierarchy of increasing severity of penalties be established? (This could reflect the severity of the incident and harm caused, with greater penalties for ‘repeat’ offenders, or for offenders which have sought to impose additional harm by intentionally seeking to maximise the exposure of the images through various forums.)**

* Yes.

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

* The takedown of the images should be enacted as swift as possible. Victims find it extremely difficult when processes intended to address injustice are drawn out. They accept that things cannot happen immediately but when it takes 6 months and nothing appears to have happened they find that almost as distressing as the original incident.

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

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

* Yes. The Commissioner will need to have these arrangements to expedite image takedowns.

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

* Yes. If the intent is to humiliate the victim the penalties should be higher.

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

* Yes, in the case of a minor, the parents or guardians should also be able to be included. If a person uploads the image to a closed online group (with the victim’s permission) and then someone else in the group shares that image, that person should be held liable also.

**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?**

* Yes

## Information gathering powers

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

* Yes.

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

* Yes.

## Complaints process

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

* No as speed is of the essence to stop the sharing of images online. The victim does not have to establish intent. An intimate image is either there or not.
* The complete take down of an image from the internet is not possible. When the image has been shared once, there is no way of knowing whether it has been on-shared to other services.
* If the known image is removed by a separate complaint process there will not be any evidence on which to fine an offender. As the Commissioner will have arrangements with services it makes sense for the Commissioner to have the image taken down and a record made of this as evidence for the fine.
* Complaining to a host site often results in no action being taken because the host site definition of an ‘intimate image’ may well be different from what an average person would see as an intimate image and may not contravene the user rules.

**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?**

* As fast as possible. We do not think the victim should have to complain to the hosting site first. There needs to be a faster response to this than the average bureaucracy when dealing with a complaint. A 24 hour turn around should be best practice.

**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?**

* Yes

**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?**

* A fine
* Having the URL of their site blocked

### Consent

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

* Explicit verbal or written permission should be required, particularly if it is to be placed in a public forum such as on social media.

**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?)**

* If the image is shared in a different context than the consent was given, the case should be treated as if no consent has been given. eg If consent has been given for sharing on a private or closed group, sharing the image on a public forum should be treated as if no consent has been given.

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

* This issue is about not being able to cover every vulnerable group so it is more about how it gets dealt with. Some images, for instance things not up to a community standard of what is acceptable, or depicting an illegal act, should be taken down without the victim having to be the one to make the complaint. The companies who own the social media sites should be held responsible for having an environment that is unsafe for users. They are the ones who should be made to be more socially responsible. A penalty should be levied on them if they are unable to stop their users posting unacceptable material.

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

* Yes. It should be assumed that everyone wants to maintain their privacy of intimate images. The onus of consent should be on the person sharing the image to prove that consent was given.

**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?**

* Yes. Because an image can be spread so quickly, once an image is shared it is impossible to unshare it. Someone who consents then changes their mind should bear some of the responsibility for the image being ‘out there’. However, once permission has been withdrawn, all efforts should be made to remove it. This is why there should be a clear understanding of consent and what the person is consenting to before the image is shared.

### Intimate image

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

* Images of a sexual nature that the average person would consider should be kept private. These would be along the lines of the definition of pornography.

**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?**

* Yes, when the victim is identifiable.

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

* If the image is of a sexual nature and is not one that the victim would like their family, friends or work colleagues to see, then it should be considered intimate.

### Sharing

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

* Facilitating a third party to view the image.

**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.)**

* Yes. Sharing in any form, digital, physical or just showing it to others on your screen.

**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?**

* No. Showing an intimate image to only one person, such as an employer, could have devastating repercussions to the victim. If we are trying to get the message across that sharing without consent is wrong, then it should be wrong no matter if you share with one person or many people.

**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.)?**

* Being intoxicated is not a defence for committing a crime. It is not the community standard for other crimes like armed robbery. The normal issues would apply if someone is not mentally fit to plead.

### Intent to cause harm

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

* No. Sharing without consent is sharing.

**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?**

* Yes. Intent to cause harm and seriousness should be taken into account as factors to be considered by the commissioner when determining any if additional charges should be laid and in the severity of fines.

**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?**

* The likelihood of harm occurring is enough. We are trying to stop a behaviour designed to humiliate and degrade victims. They should not have to say that this has happened to them and be re-victimised in the process.

**36. Should the Commissioner give consideration to the ‘likely’ degree of harm to the victim in determining the action to take, or to the actual degree of harm that has arisen?**

### Electronic service, social media service and relevant electronic service

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

* "**carriage service** " means a **service** for carrying communications by means of guided and/or unguided electromagnetic energy. This definition on which so many laws rely is made redundant with the use of the term electromagnetic energy. It does not cover fibre optical communication or future technologies such as the use of quantum effects.
* This should not just be limited to images. Let’s say that the virtual reality suit can record having sex with a person, both their visual image and the sensory data. If someone then uploads or shares this experience without the consent of their partner for others to share, this should also be covered. Similarly with sound recordings.