



7 July 2017

The Director, Online Content
Department of Communications and the Arts
By email: onlinesafety@communications.gov.au

Dear Director,

RE: PROPOSED CIVIL PENALTIES REGIME – NON-CONSENSUAL SHARING OF INTIMATE IMAGES

1. Thank you for the opportunity to make a submission as part of the Government's consultation on a proposed civil penalties regime to deal with the non-consensual sharing of intimate images and related matters.

About WLSA

2. Women's Legal Services Australia (WLSA) is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system. We seek to promote a legal system that is safe, supportive, non discriminatory and responsive to the needs of women.
3. Our members provide free and confidential legal information, advice, referral and representation to women across Australia in relation to legal issues arising from relationship breakdown and violence against women. Our legal services are directed to vulnerable and disadvantaged women, most of whom have experienced family violence.
4. Our members' principal areas of legal service work are family violence (family violence intervention orders), family law, child protection and crimes compensation. Our members also deliver community legal education programs and workshops. Individually and together we advocate for laws that are fair for women experiencing violence and relationship breakdowns. We are informed by a feminist framework that recognises the rights of women as central.

Overview

5. The non-consensual sharing of intimate images is part of a concerning trend in which technology is used to perpetrate or facilitate abuse. We note that while abuse can be targeted against people of any gender, victims of family and/or sexual violence are very often women. This holds true with regard to the non-consensual sharing of intimate images – a crime that disproportionately skews not just toward women, but toward younger women. Whilst in our experience the impact of such behaviour is often minimised, including by law enforcement, such behaviour can have a significant impact on women, including impacting on their educational opportunities and employment.
6. WLSA's view is that a civil penalty regime is an important part of the response to this issue. Such a regime needs to be accessible and include powers which allow for quick, cheap and efficient responses, including fast take down powers to remove images and limit distribution, and effective complaint mechanisms.

7. It is WLSA's position however that any civil penalty regime must be accompanied by consistent and uniform criminal legislation enacted in each Australian State and Territory, and at a Commonwealth level, noting State and Territory legislation must address the non-consensual sharing of intimate images beyond carriage services and postal services. **We consider it of vital importance to have criminal remedies as a means of addressing this issue both in terms of deterrence and to provide access to justice for victims.**
8. WLSA believes that the non-consensual sharing of intimate images is a serious issue, and that any response should be accompanied by training and support for professionals who work closely with victims or survivors of this violence (such as social workers and domestic violence workers), as well as training for law enforcement, about the serious impact of these behaviours on victim/survivors, and the availability of any civil penalty regime that is put in place.

Framing of the prohibition

9. The discussion paper suggested framing a prohibition on the matter along the following lines:
"A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, without that other person's consent on a relevant electronic service or social media service."
10. WLSA supports the creation of a holistic regime which prohibits both electronic and nonelectronic distribution and sharing of images without consent. Images can be shared without consent via both electronic and non-electronic means, with a similar impact on a victim. Limiting the prohibition to electronic means of sharing creates a gap which needs to be addressed. We acknowledge however that Constitutional limitations restrict the Commonwealth's power in this area – allowing it to make laws in relation to carriage service providers and postal services, but not laws to address person-to-person sharing of intimate images, or leaving the image on someone's doorstep etc. This highlights the importance of **uniform State/Territory, as well as Commonwealth, responses in this area.**
11. WLSA is also cognisant of the needs for framing of the prohibition such that it provides for changes in technology into the future. It is often difficult for the law to keep up with the shifting nature of, and innovations in, technology. The prohibition needs to be framed with this in mind to ensure, as much as it is possible to do so, that it covers the non-consensual sharing of intimate images via technological means which cannot at present be accounted for.

Civil Penalty Regime

12. The Discussion Paper highlights a number of potential enforcement measures that could be included in a civil penalty regime to combat the non-consensual sharing of intimate images. In WLSA's view the most important power to be included in any such regime are **fast take down powers** – whomever is administering the regime needs to be able to act swiftly to remove images and prevent their further distribution. The process for these powers to be exercised should be clear, simple and accessible for victims seeking such assistance.
13. WLSA also supports the inclusion of other enforcement mechanisms including injunctive powers, such as take down or deliver up, destruction or removal orders; enforceable undertakings; and powers to order an apology.
14. Whilst outside of the remit of this discussion paper, WLSA also supports the establishment of a statutory cause of action for serious invasions of privacy. As the nature of technology facilitated stalking and abuse often transcends State and Territory borders, we recommend well considered uniform laws be put in place on this issue at state/territory and federal levels.

Complaints process

15. WLSA supports the creation of a **just, quick, cheap and accessible** complaints mechanism for victims.
16. Any complaints mechanism or pathway that is created, whether by direct complaints to the Commissioner or use of existing complaint mechanisms as a first step, must ensure a fast response time and a process geared towards effective and swift application of enforcement powers to remove and prevent further distribution of images. However, we do not believe there should be a requirement to use existing compliant mechanisms before making a complaint to the Commissioner.
17. The complaint process must also be promoted to the Australian community, and information and resources made available broadly to ensure victims, support workers, law enforcement and others are aware of the process
18. We envisage as part of any complaints process, the Commissioner will become aware of serious criminal offences, and/or victims who require further legal support and advice in relation to the impact of an incident of non-consensual sharing of images. Any complaints process should provide effective referrals to accessible and affordable legal services with the skills and expertise to advise victims in these situations. WLSA recommends that funding should be provided to existing community legal services and/or legal aid commissions to ensure such services are available to victims.

Definitions *Consent*

19. WLSA strongly believes that consent is at the core of the issues raised in the Discussion Paper.
20. Consent should be given freely and voluntarily, and it should be explicitly stated in the legislation that consent to make the image of itself does not include consent to distribute an image. Separate consent should be required for the particular sharing of the intimate image each particular time and in the manner used.
21. We refer the Government to the NSW Director of Public Prosecutions (NSW DPP) useful discussion of consent in relation to the non-consensual sharing of images in its submission to the Legal and Constitutional Affairs Reference Committee on the Phenomenon colloquially referred to as 'revenge porn'.¹ We agree with the NSW DPP that there has to be **explicit and expressed consent** for the sharing of images. The onus should be upon the offender to prove such consent was given.
22. WLSA also recommends that consent given within a relationship is considered to be terminated upon the conclusion of the relationship.
23. We recommend consistency in the approach to consent. Given generally a person 16 years or older can consent to sexual intercourse in our view they should be able to consent to the taking and sharing of an intimate image, provided consent is freely and voluntarily given. In relation to children who share intimate images without consent, WLSA is of the view that any response should be consistent with the principles underpinned by the Convention on the Rights of the Child.² *Intimate image*
24. The definition of 'intimate image' should be worded so as not to create a barrier or significant hurdle to accessing the civil penalty regime or complaints process. In WLSA's view, intimate images should include still images or video and incorporate the following:

¹ NSW Director of Public Prosecutions, *Submission to the Legal and Constitutional Affairs References Committee on the Phenomenon colloquially referred to as 'Revenge Porn'*, January 2016 at 4 (accessed at : <http://www.aph.gov.au/DocumentStore.ashx?id=852e7624-cca2-4562-9f97-cb6fbee0ae7&subId=407845>)

² *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990.

- a. Images depicting a person engaged in, or appearing to be engaged in, sexual activity or a sexual pose, either alone or in the presence of others;
 - b. Images depicting a person in a sexual context;
 - c. Images depicting a person's genitalia or anal region;
 - d. Images depicting the breasts of a female or transgender, gender diverse or intersex person;
 - e. Images which a reasonable person with the same relevant characteristics as the subject of such images would expect to be kept private.
25. Any definition of intimate images should also include images which have been altered or doctored, e.g., in which a victim's head has been digitally imposed onto the body of a naked woman.
26. Intimate images should also include images that reveal a person in a way that is inconsistent with their cultural context. For example, as image of a person being depicted without a head covering where a head covering is of cultural or religious importance to that person.
27. WLSA also wishes to draw attention to the impact on victims of threats to share intimate images without consent, where the image does not in fact exist or the victim has not seen the image to know whether it in fact exists. In many cases victims do not know how to locate images. It is important that it does not fall to the victim to have to locate the images but rather they are assisted and supported in this, for example, by the Office of the eSafety Commissioner.
28. This also highlights the need for both civil and criminal remedies. As highlighted in the *National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images*,³ threats to distribute intimate images without consent should be an offence irrespective of whether or not the intimate image exists.

Sharing

29. As outlined above, WLSA is of the view that the concept of 'sharing' or 'distribution' of images should be defined broadly to incorporate traditional, existing and emergent technologies.
30. Ideally the sharing of images by non-electronic means, such as person to person sharing, or leaving an intimate image on someone's doorstep etc, would also be covered under such a scheme. Noting however the Constitutional limitations outlined above WLSA emphasises the need for a cross-jurisdictional response to ensure a holistic approach to this issue for victims and the community.
31. The Discussion paper refers to the use of definitions in the *Enhancing Online Safety for Children Act 2015* as a basis for defining terms including 'electronic service', 'social media service' and 'relevant electronic service' in the new prohibition regarding the non-consensual sharing of intimate images. We note however that the definition of "relevant electronic service" under that Act does not seem to account for the sharing of images via Bluetooth, nor via "bumping" or "beaming" images from one phone to another (this is done by tapping/holding two phones together, and may be facilitated through a specially designed app).

Intent to cause harm

32. WLSA is strongly of the view that absence of consent should be sufficient to give rise to the prohibition, and proof of 'actual harm' to the victim should not be required in order for a victim to access the penalties regime or complaints process, nor to empower the Commissioner (or

³ Law, Crime and Community Safety Council, *National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images*, 2010 (accessed at <https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Documents/National-statement-of-principlescriminalisatio-n-non-consensual-sharing-intimate-images.PDF>)

other relevant decision-maker) to take action to remove images or impose a penalty on the perpetrator.

33. If a victim is able and willing to engage in further evidence gathering to establish 'seriousness' or aggravated nature of the behavior, or that is caused harm, it may be appropriate to have such factors taken into account by the Commissioner in determining what action to take in these circumstances. Factors including where there has been multiple incidents of sharing, where harm can be demonstrated, or where there is a power differential between the perpetrator and victim may be relevant to consider in this context.
34. Such an approach should not however prevent victims unable to demonstrate these 'aggravating' or 'seriousness' factors from obtaining assistance under the type of regime being considered by the Department. As outlined above, in WLSA's view, the key issue in this area is the question of explicit and expressed consent, and when consent to share images is absent, victims must have access to quick, accessible and effective mechanisms to minimize harm, and ensure access to justice.
35. Thank you for the opportunity to make a submission to this consultation. Please do not hesitate to contact WLSA on the details below should you wish to discuss our submission further.

Angela Lauman

National Law Reform Coordinator

Women's Legal Services Australia

GPO Box 1726, Canberra City, ACT 2601

[REDACTED]

[REDACTED]

www.wlsa.org.au