

7 July 2017

The Director, Online Content Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

By email: onlinesafety@communications.gov.au

Dear Director,

Civil remedies regime for non-consensual sharing of intimate images

1. Women's Legal Service NSW (WLS NSW) thanks the Department of Communications and the Arts for the opportunity to comment on the Civil remedies regime for non-consensual sharing of intimate images discussion paper.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

Overview

3. Over the past few years we have seen a significant increase in technology-facilitated stalking and abuse, that is, the use of technology, such as the internet, social media, mobile phones, computers, and surveillance devices, to stalk and perpetrate abuse on a person. In particular, we are seeing a concerning trend of technology being regularly used against women by perpetrators as a tactic within a wider context of domestic violence, including the non-consensual sharing of intimate sexual images.
4. We note views are not being sought on the effectiveness or operation of existing criminal offences with regards to the making and sharing of intimate images without consent. However, we believe it is important to highlight that both criminal sanctions and civil remedies are required. Criminal remedies play both an important educative and deterrence role and will send a key message to the community that such behaviour is not acceptable.



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5. We commend the recent introduction of the *Crimes Amendment (Intimate Images) Act 2017 (NSW)*. Consistent and uniform criminal sanctions are required across state and territory jurisdictions and need to be complemented by additional commonwealth criminal sanctions to ensure there are adequate criminal sanctions for non-consensual sharing of intimate images irrespective of the manner in which the image is shared.
6. We note and welcome the National Statement of principles relating to the criminalisation of the non-consensual sharing of intimate images produced by the Law, Crime and Community Safety Council.

A prohibition against sharing of intimate images

7. The Discussion Paper suggests a prohibition could be framed as follows:

'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'.

8. We support a prohibition against non-consensual sharing of intimate images which includes the behaviour of the person sharing the intimate image and their causing the image to be shared.
9. We acknowledge the constitutional limitations such that the Commonwealth can make laws relating to carriage service providers and postal services. To the extent the Commonwealth is able to legislate we recommend the means of distribution not be limited to the digital space.
10. This highlights again the need for both criminal sanctions and civil remedies across all jurisdictions.
11. It is also important the prohibition be framed in a way that will respond to emerging technologies.

Civil penalty regime & complaints process

12. We are open to the range of remedies and enforcement measures outlined in the paper: civil penalties (including scaled points for first time offenders to repeat offenders); enforceable undertakings; injunctions; infringement notices; formal warnings; take down notices; and other actions that the Commissioner thinks appropriate.
13. A quick and accessible take down mechanism is particularly important with enforcement mechanisms to ensure compliance. Penalties should apply to individuals who share intimate image without consent and do not comply with a take down notice in a timely manner, including third parties, as well as to content hosts.
14. Given the speed with which intimate images can be shared without consent it is of vital importance that take down notices be issued quickly and require a quick response.

15. We welcome social media services establishing or building upon their complaint schemes to ensure easy access and a quick response. However, victims should not be required to lodge a complaint with sites that operate established complaints mechanisms prior to lodging a complaint with the eSafety Commissioner. Such complaint mechanisms might not be clear or easily accessible and it places the burden on the victim to locate all the places where the image has been shared and make a complaint to each site. This can be time consuming and distressing for the victim and the victim might not know how to locate the images.
16. As part of the process of lodging a complaint with the eSafety Commissioner, the Office of the eSafety Commissioner should assist the victim to search for and locate the images when relevant and issue take down notices to individuals and content hosts.
17. It is important that any new complaints process be well promoted across Australia and that information and resources be widely available in a range of community languages, in easy English and in a range of accessible formats. A Community Engagement strategy will be of vital importance to ensure victims, support services, community organisations, law enforcement and others are aware of the new complaints process, including how to access it and what happens once a complaint is lodged. Keeping complainants informed of the progress of their matter will also be important.
18. During the complaints process other legal needs may be identified, including criminal matters. It is important that adequate support is provided to respond to this. Adequate additional funding for legal assistance services to provide this support must be considered.
19. To increase access to a take down remedy, we recommend a take down power also be available in criminal proceedings in all jurisdictions¹ and in apprehended violence order proceedings in state and territory jurisdictions. A contravention of the order should be a criminal offence.²

Definition of terms

Consent

20. Consent should be defined. Consent should be given freely and voluntarily.
21. As we have previously argued, it should be explicitly stated in legislation that consent to make the image of itself does not include consent to distribute an image. Separate consent is required for each distribution. Further, as stated in our evidence before the Legal and Constitutional Affairs Reference Committee on 18 February 2017, we agree with the views of the Office of the NSW Director of Public Prosecutions (ODPP) in its submission to that inquiry that there be "explicit and expressed consent". We submit explicit and expressed consent be required for the sharing of that particular image at that

¹ See, for example, s91S *Crimes Amendment (Intimate Images) Act 2017 (NSW)*

² Ibid.

particular time and support the ODPP position that the onus should be on the person sharing the image to prove such consent was given.

22. We recommend consent to share intimate images given within a relationship is considered to be terminated upon the end of the relationship.
23. We recommend consistency in the approach to consent. Given that generally a person 16 years and older can consent to sexual intercourse, we submit they should be able to consent to the taking and sharing of an intimate image, provided consent is freely and voluntarily given.
24. Where a minor is the perpetrator of non-consensual sharing of intimate images the response should be consistent with the *Convention on the Rights of the Child*.

Intimate image

25. Intimate images should include a still or moving image, whether altered or not.
26. We now live in a digital age where electronic devices have built in editing functions as well as the wide availability of Apps, software and programs for images to be altered and edited with incredible ease. A layperson now has at their fingertips the ability to edit an image and make it look convincing and as real as if professionally done. Intimate images should therefore include images that may have been doctored, for example, a victim's head photo-shopped onto an image of a naked woman.
27. Drawing on Victoria, South Australia and NSW definitions in criminal law and the Criminal Code Amendment (Private Sexual Material) Bill 2015, intimate images should include:
 - 27.1 images of a person who is engaged in, or appears to be engaged in, a sexual pose, sexual activity or in a context that is sexual of a kind not ordinarily done in public, whether alone or in the presence of others; images of a person in a state of undress; images of a person engaged in any other like activity;
 - 27.2 images of a person's genital area or anal area, whether bare or covered by underwear;
 - 27.3 images of the breasts of a female or a transgender, gender diverse or intersex person;
 - 27.4 images that reveal a person in a way that is inconsistent with their cultural context. For example, an image of a person being depicted without a head covering where a head covering is of cultural or religious importance to the person.

in circumstances in which a reasonable person with the same relevant characteristics as the subject of such images would expect to be kept private.

Sharing

28. It is important that sharing is broadly defined and is able to capture emerging technologies.
29. To the extent possible within constitutional limitations, it should extend beyond the digital space and should also capture the showing of an image. Constitutional limitations again highlight the need for both criminal and civil remedies across state/territory and federal jurisdictions.
30. In determining whether a person had the mens rea for an offence of sexual assault, intoxication, if self-induced, cannot be taken into account.³ Self-induced intoxication should also not be able to be taken into account in a civil remedies regime.

Intent to cause harm

31. In our submissions to earlier inquiries we have supported a harm element to an offence of non-consensual making and/or sharing of intimate images. As stated in our evidence before the Legal and Constitutional Affairs Reference Committee on 18 February 2017: *"On reflection, we now hold the view that absence of consent should be sufficient. We see consent as the core issue"*.
32. We do not want a harm element to impede access to a remedy.
33. It is also possible to have a two-tiered civil penalty regime.
34. The base tier could be activated where there is an absence of consent with respect to the sharing of intimate images.
35. If a victim is able and willing to engage in further evidence gathering to establish the non-consensual sharing was of an aggravated nature, or that it caused harm, victims should be able to elect to engage in a supplementary process in which the gravity of harm could be quantified and result in harsher penalties.
36. The remedy at either level must include take down notices and consequences if these are not complied with in a timely manner.
37. It is also important that second and subsequent instances of sharing of intimate images without consent carry a higher maximum penalty than the first instance. This increase in penalty should occur regardless of whether the non-consensual sharing is perpetrated against the same person or a different person.
38. Similarly, maximum penalties should be harsher where content hosts repeatedly fail to comply with take down notices in a timely manner.

³ *R v Gulliford* (2004) 148 A Crim R 558 at [127]. *Section 428D(i) Crimes Act 1900 (NSW)*

Other issues

39. We note that the sharing of intimate images often takes place in private online groups, such as invitation-only Facebook groups. Photos or videos posted in these groups are occasionally shared or posted again more publicly by unrelated people with the purpose of drawing attention to and condemning the initial non-consensual sharing, and of the type of behaviour occurring in the private group. These subsequent posters will usually de-identify the victim of the original post, but often the perpetrator remains identifiable. In circumstances such as this, where a version of a post is shared for the purposes of exposing perpetrator behaviour, it would be undesirable for those subsequent sharers to be liable under the proposed prohibition. Consideration should be given to a public interest defence for circumstances such as this.
40. Intent could be relevant to a public interest defence. Intent would otherwise be irrelevant.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Helen Campbell OAM
Executive Officer