



New South Wales
Council for Civil Liberties

**NSW Council for Civil Liberties
SUBMISSION**

**Civil penalties regime for the
non-consensual sharing of
intimate images**

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Introductory Comments

The New South Wales Council for Civil Liberties (CCL) is pleased to have the opportunity to make a submission to the Department of Communication and the Arts on a civil penalties regime for non-consensual sharing of intimate images.

CCL supports a statutory prohibition at Commonwealth level of the non-consensual sharing of intimate images. We refer to the CCLs submission to NSW Legislative Council on Law and Justice Inquiry into remedies for the serious invasion of privacy in New South Wales in 2015. In that submission comments were made in regard to the best approach in dealing with “revenge porn” and that any criminal offences should not preclude civil remedies being made available to victims of those crimes. It is the view of the CCL that the non-consensual sharing of images is a privacy issue in which experiences deemed private are distributed to the public, the victim’s family, work mates, employer or friends. Harm, humiliation and harassment of victims, through the actual or threat of non-consensual sharing of such images, has led to suicide in some cases.

In summary, the CCL position is that:

- The Commissioner appointed under the Enhancing Online Safety for Children Act 2015 (Cth) (EOSC Act) should be empowered to issue take down notices for non-consensually shared intimate images. Other remedies such as enforceable undertakings, injunctions and site blocking should be used to complement a complaints system similar to that currently existing in the EOSC Act. These actions ensure that relief can be obtained by victims though they may lack the financial means to apply for relief through the courts.
- The suggested prohibited behaviour should include the “threat” to share an intimate image. It is appropriate that the prohibition does not distinguish between whether the image was originally consented to or not. It does not, therefore, matter if the image was a “selfie” or taken without a person’s knowledge. It is appropriate that the prohibition does not distinguish between images taken in private or public, permitting capture, for example, of sharing of images of sexual assault at a party. Internet service and content providers need to be more proactive in ensuring that consent to uploading of sexually explicit photos is obtained by the subject of an image, prior to posting.
- The definitions of intimate image, sharing and electronic service should be widened.
- There should be a balance of interests and the defences of public interest and consent should be available.

Response to Issues for Consideration

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

Yes. If the aim is to deter, prevent and mitigate harm to victims then the prohibition should include a threat to share intimate images. The threat of distribution of intimate images to the victim’s family, work mates or to the public generally is often used to harass and control them.¹ The threat is often

¹ Henry, N. and Powell, A. (2015) Beyond the ‘sext’: technology-facilitated sexual violence and harassment against adult women *Australian & New Zealand Journal of Criminology* Vol 48 (1) 104-118 at p.113

implied by conduct (e.g. the act of simply sending the picture to the victim), as well as explicit² and is often acted upon.³ Distress and harm caused by threats to share non-consensually are as great as actual sharing. The Summary Offences Act 1966 (Vic) makes it a criminal offence to maliciously distribute, or threaten to distribute, intimate images without consent.⁴ South Australia has also now extended its Summary Offences Act⁵ to include threats to distribute invasive images of a person.

Threats to distribute images should include images which may not actually exist.⁶

Sharing on an electronic service or social media service is too narrow to capture many forms of distribution. The forms of sharing should be expanded increase the type of internet services affected and to include low and no tech forms of sharing, like mail and manually distribution.

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)?

Yes, an Australian link should be included. The Commissioner should be able to take action overseas to investigate complaints. The EOOSC Act extends to every external Territory and outside Australia.

The Spam Act doesn't capture the situation where an individual might distribute images from overseas. The Australian link is more comprehensive in, for example, the Australian Privacy Principles.⁷

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

The CCL supports the use of penalties existing in the EOOSC Act. These include enforceable undertakings, particularly relevant where there is a threat of sharing, and injunctions sought by the Commissioner when a take down notice is ignored. End user notices may be issued to those that post material, including web sites, which require the end user to remove material.

Take down notices offer speedy removal of images from the internet. Like online copyright infringement legislation, take down should be the immediate response of the service provider. The existing two-tiered scheme in the EOOSC Act encourages large scale social media sites to implement an effective complaints systems and cooperate with the Commissioner. The cooperative model is also found in the New Zealand civil enforcement regime.⁸

² Legal Aid NSW (2016) The sharing of images without consent-‘Revenge porn’ *Submission to the Department of Justice* p.10

³ *ibid* p.9

⁴ Summary Offences Act 1966 (Vic) ss41DA and S41DB

⁵ Summary Offences Act 1953 (SA) s26D

⁶ Henry, N. Revenge porn: Do Australian laws go far enough? <https://nest.latrobe/revenge-porn-do-australian-laws-go-far-enough/>

⁷ Privacy Act 1988 (Cth) s5B

⁸ Harmful Digital Communication Act 2015 (NZ)

Further measures could require the suspension or deletion of user accounts that upload non-consensual images⁹ with restrictions placed on the use of a computer or the internet by a perpetrator, as in the Canadian Criminal Code.

Website hosts should also be obliged to disclose the identity of a perpetrator who non-consensually shares intimate images¹⁰ and the publication of the name of the person in the image,¹¹ should be prohibited where relevant.

The Commissioner should be able to seek such other orders as reasonably appropriate in the circumstances.

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

Yes. The Commissioner should report unlawful activity to law enforcement agencies, for example, when a serious sexual assault has occurred.

The EOOSC Act already permits the sharing of information in certain circumstances.¹² In particular, the Commissioner is permitted to disclose information, to the Australian Federal Police; the Director of Public Prosecutions; an authority of a State or Territory responsible for enforcing one or more laws of the State or Territory and an authority of a foreign country, responsible for regulating matters relating to the capacity of children.¹³

5 What triaging processes should be implemented by the Commissioner for the handling of complaints? For example, if an intimate picture is of a minor a person under the age of 18, should the Commissioner be required to notify police and /or parents/guardians of the minor? Should there be any circumstances in which the minor should have the option to request that police or family is not notified?

A range of supports should be available to assist a victim to have their intimate images removed, to facilitate resolution of a dispute and provide information about legal remedies and protections.

In line with various privacy guidelines, the Commissioner should be able to exchange information in certain circumstances with other prescribed bodies, such as law enforcement agencies. The Commissioner should report unlawful activity to law enforcement agencies, for example, when a serious sexual assault has occurred. The EOOSC Act already permits the sharing of information in certain circumstances.¹⁴

⁹ Otero, D. (2016) Confronting non-consensual pornography with federal criminalization and a “Notice-and-takedown” provision *University of Miami Law Review* Vol 70, 585 at p12

¹⁰ Dickson, A (2016) ‘Revenge Porn’: A victim focused response *UniSA Student Law Review* Vol.2 pp42-69 at p51

¹¹ The Intimate Image Protection Act, 2015 CCSMc187 (Manitoba)

¹² EOOSC Act ss75-86

¹³ EOOSC Act s80

¹⁴ EOOSC Act ss75-86

This response needs to be balanced with the risk that the minor won't report the intimate images if their parents or guardians are informed¹⁵ or information is supplied to police which punish the perpetrator excessively.¹⁶ This is the reason that threats to share can be so damaging.

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. The EOOSC Act already has the power to investigate complaints about other illegal content, hosted online including the sharing of sexual images of Australian children.¹⁷

Minors don't have the same capacity to appreciate the impact of their actions.¹⁸ There is significantly more potential for them to misuse digital technology to invade another's privacy.¹⁹

Where the situation involves the consensual exchange of distribution of an image of someone who is under 16, by a person over 18, it becomes a question of whether the minor's consent is valid. CCL supports the view that consent cannot be given by a child under 16 but an age consent defence should be available if a child under 16 is not more than two years younger than the perpetrator.²⁰ Consideration should also be given to the circumstances of the relationship, the maturity of the parties and whether the older person is in a position of power to the younger person.

CCL supports the position presented by the Advocate for Children and Young People (ACYP) that there should be lesser penalties for minors who offend, those who act without malice and those who take steps to mitigate harm on realising the consequences of their actions.²¹

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)?

The response needs to be balanced with the risk that the minor won't report the intimate images if their parents or guardians are informed or information is supplied to police which punish the perpetrator excessively. Consideration should also be given to the circumstances of the relationship and the maturity of the parties.

¹⁵ Victims of different cultural or religious groups are also reluctant to report the non-consensual sharing of intimate images. Henry, N. Revenge porn: Do Australian laws go far enough? <https://nest.latrobe/revenge-porn-do-australian-laws-go-far-enough/>

¹⁶ Advocate for Children and Young People (ACYP) (2016) Submission on the sharing of intimate images without consent- 'revenge porn' at p 13; Henry, N. and Powell, A. (2015) Beyond the 'sext': technology-facilitated sexual violence and harassment against adult women *Australian & New Zealand Journal of Criminology* Vol 48 (1) 104-118 at p110

¹⁷ EOOSC Act s15(1)(a)(ii)

¹⁸ Legal Aid NSW (2016) The sharing of images without consent- 'Revenge porn' *Submission to the Department of Justice* p.12

¹⁹ Australian Law Reform Commission (ALRC) (2014) Serious invasions of Privacy in the Digital Era *ALRC Report 123* at p211

²⁰ Legal Aid NSW (2016) The sharing of images without consent- 'Revenge porn' *Submission to the Department of Justice* p.12

²¹ Advocate for Children and Young People (ACYP) (2016) Submission on the sharing of intimate images without consent- 'revenge porn' at p3

CCL therefore supports the position that there should be lesser penalties for minors who offend. The imposition of fines on minors should take into account their capacity to pay.

Sharing of intimate images may be serious without necessarily being harmful to the victim, for example, when sharing is threatened. The degree of the harm likely to be caused, and the victim's reasonable expectation of privacy, may be considered as an element of the seriousness of the breach of privacy.²²

The perpetrator's voluntary removal of images should be a mitigating factor in sentencing.

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. CCL believes that there should be lesser penalties for minors who offend, those who act without malice and those who take steps to mitigate harm on realising the consequences of their actions. The degree of the harm likely to be caused, and the victim's reasonable expectation of privacy, should be considered.

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

No. The immediate response will be the same, that is, the removal of offending material in a timely manner.

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

Removal of material is the most immediate and appropriate remedy. The use of take down notices is supported by CCL. An online provider or individual controlling its own website must remove or take down specific content or preferably seek consent of the subject of the intimate image before uploading of the image.²³ The Copyright Act, for example, empowers a court to order the destruction of material that violates copyright.²⁴

Site blocking is another option. The Copyright Act also provides the Federal Court with power to order a carriage service provider to block access to a foreign website that has the primary purpose to infringe copyright.²⁵

Joint action between the Commissioner and internet firms could encourage the use and development of other technological tools. Algorithms that recognise sexual images of children are already used to clear child pornography from internet platforms. Software is presently being

²² Australian Law Reform Commission (ALRC) (2014) *Serious invasions of Privacy in the Digital Era ALRC Report 123* at p135

²³ Legal Aid NSW (2016) *The sharing of images without consent- 'Revenge porn' Submission to the Department of Justice* p.14

²⁴ Copyright Act 1968 as amended by the Copyright Amendment (Online Infringement) Act (Cth) 2015, s.133

²⁵ *Ibid* s115A

developed to identify and remove terrorist content by the tagging of inappropriate material, which can then be easily deleted by others.²⁶

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

Yes. Though, the EOCS Act complaints scheme may not capture small scale media sites or other web sites that host revenge pornography.²⁷ The benefit of the scheme is that once the office proceeds with a complaint it takes control over the removal of the material. The office doesn't require complainants to make statements to police or to obtain a court order before action can be taken.

An expansion of the cooperative arrangement should ensure that the onus is on the social media service or website to take steps to verify that the intimate image is being distributed with the subject's consent. It is reasonable for communities to be more demanding of the standards of internet providers and hosts. Websites such as Reddit have banned posting of sexually explicit images without the subject's consent.²⁸ The use of an affirmative showing of consent by the service provider might be linked to safe harbor provisions.²⁹

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

Yes. Consideration should be given as to whether the image sharer intentionally engaged in non-consensual sharing conduct. CCL believes that the perpetrators behaviour against community standards should be assessed as well as considering the recklessness or intent in causing harm to the victim.³⁰

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

Yes. For example, the Canadian Online Crimes Act 2014 makes it an offence for anyone to knowingly publish, distribute, transmit, sell, make available or advertise an intimate image of a person, without their consent. This means that those who repost or reshare non-consensual images knowingly or recklessly, can be the subject of enforcement action.³¹

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?

²⁶ Economist (June 10-16 2017) Fighting the cyber-jihadists *The Economist* p.

²⁷ Dickson, A (2016) 'Revenge Porn': A victim focused response *UniSA Student Law Review* Vol.2 pp42-69 at p61

²⁸ Henry, N. and Powell, A. (2016) Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law *Social & legal Studies* Vol 25 (4)397-418 at p404

²⁹ Otero, D. (2016) Confronting non-consensual pornography with federal criminalization and a "Notice-and-takedown" provision *University of Miami Law Review* Vol 70, 585 p12

³⁰ Advocate for Children and Young People (ACYP) (2016) Submission on the sharing of intimate images without consent- 'revenge porn' at pp8 & 9

³¹ Henry, N. and Powell, A. (2016) Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law *Social & legal Studies* Vol 25 (4)397-418 at p403

Yes. For example, the Copyright Act provides the Federal Court with power to order a carriage service provider to block access to a foreign website that has the primary purpose to infringe copyright.

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

Yes. CCL supports the use of information gathering powers similar to those under the Telecommunications Act 1997 (Cth).

Such further powers may permit, for example, the tracking of transmission data, individuals or things, subject to the threshold of reasonable grounds to believe that an offence has or will be committed.³²

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

Yes. CCL supports the use of search warrant powers authorising the obtaining of transmission data if there are reasonable grounds to believe that an offence has or will be committed.³³

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

No. Minors or vulnerable persons may not be in a position to use established complaint processes without the intervention of the Commissioner.

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?*

The EOOSC Act provides that a complaint can only be made to the Commissioner if a complaint has been made to the relevant internet server. The Commissioner will proceed with the case if the server has not removed the material within 48 hours of the original complaint. This seems a reasonable maximum length of time to wait.

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. Like online copyright infringement legislation, take down should be the immediate response of the service provider or content host. An online provider or individual controlling its own website should have a legal obligation to remove or take down specific content.

³² Canadian Criminal Code (Protecting Canadians from Online Crime Act) s.492.1. The code refers to reasonable grounds to suspect.

³³ Ibid s.492.2. The code refers to reasonable grounds to suspect.

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?

The commissioner should be able to seek an injunction to restrain an anticipated or continuing breach. Similar enforcement measures and monetary penalties that apply under the EOOSC Act could be applied.

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

There should be a broad definition of consent as free agreement. Consent may be implied or express. CCL agrees that it should be a matter for the perpetrator to establish that the victim/complainant consented to the sharing of the intimate image.

Minors lack the capacity to consent to sexual assault, as is the case when a person is unconscious, asleep, or because they have been subject to physical or mental threats.³⁴ These should also therefore negate consent in the case of distribution of intimate images.³⁵

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?)

Provided that the consent was given in the reasonable expectation of privacy (whether that be with one other person, a small group of people or for one particular purpose) cases should be treated the same. For example consent to share an intimate image in a medical context is not consenting to posting online.

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

Yes. As in the case of minors, vulnerable people lack the capacity to consent to, for example, sexual assault.

“Vulnerable person” means a child or a cognitively impaired person in the Criminal Procedure Act 1986 (NSW).

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

Yes. CCL believes that it should be a matter for the perpetrator to establish that the victim/complainant consented to the sharing of the intimate image.

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?

³⁴ NSW Crimes Act 1900 s61HA

³⁵ Legal Aid NSW (2016) The sharing of images without consent-‘Revenge porn’ *Submission to the Department of Justice* p11

CCL supports the ALRC and Legal Aid NSW³⁶ positions that where consent becomes contentious, it should be determined on a case by case basis. An example, might be where consent to share becomes negated because it is gained through a controlling or abusive relationship.

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

CCL agrees with the range of behaviours encompassing intimate images, considered by the Senate Legal and Constitutional Affairs Reference Committee.³⁷ Different jurisdictions in Australia use a range of definitions for “intimate images.”

CCL supports the view that the definition should also include the appearance or “the apparent engagement in a sexual pose or sexual activity”.³⁸ In Victoria reference is made to “a person in a manner or content that is sexual”.³⁹ The law should take into account the nature and content of the image.⁴⁰

The definition should not just include an image that is sexually explicit but may also depict a person in semi undress.⁴¹ Several US states are amending their privacy statutes to address the current trend of upskirting, or filming up a woman’s dress and sharing the images.⁴² The NSW Crimes Act refers to private parts as “bare as well as covered by underwear” and private acts which include being “in a state of undress” in circumstances where “a reasonable person would reasonably expect to be afforded privacy”.⁴³ The intimate image would include the situation when the victim is completely clothed but performing oral sex on someone.

Reference to “breasts” should also be to the breasts of a post-pubescent female, transgender or intersex person who identifies as female, whether covered by underwear or bare.⁴⁴

The prohibition should apply whether the intimate images exist or not. The threat by an ex-partner of possible intimate images is real, regardless of whether the images actually exist.

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. The prohibition should cover digitally manipulated or created images but only if the victim is readily identifiable, though this may be by text. The definition should not be so broad as to include drawings.⁴⁵

³⁶ Ibid p8

³⁷ Inquiry into the *Phenomenon colloquially referred to as ‘revenge porn’*

³⁸ Legal Aid NSW (2016) The sharing of images without consent-‘Revenge porn’ *Submission to the Department of Justice* p.6; Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth) s474.24 D(a)(i)

³⁹ Summary Offences Act 1966 (Vic) s40

⁴⁰ Henry, N. and Powell, A. (2016) Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law *Social & legal Studies* Vol 25 (4)397-418 at p. 402

⁴¹ Evidence of Henry, N., Powell, A. and Flynn, A. (2016) in Remedies for the serious invasion of privacy in New South Wales *Standing Committee on Law and Justice Report*

⁴² Griffith, V.N. (2016) Smartphones, nude snaps, and legal loopholes: Why Pennsylvania needs to amend its revenge porn statute *University of Pittsburgh Journal of Technology Law and Policy* Vol.16,135 at p.5

⁴³ NSW Crimes Act 1900 s91I; Also Summary Offences Act 1953 (SA) s26A

⁴⁴ Crimes Act 1900 (ACT) s 61B(10); also Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth) s474.24 D(a)(iii)-(iv)

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

In Victoria it is an offence to distribute intimate images without consent “where the distribution of the image is contrary to community standards of acceptable conduct”.⁴⁶ In this sense, community standards are a measure of the expectation of privacy to be attached to the intimate image. The Act states that, in deciding if something is an intimate image, community standards would be taken into account having regard to the nature and context of the image, the circumstances of its creation and distribution and the age, intellectual ability, vulnerability or other relevant circumstances, including the degree of privacy affected.⁴⁷

Penalties should take into account the degree to which the sharing of images violates the victim’s community’s standards of acceptable conduct.⁴⁸

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

CCL favours the definition of sharing, in s40 of the Victorian Summary Offences Act, for distribute, which includes “publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not; and make available for access by any other person, whether by a particular person or not.”

The prohibition should capture all ways in which an intimate image can be shared, either through physical delivery, making available, social networking, email, publishing, or word of mouth advertising. Therefore, showing a video or photo on one’s mobile phone to another person, would be captured.⁴⁹

In Victoria, distribution is also linked to “community standards of acceptable conduct.”⁵⁰ And CCL supports a similar wide definition of sharing. This definition has the benefit of covering emerging technologies and practices.

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.)

The definition should consider sharing beyond the digital space, for example, sharing by mail, delivery, distribution, trade, or advertisement or any facility of interstate or foreign commerce to disclose and intimate image.⁵¹ The NSW Parliamentary Joint Committee on Children and Young People and the ACYP both agree that the definition of distribution should account for the sharing of

⁴⁵ Franks, M.A. (2015) Drafting an effective “Revenge Porn” law: A guide for legislators Available at SSRN: <https://ssrn.com/abstract=2468823> or <http://dx.doi.org/10.2139/ssrn.2468823> at p7

⁴⁶ Summary Offences Act 1966 (Vic) ss 41DA, 41DB

⁴⁷ Ibid s40

⁴⁸ Henry, N. and Powell, A. (2016) Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law Social & legal Studies Vol. 25 (4)397-418 at p.402

⁴⁹ Ibid p403

⁵⁰ Summary Offences Act 1966 (Vic) s41DA

⁵¹ Burris, A. (2014) Hell hath no fury like a woman porned: Revenge porn and the need for a Federal nonconsensual pornography statute *Florida Law Review* Vol. 66, 2325 at p.10

images both with and without the assistance of technology.⁵² There is a capacity to cause serious harm for example, by posting flyers around the victim's school or community.⁵³

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. There is capacity to cause serious harm, regardless. The victim's reasonable expectation of privacy should be an element of consideration in determining harm.

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.)?

Minors and vulnerable people don't necessarily have the same capacity to appreciate the impact of their actions.⁵⁴ There is significantly more potential for them to misuse digital technology to invade another's privacy.⁵⁵

CCL believes that in all cases the perpetrators behaviour against community standards should be assessed as well as considering the recklessness or intent in causing harm to the victim.⁵⁶

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

CCL agrees that the standard must be sufficient to deter trivial or frivolous action.⁵⁷ Serious invasion of privacy is appropriate and sufficient to limit the effect on freedom of speech.⁵⁸

A sharing of intimate images may be serious without necessarily being harmful to the victim, for example, when sharing is threatened. The degree of the harm likely to be caused, and the victim's reasonable expectation of privacy, may be considered as an element of the seriousness of the breach of privacy.⁵⁹

Intention "to distress the victim is beside the point: the relevant question is whether he or she intentionally engaged in nonconsensual conduct."⁶⁰ Including an "intent to cause harm" element should be resisted because the motive of many perpetrators is not to cause harm or distress but also a desire to cause humiliation, entertain, make money or achieve notoriety.⁶¹ Inadvertent or

⁵² Advocate for Children and Young People (ACYP) (2016) Submission on the sharing of intimate images without consent- 'revenge porn' at p.6

⁵³ Ibid

⁵⁴ Legal Aid NSW (2016) The sharing of images without consent- 'Revenge porn' *Submission to the Department of Justice* p.12

⁵⁵ Australian Law Reform Commission (ALRC) (2014) Serious invasions of Privacy in the Digital Era *ALRC Report 123* at p211

⁵⁶ Advocate for Children and Young People (ACYP) (2016) Submission on the sharing of intimate images without consent- 'revenge porn' at pp8 & 9

⁵⁷ Australian Law Reform Commission (ALRC) (2014) Serious invasions of Privacy in the Digital Era *ALRC Report 123* at p134

⁵⁸ Ibid p132

⁵⁹ Ibid p135

⁶⁰ Franks, M.A. (2015) Drafting an effective "Revenge Porn" law: A guide for legislators Available at SSRN: <https://ssrn.com/abstract=2468823> or <http://dx.doi.org/10.2139/ssrn.2468823> at p6

⁶¹ Ibid p.6

unknowing disclosures should be assessed on a case by case basis, for example, breaches in big data are quite serious without necessarily being intentional.

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?

In terms of action to be taken against the perpetrator, CCL agrees with suggestions made by ACYP that the perpetrators behaviour against community standards should be assessed as well as considering the recklessness or intent in causing harm to the victim.⁶²

Where a third party shares an image without having any knowledge of its non- consensual nature this should be a defence to the prohibition or at least be considered in mitigation of the offence, if recklessly indifferent.⁶³

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?

For the purposes of determining what action to take against a perpetrator, it should be sufficient that there be a likelihood of harm occurring. New Zealand's harmful Digital Communication Act protects victims that have *or will* suffer harm.

CCL agrees with the ALRC that an invasion of privacy need not cause actual damage.⁶⁴ Alberta's new tort providing civil remedies for victims of non-consensual pornography is also actionable without any proof of harm.⁶⁵

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?

The Commissioner should give consideration to the 'likely' degree of harm to the victim in determining the action to take. CCL believes that an invasion of privacy need not cause actual damage.

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

Not completely. The EOSC Act may not capture small scale media sites or other web sites hosting pornography or non-digital sharing, in its definition of relevant electronic service or social media services. See response to Question 30

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

⁶² Advocate for Children and Young People (ACYP) (2016) Submission on the sharing of intimate images without consent- 'revenge porn' at pp8 & 9

Legal Aid NSW (2016) The sharing of images without consent- 'Revenge porn' *Submission to the Department of Justice* p15; Intimate Image Protection Act 2015(Manitoba) s11(1)

⁶⁴ Australian Law Reform Commission (ALRC) (2014) Serious invasions of Privacy in the Digital Era *ALRC Report 123* at p.138

⁶⁵ Protecting Victims of Non-consensual Distribution of Intimate Images Act 2107(Alberta) s4

Yes. The definition should consider sharing beyond the digital space, for example, sharing by mail, delivery, distribution, trade, or advertisement or any facility of interstate or foreign commerce to disclose and intimate image.⁶⁶

This submission was prepared by Michelle Falstein on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Department of Communications and the Arts.

Yours sincerely,



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⁶⁶ Burris, A. (2014) Hell hath no fury like a woman porned: Revenge porn and the need for a Federal nonconsensual pornography statute *Florida Law Review* Vol. 66, 2325 at p.10