

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

Standing Committee of Attorneys-General

Discussion Paper on

Unauthorised Photographs on the Internet and Ancillary Privacy Issues

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1. Executive Summary

1. The New South Wales Council for Civil Liberties ('CCL') is a not-for-profit non-government organisation committed to monitoring and defending civil liberties in New South Wales, across Australia and in our region of the world. CCL was founded in 1963 and has members from all walks of life.
2. Having reviewed the SCAG discussion paper and discussion questions, CCL only wishes to address the fifth discussion question concerning an enforceable civil right in relation to the use of one's own image. CCL is of the view that there are currently sufficient criminal sanctions to cover the taking of, and misuse of, images of children on the internet. CCL is also of the view that any attempt to regulate the taking of photographs of lawful activity in public is problematic. There is therefore no need for SCAG to consider drafting more criminal offences at this point in time.
3. CCL believes that the sensational moral panic that inspired the discussion paper misses the point entirely about images that appear on the internet. As the discussion paper quite correctly points out, the harm from the images complained about occurs at the point of *use* or *publication* of the image, not at the *taking* of the image. The underlying problem, therefore, is the loss of privacy associated with the *publication* on the internet of one's own image without consent.
4. CCL believes that, because of the very personal nature of one's own image, the right of the individual to control the online publication of their own image should be enforceable, subject only to an exception of public interest. The paramountcy of this right derives from the right to privacy and the principle that over one's own body the individual is sovereign. On the other hand, the public interest exception preserves freedom of the press, of political communication and of expression generally. CCL believes that this principle strikes the right balance between the individual right to privacy and the public's interest in viewing images on the internet.
5. SCAG will draft better laws if it focuses less on the sensational examples in the discussion paper and more on the right of all individuals (both adults and children) to control the use of their own image online.

CCL recommends that SCAG concentrate its efforts on providing an inexpensive administrative and civil remedy allowing individuals to have their image removed from the internet, where that is possible, and subject only to a public interest exception.

6. Such a remedy will give individuals the opportunity to regain their privacy and dignity. The public interest exception acknowledges that there are cases in which the freedoms of speech and the press will trump an individual's right to privacy.

2. private takedown notices

2.1 right to privacy –v– public interest

7. When the emotive issues that inspired the discussion paper are peeled away, the underlying problem is the loss of privacy associated with the *publication* on the internet of one's own image without consent. This issue affects both children and adults. It involves photographs of a sexual and non-sexual nature.
8. This loss of privacy is a violation of an individual's right to privacy, derived from Article 17 of the *International Covenant on Civil and Political Rights*.
9. However, like all rights, this right is not absolute. There are legitimate reasons why such personal images should remain in the public domain, despite an individual's desire to have them removed. For example, images portraying news events or the misconduct of public officials are of genuine public interest.
10. The concept of 'public interest' is notoriously difficult to define. In the interests of preserving freedom of speech, the common law of defamation has accepted a broad definition of public interest. For example, in *Bellino v ABC*, Brennan CJ quoted Lord Denning MR:¹

There is no definition in the books as to what is a matter of public interest... I would not myself confine it within narrow limits. *Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.* [emphasis added]
11. CCL believes that, because of the very personal nature of one's own image, the right of the individual to control the online publication of their own image should be enforceable, subject only to an exception of public interest. The paramountcy of this right derives from the right to privacy and the principle that over one's own body the individual is sovereign.² On the other hand, the public interest exception ensures freedom of the press, of political communication and of expression generally. CCL believes that this principle strikes the right balance between the individual right to privacy and the public's interest in viewing images on the internet.
12. This means that photographs taken of teenage lifesavers or rowers, the examples used in the discussion paper, could be published in online news and sports sites (with or without consent). However, an individual should be provided with a mechanism to force the removal of the same photograph from a site in which there is invested no public interest, for example a 'child pornography' site.

¹ *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, 193 (Brennan CJ) quoting *London Artists Ltd v Littler* [1969] 2 QB 375, 391 (Lord Denning MR).

² John Stuart Mill, *On Liberty* (1859), Chapter 1 'Introductory'.

2.2 private takedown notices

13. One way to enforce the principle of private control over one's own image, in the context of unauthorised photographs on the internet, would be to provide individuals with a simple and cost-effective system to regain control of their own image. This could be achieved by adapting the existing system of *take-down notices* for 'prohibited content'.³
14. If an individual becomes aware of the use of their image on the internet in a context in which they do not consent (for whatever reason), then they should be able to send a request to a regulatory body, most obviously the Australian Communications and Media Authority ('ACMA'), for a "private takedown notice". The private takedown notice would be sent to the appropriate Internet Content Host ('ICH') asking for the recovery and removal of the image or images the subject of the notice.
15. Before issuing such a notice, ACMA should have to examine three questions:
 - (i) is the image complained of an image of the individual requesting the notice; alternatively, is the image complained of an image of an individual over whom the requestor has legal guardianship?
 - (ii) in all the circumstances, is the image one of public interest?
 - (iii) is the image stored on an Australian internet site?
16. The first question is a gate-keeping inquiry. It ensures that the complainant has a legitimate personal interest in the image being complained about.
17. The second question tackles the issue of public interest. While questions one and three inquire into purely objective facts, the weighing of the public interest requires an exercise of discretionary power. This question is also concerned with the context and content of the image complained of. The complainant would be required to explain why they want the image removed and why the image, in all the circumstances, is not one of public interest.
18. Having addressed these two questions, ACMA officers would be required to determine whether the matter should be taken any further. If ACMA decides not to proceed, then the complainant should have recourse to the normal procedures of internal review and administrative appeal.

³ see *Broadcasting Services Act 1992* (Cth) Schedule 5, cl 30.

19. If the ACMA decides that the complaint should be taken further, then the third and final question should be addressed – the question of jurisdiction and the internet. If the image is stored within Australia, then the ACMA should issue a ‘private takedown notice’ to the ICH. The notice is not legally binding. It merely informs the ICH that a complaint has been made and that if the image is not removed within a reasonable time then a court order will be sought for the removal of the image. The usual rules of procedural fairness apply at this stage and the ICH has the right to be heard on why the image should not be removed.
20. The final decision of ACMA to seek or not to seek a court order for removal of the image is an administrative decision and also subject to the usual processes of administrative review and appeal. If the ICH refuses to comply with a court order for removal of the image, then the ICH will be liable for contempt of court proceedings in the usual way. The court orders should be enforceable against individuals, companies and government.
21. If the image is stored outside of Australia, then there is little the ACMA can do by way of seeking legally enforceable takedown orders. This limitation will persist as long as the internet remains regulated at a national rather than an international level. All the ACMA could do in this situation is send a request for removal to the foreign ICH. If the ICH has legal status in Australia, then other legal remedies remain open to the complainant, for example the tort of defamation.⁴
22. Apart from the ACMA seeking a court order, it would also be efficient to empower a statutory court to impose such orders directly in litigation already before the court.

2.3 no affect on existing common law, equitable or statutory rights

23. The introduction of private takedown notices should in no way interfere with existing common law, equitable or statutory rights of parties. For example, suit in defamation should remain available to a complainant in order to seek damages. This also ensures that these notices do not interfere with any common law development of a wider tort of privacy.
24. Nor should the introduction of private takedown orders affect the law of contract. While an individual’s right to have an online image removed should be paramount, this should not void any contract associated with the creation or use of the image. For example, a person may have accepted a fee for permitting a nude photograph of themselves to be taken and posted on the internet. If the subject of the photograph has a change of mind later and succeeds in having that image removed from the internet, then the subject should remain liable for any action for breach of contract.

⁴ *Dow Jones v Gutnick* (2002) 210 CLR 575.

3. no need for new criminal offences

25. In response to the first four questions posed by the discussion paper, CCL believes that there is no need at this point to introduce new criminal offences when the real harm could be addressed by the administrative and civil remedy of private takedown notices. From the extensive table of existing criminal offences at the end of the discussion paper, it appears that law enforcement agencies have sufficient powers to prevent harm coming to members of the public.
26. In relation to the taking of unauthorised photographs, CCL is of the view that it is extremely difficult to formulate, police and prosecute any criminal offence seeking to regulate or prohibit such activity. For example, the photographs referred to in the discussion paper, of children in a Brisbane park or a teenage Victorian lifesaver at the beach, do not depict unlawful activity. Making it a crime to take photographs of lawful activity is extremely problematic.
27. To take another example: a photo taken of young teenage rowers and posted on their own website could be copied and used in an unauthorised manner on another website. In this example, the *taking* of the photograph is legitimate. The *publication* or *use* of it, however, is unauthorised.
28. The only criminal sanction mentioned in the discussion paper that is worthy of further investigation, with respect to uniform national laws, is the offence of covert intimate filming. CCL notes that New South Wales has already enacted legislation similar to that proposed in New Zealand.⁵
29. In relation to the publication of unauthorised online images of children in the context of child pornography, this kind of activity will be caught by the recently-enacted (and extremely broad) Commonwealth child pornography internet laws.⁶
30. Nevertheless, if SCAG is determined to introduce new offences, then at the very least a malicious intent to harm the individual photographed should be required. The onus should rest on the prosecution to prove the offence beyond reasonable doubt. Finally, a defence of lawful excuse, for academic, scientific, legal and artistic purposes, should be available.

⁵ *Summary Offences Act 1988* (NSW) ss 21G & 21H.

⁶ *Criminal Code Act 1995* (Cth) s 474.19 (access, produce, transmit, publish or distribute child pornography). Max. penalty: 10 years.