



Law Council  
OF AUSTRALIA

# Civil Penalty Regime for Non-Consensual Sharing of Intimate Images

Department of Communications and the Arts

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# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
<b>Executive Summary</b> .....	<b>5</b>
<b>A prohibition against sharing of intimate images</b> .....	<b>6</b>
<b>Civil penalty regime</b> .....	<b>8</b>
<b>Information gathering powers</b> .....	<b>12</b>
<b>Complaints process</b> .....	<b>13</b>
<b>Definition of terms</b> .....	<b>14</b>
Consent.....	14
Intimate image.....	16
Sharing.....	17
Intent to cause harm.....	18
<b>Electronic service, social media service and relevant electronic service</b> .....	<b>19</b>

# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, the Intellectual Property Committee and the Privacy Law Committee of the Business Law Section, the Law Society of New South Wales and the Law Society of South Australia in the preparation of this submission.

## Executive Summary

1. The Law Council is pleased to provide this initial response to the Department of Communications and the Arts' discussion paper, 'Civil penalties regime for non-consensual sharing of intimate images', May 2017 (**Discussion Paper**).
2. The Discussion Paper raises several issues relating to the establishment of a civil penalty regime designed to prohibit, deter and penalise persons and content hosts who share intimate images or videos of a person without their consent. It is proposed that the eSafety Commissioner (**the Commissioner**) be given additional powers to enforce the prohibition.
3. While anecdotal evidence indicates the practice is increasing, the Law Council notes that a study by RMIT University and La Trobe University of 3,000 Australian adults stated that one in 10 survey respondents reported that a nude or semi-nude image of themselves had been posted online without their consent.<sup>1</sup> This apparently high incidence suggests a need to address the problem, particularly given that the non-consensual sharing of intimate images online can be an extremely distressing experience for the victim. The posting of intimate images may cause harm to adult victims or minors. Distress can be exacerbated by the ease with which such images can be disseminated rapidly through online networks.
4. It will be necessary to ensure that the Commissioner is sufficiently resourced to effectively perform its functions. Further, as the issue is part of the larger issue of privacy, the Privacy Commissioner should be consulted on the proposed civil penalty regime and information sharing provisions. The issues raised are part of the larger issue of serious invasions of privacy. It is important therefore that any solutions developed in responding to the issues raised by this category of conduct do not undermine responses to the issue of privacy as a whole.
5. The Law Council notes that the Discussion Paper raised a large number of issues for consideration. The Law Council offers comments on a number of key issues.
6. The Law Council makes the following key recommendations:
  - A civil penalties regime for the non-consensual sharing of intimate images should be introduced;
  - The prohibition should be framed such that it includes all the digital fora on which intimate images might be shared, including websites;
  - An Australian link should be required for the prohibition to be engaged;
  - There should be a hierarchy of penalties available to the Commissioner, including rehabilitative and diversionary processes for minors;
  - The Commissioner should have information gathering powers similar to those of the Australian Communications and Media Authority; and
  - The prohibition should not include an 'intent to harm' or a 'seriousness' element.

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<sup>1</sup> Anastasi Powell & Nicola Henry, *Digital Harassment and Abuse of Adult Australians: A Summary Report*, RMIT University (2015).

## A prohibition against sharing of intimate images

7. The Discussion Paper proposes a prohibition on sharing intimate with images consent 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.<sup>2</sup>*

8. 'Relevant electronic service' is defined in the *Enhancing Online Safety for Children Act 2015* (Cth) (**EOSC Act**) as:

- A service that enables end-users to communicate, by means of email, with other end-users;
- An instant messaging service that enables end-users to communicate with other end-users;
- An SMS service that enables end-users to communicate with other end-users;
- An MMS service that enables end-users to communicate with other end-users;
- A chat service that enables end-users to communicate with other end-users;
- A service that enables end-users to play online games with other end-users; or
- An electronic service specified in the legislative rules.

9. 'Social media service' is defined in the EOSC Act as an electronic service that satisfies the following conditions:

- The sole or primary purpose of the service is to enable online social interaction between 2 or more end-users;
- The service allows end-users to link to, or interact with, some or all of the other end-users;
- The service allows end-users to post material on the service; and
- Such other conditions (if any) as are set out in the legislative rules.

10. The Discussion Paper also notes that the prohibition could require an 'Australian link' and could draw upon relevant provisions in the *Spam Act 2003* (Cth).

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

11. Subject to appropriate definitions of 'intimate image', 'share' and 'consent' (as to which see below), the Law Council is generally supportive of the proposed framing of the prohibition. The Law Council has concerns with some of that terminology. The Law Council notes that the current definitions of 'relevant electronic service' and 'social media service' may not adequately capture all of the digital fora on which intimate

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<sup>2</sup> Department of Communications and the Arts, *Civil penalties regime for non-consensual sharing of intimate images Discussion Paper* (May 2017), 9.

images may be shared. The Senate Legal and Constitutional Affairs References Committee's *Phenomenon colloquially referred to as revenge porn* report noted that there are various means by which intimate images can be shared, including uploading images to pornography websites, including mainstream pornography sites or specifically designed revenge pornography or 'ex-girlfriend porn' websites, as well as image board websites.<sup>3</sup> It is not clear that such websites would fall within the definition of 'relevant electronic service' or 'social media service' and thus the sharing of images on such a website may fall outside the scope of the prohibition.

12. A 'carriage service' is a particularly convoluted definition which has proved far too limited in the context of the *Copyright Act 1968* (Cth) (**Copyright Act**). The term 'share' may also involve connotations not just of sending but also of (consensually) receiving. These complications are avoided by the largely technology neutral definition of 'communicate' in the Copyright Act.

13. The Law Council considers a simpler and more direct prohibition would be:

A person must not make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) an intimate image of a person (the **second person**), or cause an intimate image to be made available online or electronically transmitted, without the second person's consent.

14. Experience with what is now section 18 of the *Australian Consumer Law 2010* (Cth) shows that the courts have dealt with such plainly framed prohibitions appropriately and consistently with their intended purpose.

15. Alternatively, the definition of 'sharing' could be defined to include distributing, publishing and posting online.

16. The Law Council also recommends that consideration be given to expanding the definition of 'share' and the operation of the proposed civil penalty regime to include providing third parties with access to the image or video, without necessarily publishing it or posting it online (for example, playing a video on a laptop to third parties in a private setting). This may require a referral of power from the States or for State and Territory regimes to cover such aspects.

**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)?**

17. The Law Council considers that an Australian link would be appropriate for the prohibition to come into effect. An Australian link is required for the cyberbullying regime, in that an 'Australian child' must be the target of cyberbullying material.<sup>4</sup> In the Law Council's view, consideration should be given to the inclusion of the following factors:

<sup>3</sup> Senate Legal and Constitutional Affairs References Committee, *Phenomenon colloquially referred to as 'revenge porn'* (February 2016), 3.

<sup>4</sup> *Enhancing Online Safety for Children Act 2015* (Cth), s 18. 'Australian child' is defined as 'a child who is ordinarily resident in Australia.'

- The individual or organisation who sent the image or video, or authorised the sending of the message, is:
  - i. An individual who is physically present in Australia when the message is sent; or
  - ii. An organisation whose central management and control is in Australia when the message is sent.
- The individual or organisation receiving the image or video is:
  - i. An individual who is physically present in Australia when the message is sent; or
  - ii. An organisation whose central management and control is in Australia when the message is sent.
- The computer, server or device used to access the image or video is based in Australia or owned by an Australian company.

18. In the absence of an Australian link, there is a risk that the Commissioner may not be able to provide a remedy to a complaint and may lack the ability to enforce any directions issued in the matter.

19. The Law Council further considers that the Australian link should not extend to a scenario where the intimate image content has originated in Australia but both the offender and the victim are no longer in Australia.

## Civil penalty regime

20. The proposed civil penalty regime would complement an online complaints portal and existing Commonwealth, state and territory criminal offences. It is proposed that the Commissioner be given additional powers to investigate complaints similar to those for the cyberbullying complaints scheme. The Commissioner is currently empowered to obtain information from such persons, and make such enquiries, as he or she thinks fit for the purposes of an investigation into a cyberbullying complaint.<sup>5</sup> In particular, the Commissioner may:

- Summon a person to produce documents, answer questions or provide information;<sup>6</sup> and
- Require a person to make available to the Commissioner any documents in the possession of the person relevant to the subject matter of an investigation.<sup>7</sup>

21. There are also a number of enforcement mechanisms available to the Commissioner in the context of cyberbullying complaints. In relation to social media services, the Commissioner may issue a social media service notice requiring the service to remove offending material within 48 hours;<sup>8</sup> failure to do so carries a civil penalty of 100 penalty units.<sup>9</sup> The Commissioner may also issue an end-user notice requiring the

<sup>5</sup> *Enhancing Online Safety for Children Act 2015* (Cth), s 19(3).

<sup>6</sup> *Broadcasting Services Act 1992* (Cth), s 173(2).

<sup>7</sup> *Ibid.*, s 177(2).

<sup>8</sup> *Enhancing Online Safety for Children Act 2015* (Cth), s 35.

<sup>9</sup> *Ibid.*, s 36.



person to remove the offending material within a specified time, refrain from posting cyberbullying material and/or apologise to the child who was the subject of the cyberbullying.<sup>10</sup> The Commissioner is also empowered to seek enforceable undertakings or injunctions.<sup>11</sup>

22. The Discussion Paper also notes that the proposed civil penalty regime may include a penalty for persons who have knowledge of, or participate in, the non-consensual sharing of intimate images.<sup>12</sup>

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

23. The Commissioner should be provided with flexibility and have a broad range of responses to deal with individual cases of non-consensual sharing of intimate images in the most appropriate manner. The current suite of enforcement provisions with respect to cyberbullying would seem appropriate in this context.

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

24. Currently, the Commissioner may disclose information to an authority of a foreign country responsible for regulating matters relating to the capacity of individuals to use social media and electronic services in a safe manner where the Commissioner is satisfied that the information will enable or assist the authority to perform or exercise any of the authority's functions or powers.<sup>13</sup> The Commissioner may also disclose information or material to Australian law enforcement agencies, but not international law enforcement agencies, in certain circumstances.<sup>14</sup>

25. The Law Council considers it appropriate that the Commissioner be able to share information with domestic and international law enforcement agencies, provided there are appropriate protocols in place to ensure that victims' and perpetrators' privacy and personal information is appropriately protected. The Privacy Commissioner should be satisfied that any information sharing provisions are a proportionate infringement on privacy.

26. As a related point on the issue of information sharing generally, there may be utility in careful consideration of the following issues:

- Whether the imposition of a civil penalty on a person is properly disclosable where that person is applying for a job with government or in the private sector;
- Whether repeat contraventions of a civil penalty provision should be disclosable and have a bearing upon a prospective or current employee's suitability to hold his or her position;

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<sup>10</sup> Ibid., s 42.

<sup>11</sup> Ibid., ss 47, 48.

<sup>12</sup> Department of Communications and the Arts, *Civil penalties regime for non-consensual sharing of intimate images Discussion Paper* (May 2017), 10.

<sup>13</sup> *Enhancing Online Safety for Children Act 2015* (Cth), s 80(1)(g).

<sup>14</sup> Ibid., ss 80, 92.

- Whether a prospective employer should be able, with a job applicant's consent, to apply to the Commissioner for access to civil penalty information;
- Whether the imposition of a civil penalty should have any bearing upon suitability for a Working with Vulnerable People registration (although, this is a matter for the states and territories).

**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?**

27. As noted above, the Commissioner can currently disclose information to law enforcement in certain circumstances. The Commissioner may also, in the context of the cyberbullying regime, disclose information to a parent or guardian of an Australian child if the Commissioner is satisfied that the information will assist in the resolution of a complaint.<sup>15</sup> Information may also be disclosed by consent.<sup>16</sup>

28. The Law Council suggests that the following notification process should apply where an intimate image of a minor is shared by another minor:

- Where the subject of the image is over the age of 16 – the Commissioner should have a discretion as to whether to notify police or the parents/guardians of the minor – there should be a requirement to notify if the Commissioner believes it is in the best interests of the minor; and
- Where the subject of the image is under the age of 16 – the Commissioner should notify police and the parents/guardians of the minor.

29. Consideration should also be given to whether other institutions should be notified of prohibited conduct involving minors, including education providers. This may be appropriate where there is a nexus between the conduct and the institution, for example, where conduct occurred on the premises of the institution. In cases where the Commissioner is notifying third parties, consideration should also be given to protecting the identity of the person who made the report to the Commissioner. This would be in line with provisions in other legislation such as section 29 of the *Children and Young Persons (Care & Protection) Act 1998* (NSW).

30. Further, the Law Council considers that complaints from children and young people should be prioritised and that these complainants should be connected to age-appropriate support services as soon as possible.

**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?**

**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**

<sup>15</sup> Ibid., s 82(1).

<sup>16</sup> Ibid., s 83.

**this be dependent on the severity of the case (for example, how widely the image is shared or on what forums the images are shared)?**

31. In the Law Council's view, it would be appropriate that tailored provisions apply where both the complainant and the alleged offender are minors. As a general proposition, the Law Council considers that children and young people should be treated differently to adults. The United Nations Committee on the Rights of the Child, in its General Comments No 10, stated:

*Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.<sup>17</sup>*

32. The Law Council is of the view that civil penalties are generally more appropriate than criminal sanctions in this context. A criminal record may impede a child's prospects of rehabilitation. Depending on the seriousness of the conduct, the emphasis should be on education children and young people and supporting them to make amends for their actions, as opposed to penalising them. Financial penalties will rarely be appropriate for children and young people. The Law Council suggests that the civil penalties regime could include not only infringement notices, formal warnings and take down notices, but also diversionary/rehabilitation processes, such as the possibility of a conference, attendance at counselling and participating in courses relating to cyber bullying and sexting.
33. However, given the potential gravity of the conduct in question, the civil penalty regime should not supplant the criminal law. It should be open to the Commonwealth Director of Public Prosecutions to prosecute for the most serious of cases.<sup>18</sup>

**8. Should a hierarchy of increasing severity of penalties be established? (This could reflect the severity of the incident and the 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.)**

34. The Law Council supports a hierarchy of penalties. A number of factors should be considered together in assessing the seriousness of the conduct; these could be set out as a non-exhaustive list of factors to take into account. The Law Council considers that the number of people that an image is made available to is in itself a complete

<sup>17</sup> Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007), [10]; see also Kelly Richard, 'What makes juvenile offenders different from adult offenders' *Trends and Issues in Crime and Criminal Justice*, No 409 (February 2011).

<sup>18</sup> Sharing such an intimate image of a minor via a carriage service may constitute an offence punishable by 15 years imprisonment – see *Criminal Code Act 1995* (Cth), s 474.19.

indication of the harm intended by the perpetrator or inflicted upon the victim. Accordingly, this should not be the sole or main consideration.

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

35. Cooperative relationships with social media services would be of great value to ensure that offending material is removed promptly.

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

36. The Law Council considers that the prohibition should extend to persons who both knew of, and participated in, a contravention of a civil penalty provision. However, persons who merely provide the network infrastructure, or access to that infrastructure, without any knowledge that the communication is non-consensual should not be exposed to liability, at least until they have knowledge that the use is without consent.

**14. Should the Commissioner be able to seek a court order to require Internet Service Providers to block individual website(s) in extreme cases where all other avenues have been exhausted?**

37. There is every potential for the service provider to which the non-consensual image is posted or transmitted to be outside Australia. However, it may be necessary for the Commissioner to be empowered to apply to the Federal Court for an order blocking access to a site where the image is being 'hosted' similar to the regime implemented under s 115A of the Copyright Act. This will require closer consideration, however, to be satisfied that it is technically feasible to block access to the offensive material and not unrelated matters.

## Information gathering powers

38. The Commissioner currently has the ability to give written directions to a carrier or service provider in connection with performing their functions and exercising their power.<sup>19</sup> The Discussion Paper proposes giving the Commissioner additional powers to gather information similar to those of the Australian Communications and Media Authority (ACMA).<sup>20</sup> ACMA is empowered to obtain information from carriers, service providers and other persons if the information is relevant to ACMA's functions or powers and ACMA may require a carrier, provider or person to provide information or produce documents.<sup>21</sup>

<sup>19</sup> *Telecommunications Act 1997* (Cth), s 581(2A).

<sup>20</sup> Department of Communications and the Arts, *Civil penalties regime for non-consensual sharing of intimate images Discussion Paper* (May 2017), 11.

<sup>21</sup> *Telecommunications Act 1997* (Cth), Pt 27.

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

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

39. The Law Council supports giving the Commissioner information gathering powers to allow him or her to gather information or evidence of the non-consensual sharing of intimate images. The power to require a carrier, provider or person to provide information or produce documents would assist the investigations of the Commissioner.
40. The Law Council notes that regulatory bodies such as the Australian Securities and Investments Commissioner, the Australian Competition and Consumer Commission and the Australian Communications and Media Authority may make applications for search warrants.<sup>22</sup> Given that there are existing or proposed criminal offences for non-consensual distribution of intimate images in some Australian jurisdictions, criminal provisions may capture some of this behaviour and search warrants may be issued in those matters. Careful consideration will need to be given to whether enforcement of the civil penalties regime requires the use of warrants for gathering information.
41. In the absence of a demonstrated need for the Commissioner to have search warrant powers, the Law Council does not support such powers being given to the Commissioner.
42. The Law Council also suggests that the Commissioner be given a role to educate the community about issues arising in relation to the non-consensual sharing of intimate images.

## Complaints process

43. The Discussion Paper notes that victims could initially lodge a complaint with the site(s) on which offending images appear, provided the sites have a complaints process. Where an image is not removed or if there is no response within 48 hours, then the victim could then lodge a complaint with the Commissioner.

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

44. Given the distress and harm that may be caused by the non-consensual sharing of an intimate image, the Law Council would be concerned that requiring a complainant to exhaust all other available complaint mechanisms would be too cumbersome and potentially render the scheme ineffective. Material posted online can be disseminated instantaneously and without cost and, therefore, quick intervention may be necessary to prevent further harm.

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<sup>22</sup> *Australian Securities and Investments Commission Act 2001 (Cth)*, s 35; *Competition and Consumer Act 2010 (Cth)*, s 154X; *Radiocommunications Act 1992 (Cth)*, s 269.

**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?**

45. The 48 hour timeframe that applies in the context of the cyberbullying scheme would seem an appropriate length of time for the proposed regime.

**19. Should there be a legal obligation on content hosts to remove the images identified by the Commissioner as requiring removal?**

46. In the Law Council's view, there should be a legal obligation on content hosts to remove images the Commissioner considers should be removed. In the absence of such an obligation, it may be that the scheme, insofar as one of its purposes is to remove offending content, would not be as effective as it otherwise could be.

**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?**

47. The Law Council considers that a monetary penalty would be appropriate.

## Definition of terms

### Consent

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

48. In Victoria, the definition of 'consent' for the purposes of the criminal offence of distributing intimate images<sup>23</sup> is 'free agreement'.<sup>24</sup> The Law Council considers that this definition would be appropriate in the context of the proposed civil penalty regime.

49. The imposition of civil penalties is a very serious matter and, accordingly, a requirement for consent to be given in writing could well be quite reasonable in a commercial setting. While a requirement of written consent would have the advantage of forcing people to consider the potential ramifications of their actions more carefully, the Law Council would be concerned that many ordinary members of the public would be unaware of, or never take into account, the need for compliance with such formalities and so potentially be exposed to the potential for the imposition of civil penalties unwittingly. The Privacy Law Committee of the Law Council's Business Law Section considers that consent should be explicit (preferably in writing) and freely given prior to any sharing of the image or images derived from the original image.

50. The Law Council is concerned, however, that persons who may be unwitting participants in a contravention or reasonably believed that they had consent to communicate the image should not be exposed to the severe consequences of civil penalties. Accordingly, while there should be power to require the removal of the image or blocking of access to it, it should be a defence to the imposition of a civil

<sup>23</sup> *Summary Offences Act 1966* (Vic), s 41DA.

<sup>24</sup> *Ibid.*, s 40.

penalty for a person to show that the person reasonably believed there was consent to the making of the communication. That protection should not continue to apply after the person becomes aware that there is no consent.

51. There may also be some situations where it is in the public interest for a communication to be made even though consent has not been given. Examples of such situations could include transmitting an image of an unconscious person to a medical specialist for advice or to police in connection with a complaint about an offence such as rape or some other form of molestation. It would also be necessary to exclude from the prohibition communications made in connection with legal proceedings or for the purposes of giving, or receiving, legal advice.
52. The Law Council is also of the view that a child under 16 years cannot consent to the recording and/or distribution of an intimate image, consistent with relevant child sexual assault and abuse offences.

**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?)**

53. The Law Council considers that where a victim has given consent for an image to be shared in one context, but the image is then shared in a different context, this should be treated as non-consensual sharing unless consent has been given. For consent to be given, it would need to be established that consent was provided within those altered (and separate) circumstances.

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

54. The Law Council suggests that vulnerable people could include:

- A child above the age of 16 years and under the age of 18 years who is under the special care of another person (section 73(3) of the *Crimes Act 1900* NSW provides examples of special care); or
- A person who has a mental impairment or mental incapacity.

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

55. The Law Council considers that the onus should be on the Commissioner to prove that the intimate image was shared without consent. This would be consistent with the wording of the draft prohibition.

**25. How should cases be treated where consent is given, but later withdrawn? Should such cases be treated differently to cases where consent has never been given?**

56. Broadly speaking, there are two scenarios that may arise in this context. First, consent may be given but then withdrawn before any sharing has taken place; this should be

treated no different from a case where sharing has taken place without consent ever having been given. Second, consent may be given, the image has been shared and after the image has been shared, consent is then withdrawn. The Law Council questions how the proposed prohibition will work in situations where an intimate image was made available with consent initially, but that consent was subsequently withdrawn. As a practical matter, it may not be possible to “purge” the internet of all copies of such images. However, a person who has a change of heart should have the possibility of seeking withdrawal of such images and if the sharer has control over the domain on which the images have been shared (such as their own Facebook account, for example), then allowing the image to remain there would arguably constitute further or at least ongoing sharing by that person. The person who communicated the material with consent should not be exposed to the sanction of civil penalties without at least having a reasonable opportunity to remove any continuing acts of communication they are involved in and the Law Council recommends that there should be a requirement to take all reasonable steps to remove offending material or prevent further dissemination where consent is revoked.

57. In any event, the Law Council’s view is that where consent is given and then withdrawn, sharing after the withdrawal of consent should not be considered less serious than if consent had never been given.

## Intimate image

<b>26. What should the definition of ‘intimate images’ be for the purpose of the prohibition?</b>
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58. The Law Council considers that the definition of an ‘intimate image’ quoted from Canada on page 13 of the Discussion Paper clearly identifies the targeted types of image with an appropriate and necessary emphasis on the requirement for a reasonable expectation of privacy. It may be sufficient to deal with cases of digital (or other) manipulation to include the words “or appears to be” after each occurrence of the word “is” in paragraph (a) of that definition:

“(a) in which the person is or appears to be nude, is or appears to be exposing his or her genital organs or anal region or her breasts or is or appears to be engaged in explicit sexual activity;”

59. Paragraph (c) would also need to be modified to remove the reference to “offence” and could sensibly read:

“(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the communication is made.”

“(d) in deciding whether a person has a reasonable expectation of privacy in respect of an image at the time a communication is made, an earlier communication of the image by making it available online or electronic transmission without the consent of the person depicted shall be disregarded.”

60. The definition of ‘intimate image’ in the *Summary Offences Act 1966* (Vic) would also provide an appropriate definition in the context of the civil penalty regime.



**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?**

61. The Law Council considers that a prohibition covering digitally manipulated or created images may have unintended consequences, particularly where it is obvious that the image has been digitally manipulated. In such instances, the distress suffered may be quite limited and not warrant being subject to the proposed regime.
62. Nonetheless, there may be scope for the inclusion of digitally manipulated or created images where it is not readily apparent that the photo has been digitally manipulated or the image nonetheless causes distress to the victim. The prohibition should cover the situation where the victim is not readily identifiable since there is still a breach of privacy. The use of non-intimate images which have been altered to make them appear to be intimate images is a different issue. While distributing such images could constitute an offence or be defamatory, there is no breach of privacy and they should not be covered by these provisions.

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

63. The Law Council has some reservations as to a ‘community standards’ element, as it may create uncertainty.

## Sharing

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

64. It is suggested that sharing should include publishing and image or disseminating or showing an image to another person or persons.

**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.)**

65. It should extend to all forms of sharing, within the bounds of the Commonwealth’s jurisdiction.

**31. Should an intimate image which is shared with only one person less harmful than an image publicly shared with a wider audience or with unknown parties?**

66. The provisions should provide for an assessment of the extent of the harm done by the sharing. Images which are shared widely and have made it into the public domain cannot be retrieved and there is a high risk of further dissemination.

## Intent to cause harm

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

67. The Law Council would not support a limitation of the prohibition to communications where there was an ‘intent to cause harm’ or a ‘seriousness’ criterion. The latter would introduce a vague and uncertain requirement which could lead to variable and inconsistent outcomes and delay or obstruct removal of images which are causing distress. Including an “intent” element would considerably narrow the scope of the prohibition and make enforcement very much more difficult.<sup>25</sup>

**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?**

68. The Law Council supports an approach whereby ‘intent to cause harm’ or ‘seriousness’ informs the Commissioner’s consideration as to what action should be taken against a perpetrator.

**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 the perpetrator, or should it be sufficient that there was a likelihood of harm occurring?**

**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?**

69. Given that the draft prohibition appears to only include actual instances of sharing intimate images, and does not encompass threats to share, the Law Council considers that determining what action to take based on the ‘likely’ degree of harm would be of little utility. If an intimate image has been shared and a complainant/victim can be identified, then the Commissioner should be able to ascertain the degree of actual harm caused. Consideration of the ‘likely’ degree of harm may be too difficult to quantify and too speculative.

70. In any event, the Law Council considers that action should be taken against a perpetrator in some form irrespective of whether there has been harm or not. The extent of the breach of privacy and the distress caused to the victim, whether or not it extends to actual harm, should be taken into account.

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<sup>25</sup> See e.g. Eric Goldman, ‘California’s New Law Shows It’s Not Easy To Regulate Revenge Porn’ [http://blog.ericgoldman.org/archives/2013/10/californias\\_new\\_1.htm](http://blog.ericgoldman.org/archives/2013/10/californias_new_1.htm).

## 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?**

71. Yes, except that they may require amendment as different technologies and platforms develop.

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

72. The Law Council considers that the definition of sharing should be broad enough to encompass any type of sharing by any technology or distribution method. This might require a referral of powers to cover methods which do not involve a head of Commonwealth power such as telecommunications.