

# **Submission: Summary**

## **Recommendations on the Proposed Civil Penalty Regime for the Non Consensual Sharing of Intimate Images**

**13 July 2017**

The Director, Online Content

Department of Communications and the Arts

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# The NSW Young Lawyers Communications, Entertainment and Technology Law Committee and the Criminal Law Committee make the following submission in response to the Proposed Civil Penalty Regime for the Non-Consensual Sharing of Intimate Images.

## **NSW Young Lawyers**

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Communications, Entertainment and Technology Law Committee (**CET Committee**) aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property; advertising and consumer protection; confidential information and privacy; entertainment; and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly about the shape of the law and the legal profession as a whole.

The Criminal Law Committee (**Criminal Law Committee**) is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Criminal Law Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Criminal Law Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

## Introduction

The CET Committee and the Criminal Law Committee (**Committees**) welcome the opportunity to make this submission of its Summary Recommendations to the Australian Government Department of Communications and the Arts in response to the Discussion Paper on the Proposed Civil Penalty Regime for the Non-Consensual Sharing of Intimate Images (**Discussion Paper**).<sup>1</sup> The Committees strongly support the introduction of a civil penalty regime for image-based violence, including the non-consensual sharing or production of intimate images. Such a regime would give those who are subject to this kind of conduct an effective, efficient and accessible avenue of recourse.

However, as a preliminary matter, the Committees submit that it is crucial to address the interaction between the proposed regime and other legal regimes – both criminal and civil. Image based abuse involves a severe breach of trust and deprives the complainant of his/her agency. Accordingly, the prohibition and Commissioner's powers need to be structured in such a way that the complainant is able to control the process. For this reason, we submit that the primary consideration should be the needs and interests of the complainant, or where a complaint is made on behalf of another person, the victim.<sup>2</sup> This primary consideration should manifest in all aspects of the process, but specifically should apply when determining whether and how a complaint should progress, including what action should be taken by the Commissioner, as well as any decisions to refer matters to prosecuting authorities or Law Enforcement Agencies (**LEAs**).

A second concern is that this intervention must not be a substitute for consideration by the Parliament whether to introduce a statutory cause of action for invasions of privacy. In this respect, it is important to note that the equitable action for breach of confidence<sup>3</sup> likely does not fully cover the range of behaviour encapsulated in image based abuse. In addition, the legislation should make clear that any imposition of civil penalties does not impact on the ability of a complainant or victim to recover damages at general law.

Finally, if this prohibition is introduced, the Office of E-Safety Commissioner (the **Commissioner**) must be fully and adequately resourced and reskilled to be able to effectively support complainants through the process and bring proceedings for breaches of the prohibition. While the Committees note that at present the Commissioner does have a limited responsibility over civil penalty provisions, these are of a substantively different character and nature than the prohibition proposed in the Discussion Paper. In effect, this prohibition would render the Commissioner a quasi-prosecuting authority. Furthermore, it would need to have an evidence gathering or fact-finding capability. In light

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<sup>1</sup> Australian Government, Department of Communications and the Arts, Discussion Paper: Non-Consensual Sharing of Intimate Images, May 2017 <https://www.communications.gov.au/have-your-say/civil-penalty-regime-non-consensual-sharing-intimate-images>.

<sup>2</sup> In this submission, we will refer to a victim as a complainant, noting that there may be circumstances where the victim and the complainant are not the same person.

<sup>3</sup> See, eg *Giller v Procopets* [2008] VSCA 236 and *Wilson v Ferguson* [2015] WASC 15.

of this, the Committees emphasise that sufficient staffing, training and resourcing must be made available to the Commissioner. In addition, it would also be necessary to have clear legislative or policy guidelines on the circumstances in which criminal prosecutions – at either a state or Commonwealth level – should be undertaken either in addition, or as an alternative, to civil penalties.

The Committees invite the Department or the Commissioner to contact Emily Ryan, President of the NSW Young Lawyers, should it require further information in relation to these Summary Recommendations. The Committees intend on providing the Department with a more detailed submission, discussing its Summary Recommendations in due course.

## Summary of Recommendations

### A prohibition against sharing of intimate images

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

- 1.1 The Committees submit that the phrase “causes an image to be shared” should be interpreted broadly rather than strictly requiring a person to cause an image to be shared.
- 1.2 The Committees submit that the prohibition should be extended to also include the threatened non-consensual sharing of intimate images.
- 1.3 The Committees continue to call on the Federal Government to consider the introduction of a statutory cause of action for serious invasions of privacy.

#### 2. Should an Australian link be included in order for the prohibition to come into effect?

- 2.1 The prohibition should be drafted so that it protects any person within the Commonwealth jurisdiction. This should include people who are in Australia temporarily, where the distributor is in Australia but the complainant is overseas, and where both distributor and complainant are overseas but are ordinarily resident in Australia (i.e. where the distribution happened outside the jurisdiction but the complaint was made within jurisdiction, or after the relevant person returned to the jurisdiction).
- 2.2 The Committees recommend that the Federal Government consider framing the Australian link as follows:

*This prohibition extends to an act done, or practice engaged in, whether inside or outside Australia and the external Territories, if an intimate image has an Australian link. An intimate image has an Australian link if:*

- (a) The intimate image originates in Australia; or*
- (b) The individual or organisation who shared the intimate image or made the intimate image available to be shared is:*

- i. an individual who is an Australia citizen, or a person who ordinarily resides in Australia, or person who is physically present in Australia, when the intimate image is shared; or*
- ii. an organisation or operator, whether incorporated or unincorporated, that carries on business or activities in Australia or an external Territory, when the intimate image is shared; or*
- (c) the computer, server or device that is used to share the intimate image is located in Australia; or*
- (d) the subject of the intimate image is an individual who is an Australia citizen or a person who ordinarily resides in Australia or person who is physically present in Australia when the intimate image is shared.*

## **Civil Penalty Regime**

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

3.1 The Committees recommend providing the Commissioner with a wide range of enforcement tools to effectively administer the proposed civil penalty regime and to deter individuals from distributing intimate images without consent, including civil penalties, enforceable undertaking, injunctions, infringement notices, formal warnings, end-user notices, take down notices, and other actions that the Commissioner thinks is appropriate.

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

4.1 The Committees agree, in principle, that the Commissioner should be able to share information with Law Enforcement Agencies (**LEAs**) domestically and internationally.

4.2 The Committees submit that any information sharing arrangements with overseas LEAs must prioritise the interest of the complainant.

### **5. What triaging processes should be implemented by the Commissioner for the handling of complaints?**

5.1 Notification to LEAs should occur in consultation with the complainant where they are over the age of 16, or their parents/guardian if they are under the age of 16.

### **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?**

6.1 On one view, it is important to take into account the age of the person sharing the intimate image, and that it would be appropriate to develop different procedures. This view accords with the position throughout the legal system, which recognises that special

considerations need to be taken into account for minors.

6.2 The countervailing view is that there should be no difference in procedures for minors. This view maintains that the purpose of the civil penalties regime is to protect victims of non-consensual sharing of intimate images.

6.3 On balance, and in light of our submission in response to question 23, the Committees recommend that adopting special procedures for minors is the preferred approach.

6.4 The Committees recommend that consideration should be given to how such procedures should be structured to adequately reflect these competing considerations.

**7. In cases where an intimate image of a minor is shared without consent 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 are shared)?**

7.1 The Committees recommend that, in principle, the prohibition should apply to people under the age of 18. However, the Committees question the appropriateness of the proposed civil penalty regime as it would apply to minors.

7.2 The Committees note that an intimate image of a person under the age of 18 will likely constitute a criminal offence and for this reason should always be reported to relevant LEAs (in consultation with the complainant if they are aged over 16, or their parents/guardian if they are aged under 16).

7.3 The Committees recommend that in addition to notifying relevant LEAs, the Commissioner should be provided with a range of enforcement mechanisms to effectively manage complaints involving minors, including for example imposition of mandatory education programs and counselling.

**8. Should a hierarchy of increasing severity of penalties be established? (This could reflect the severity of the case (for example, how widely the image is shared or on what forum the images are shared)?**

8.1 The Committees are of the view that a hierarchy of penalties would appropriately reflect the importance of publicly condemning the non-consensual sharing of intimate images. The Committees recommend that there should be harsher penalties for people who violate the prohibition more egregiously, and that penalties should increase in the case of repeat offenders however differed in their approach.

8.2 One approach advocated limiting aggravating features solely to repeat offenders. By not focusing on the impact of the offence, this approach has the advantage of avoiding the

need to quantify the harm to the victim. The countervailing view is that there should be enumerated circumstances of aggravation which would increase the penalty.

8.3 On balance, in addition to repeat offenders, and noting that the proposed civil penalty regime will have a role in publicly condemning the non-consensual sharing of intimate images, the Committees recommend that there should be harsher penalties for people who violate the prohibition more egregiously. This would enable the civil penalty regime to be an effective and available response to a wider range of conduct.

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

9.1 To the extent that a hierarchy of penalties requires further evidence gathering, it would likely create delay in the process, which may have an impact on the complainant.

9.2 The Committees recommend that if a hierarchy of penalties is introduced, it should be complemented by appropriate powers for the Commissioner to issue immediate take-down orders in order to provide the victim with immediate recourse pending an investigation of the alleged prohibited conduct or determination of penalty.

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

10.1 The Committees recommend the implementation of any available technological tools, including those developed by the Government or private entities, in combatting the non-consensual sharing of intimate images and facilitating the removal of intimate images shared without consent.

10.2 The Committees encourage the Department and the Commissioner to partner, where or as appropriate, with private organisations to invest in the development of, or develop, effective tools to combat the non-consensual sharing of intimate images and their subsequent removal.

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

11.1 The Committees are supportive of establishing a cooperative arrangement with social media services with a focus on removing intimate images, which exist online without the consent of the person who is the subject of the relevant image.

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

12.1 The question of intent raises two related but discrete issues. The first is whether the sharing was intentional – in the sense of a volitional act. The second issue directs

attention to whether the sharer intended to cause some result – such as harm to another person by sharing the image.

12.2 The Committees recommend that a person should not be in breach of the prohibition if the distribution of intimate images was not volitional. An example of this would include where a device that held the photos was stolen from a person, or if the encryption or other security measures used to by a person to protect intimate images were compromised by another person or entity.

12.3 The Committees recommend that where an image is made available because of a lost device, and the sharer did not act carelessly or unreasonably in losing the device, and took any available steps to recover the device or secure the images (through for example, remotely deleting data on the device), then that person should not be liable.

12.4 The Committees recommend that the prohibition should not be dependent on any intent to cause harm to any individual – be it the person depicted in the image or another person. However, the Committees submit that clear evidence of malice (e.g. the people the image was circulated to, the number of people the image was shared with etc.) should constitute aggravated prohibited conduct, and should therefore expose the distributor to harsher sanctions, including significant civil penalties and referral to LEAs.

12.5 In terms of breadth of distribution, the Committees are of the view that this should be a relevant consideration. The Committees endorse a staged penalty regime with increasing penalty amounts for wider distribution of images. However, the Committees stress that there should be no numerical threshold needed in order for the prohibition to be enlivened. Rather, the clear evidence of widespread distribution should be sufficient to aggravate the breach and increase the associated penalty.

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

13.1 The Committees recommend that a range of enforcement actions be made applicable to parties other than the person sharing an intimate image without consent or on the content host. To achieve the objects of the civil penalty regime, it may be necessary to take enforcement action against other individuals or corporations that host content containing these intimate images.

**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?**

14.1 The Committees are of the view that the Commissioner should be able to apply for a court order to require ISPs to block access to websites hosting content pertaining intimate

images. This power should be used with caution and reserved only for the most extreme cases.

## Information Gathering Powers

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

15.1 The Committees recommend extending the Commissioner's information-gathering powers to include those under s.581(2A) of the *Telecommunications Act 1997* (Cth) as well as Part 13 of the *Broadcasting Services Act 1992* (Cth).

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

16.1 The Committees recommend that the Commissioner should not be granted search warrant powers.

16.2 The Committees are of the view that it would be appropriate to allow the Commissioner to apply to a court for a search warrant in cases where a search warrant would be necessary for the Commissioner to effectively discharge its role and duties.

## Complaints Process

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

17.1 The Committees recommend that victims should not be compelled to use established complaints processes (where available) prior to lodging a complaint with the Commissioner.

17.2 The Committees are supportive of the view that it is appropriate for the Commissioner to provide necessary materials to support victims to pursue alternative complaints processes through for example, *social media safety centres*,<sup>4</sup> and would encourage these alternative complaints processes to be pursued where it will result in a more efficient and effective resolution of the complaint.

### **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?**

18.1 The Committees reiterate their submission in question 17 that victims should not be compelled to use established complaints processes (where available) prior to lodging a complaint with the Commissioner.

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<sup>4</sup> Office of the Children's eSafety Commissioner, 'Social media safety centres', available: <https://www.esafety.go.au/complaints-and-reporting/cyberbullying-complaints/social-media-services-safety-centres>.

18.2 The Committees are hesitant to recommend an appropriate length of time for a victim to wait to hear the result of a complaint prior to contacting the Commissioner, in so far as to submit that the appropriate period will necessarily depend on a range of relevant factors, and in any case should not exceed 48 hours.

**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?**

19.1 The Committees recommend placing a legal obligation on content hosts to remove images identified by the Commissioner as requiring removal as soon as is practicable, and in any event by close of business on the next business day.<sup>5</sup>

**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?**

20.1 The Committees recommend framing the failure to comply with a direction by the Commissioner as constituting a separate contravention in respect of each image and for each day during which the contravention continues.<sup>6</sup>

20.2 The Committees recommend the imposition of similar penalties to those imposed for failures to comply with the *Privacy Act 1988* (Cth),<sup>7</sup> the *Spam Act 2003* (Cth),<sup>8</sup> and the *Australian Broadcasting Services Act 1992* (Cth).<sup>9</sup> The prohibited conduct under the proposed civil penalty regime represent a significant public interest concern and breaches are likely to result in equal or greater harm to a victim of contraventions under these Acts.

## Definition of Terms

### Consent

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

21.1 ‘Consent to share’ should be informed, free and voluntary, be constituted by an explicit act (and not an omission), to share the relevant intimate image in a particular way and with a particular person/s or group/s.

21.2 The Committees recommend that implied consent should only be sufficient in very narrow circumstances.

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<sup>5</sup> s. 53, *Schedule 2, Australian Broadcasting Services Act 1992* (Cth).

<sup>6</sup> S.108(8), *Schedule 7, Broadcasting Services Act 1992* (Cth);

<sup>7</sup> 2 000 penalty units, s.13G and Part III A, *Privacy Act 1988* (Cth).

<sup>8</sup> 10, 000 penalty units, s.25(5)(b) *Spam Act 2003* (Cth).

<sup>9</sup> 100 penalty units, s.108, *Schedule 7, Broadcasting Services Act 1992* (Cth).

21.3 In addition, the Committees recommend that consent be negated where the person who has consented has done so due to certain mistaken beliefs.<sup>10</sup>

21.4 The Committees recommend that where an intimate image contains more than one person, the consent of one person should not be sufficient to allow the image to be shared. In these circumstances, the prohibition should make clear that the consent of every individual depicted in the intimate image should be required.

21.5 The Committees also submit that the legislation should expressly state the following limits on consent: that if a person distributes an image of themselves, that, without more, cannot be regarded as consent to further distribution; that consent given on one occasion, in one context, or for one purpose, cannot be regarded as consent for another occasion, context or purpose; and that sharing an image via one method cannot be regarded as consenting to sharing via other methods.

**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?)**

22.1 The Committees submit that there should be no differentiation between instances where intimate images are shared in a context that is different from the one for which consent has been given and instances where no consent was given at all.

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

23.1 The Committees recommend that vulnerable people should be given special consideration regarding consent.

23.2 The Committees recommend that the definition of vulnerable person include a child or a cognitively impaired person. "Cognitive impairment" should include any of the following: an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia, a severe mental illness, a brain injury.<sup>11</sup>

23.3 In addition, the Committees recommend that the definition of vulnerable people extend to include where a person is in a coercive environment.

23.4 The Committees recommend that a person under the age of 16 should be deemed to be unable to consent. This accords with the position with regard to (other) sexual offences committed against children.

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<sup>10</sup> As per *Crimes Act 1900* (NSW), s.61HA

<sup>11</sup> *Crimes Act 1900* (NSW), s 61H(1A).

23.5 In relation to those with cognitive impairments, the Committees recommend that a rebuttable presumption apply as to consent, whereby the Commissioner is able to inquire into the ability of the individual in question to give consent.

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

24.1 The Committees make no recommendation with respect to the onus of proving or disproving consent.

**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?**

25.1 The Committees recommend that cases where consent was initially given and later withdrawn should not be treated differently to cases where consent was never given. Consent should be flexible, and a person should be able to withdraw consent at any time, whether before or after distribution.

25.2 The Committees recommend that from the point at which consent is withdrawn, the law should apply as if consent was not given. Any sharing after that point should be subject to the proposed civil penalty regime.

## **Intimate Image**

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

26.1 The Committees recommend that the definition of intimate images be substantially similar to the definition adopted by the *Crimes Amendment (Intimate Images) Act 2017* (NSW).<sup>12</sup>

**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?**

27.1 The Committees recommend that the prohibition apply to manipulated or altered images. In addition, the Committees are of the view that there is no reason to limit this to digital altering. While the vast majority of alterations would be done digitally, it is certainly conceivable that non-digital techniques could be used.

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<sup>12</sup> **image** means a still or moving image, whether or not altered.

**intimate image** means:

(a) an image of a person’s private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or  
(b) an image that has been altered to appear to show a person’s private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.

**private parts** means:

(a) a person’s genital area or anal area, whether bare or covered by underwear, or  
(b) the breasts of a female person, or transgender or intersex person identifying as female.

**record an image** means record, take or capture an image, by any means.

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

- 28.1 The Committees recommend that a 'community standards' test should not be applied in determining whether an image is intimate.
- 28.2 If a community standards exception is to be included, the Committees recommend that the community standards exception be modelled on s.91T(d) of the *Crimes Amendment (Intimate Images) Act 2017* (NSW).

## Sharing

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

- 29.1 The Committees recommend that sharing be defined broadly and inclusively. Sharing should include sending, supplying, exhibiting, transmitting communicating to another person, or making the image(s) available for viewing or access by another person.
- 29.2 In addition, the Committees recommend that the definition of sharing should not be limited to digital communications and the definition should embrace hard copy distribution or display.

**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 consider sharing beyond this?**

- 30.1 The Committees recommend that the prohibition should not be limited to the digital or electronic sharing.

**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?**

- 31.1 The Committees are of the view that an intimate image which is shared with only one person is *prima facie* less harmful than an image publicly shared with a wider audience or with unknown parties.
- 31.2 However, the Committees stress that the fact that an image which was shared with only one person does not necessarily result in the distribution being less harmful than an image shared with a wider audience or with unknown parties.
- 31.3 The Committees recommend that it is essential for the Commissioner to consider the 'likely degree of harm' with reference to the nature of social media, the internet, and other communication mediums rather than simply the number or identity of the people that the image was shared with.

**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 the time of sharing the image, the sharer is mentally disabled, the person is under the age of 18 etc.)?**

32.1 The Committees recommend that voluntary intoxication should not be a defence or excuse to a violation of the prohibition.

32.2 The Committees recommend the inclusion of special provisions governing the applicability of any civil penalty regime to minors.

32.3 The Committees recommend the inclusion of special provisions for people who are cognitively impaired.

32.4 The Committees stress that the inclusion of special provision pertaining to individuals who fall into these categories should not result in the individual being fully exempted from the operation of the prohibition. Rather, the Committees recommend that a framework be implemented that gives the Commissioner an appropriate degree of discretion to resolve the matter in a way that accounts for the varying capacities of individuals within these groups.

**Intent to cause harm**

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

33.1 The Committees recommend that ‘intent to cause harm’ or ‘seriousness’ not be included as elements of the offence.

**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?**

34.1 The Committees recommend that ‘intent to cause harm’ (particularly where the intent was malicious) or ‘seriousness of the harm’ are factors that could appropriately be considered in provisions relating to aggravated contravention of the prohibition and in determining the appropriate enforcement action.

34.2 The Committees stress that the legislation should make clear that any consideration of ‘intent to cause harm’ or ‘seriousness’ in determining the appropriate action to be taken against a perpetrator should not be a prerequisite for taking enforcement action where it would be otherwise appropriate in the circumstances.

**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?**

35.1 The Committees recommend that the Commissioner should take action against a perpetrator whether or not there was intent to cause harm, whether or not harm was actually caused to the victim, and regardless of the seriousness of the harm.

35.2 The Committees recommend that the Commissioner, in deciding what type of enforcement action to take against a perpetrator, should determine whether a reasonable person would conclude that the conduct would be likely to result in harm to the victim.

**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?**

36.1 The Committees recommend that it would be more appropriate for the Commissioner to consider the 'likely degree of harm' in determining the most appropriate enforcement action to take against a perpetrator. The Committees are of the view that it is inappropriate for the Commissioner to give consideration to the 'actual degree of harm' suffered by a victim.

**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?**

37.1 The Committees are supportive of the current definitions in the EOSC Act as these are reasonably comprehensive.

37.2 The definitions under the EOSC Act are suitable for cases involving non-consensual sharing of intimate images as the expansion of the Commissioner's powers to include issues affecting adults and non-consensual sharing of intimate images are closely linked to the powers the Commissioner currently has.

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

38.1 The Committees are of the view that the technologies and distribution methods currently included in the EOSC Act are sufficient.

## Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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