



# TENDERING SENSITIVE OR INTIMATE IMAGES IN FAMILY LAW MATTERS

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## The purpose of this document

This document aims to assist solicitors to consider, in their independent exercise of forensic judgement, whether to include sensitive images, which may be moving or still, in evidence in family law proceedings. In family law matters, the use of sensitive images is not uncommon, and may in some circumstances provide valuable evidence in a party's case. However, decisions as to whether, and how, to tender these images in evidence should be approached with care.

## What are personal or sensitive images?

Still and moving images are treated as 'personal information' under s 6(1) of the *Privacy Act 1988* (Cth) (**Privacy Act**) where the individual is reasonably identifiable. In the context of family court proceedings, where the images are tendered as evidence in relation to the individual depicted, that individual will generally be reasonably identifiable.

'Sensitive information' is a subset of 'personal information', which is generally afforded a higher level of protection under the *Privacy Act*, and includes a still or moving image about an individual's sexual orientation or practices where the individual is reasonably identifiable.

## What are intimate images?

'Intimate images' are defined more narrowly in s 91N of the *Crimes Act 1900* (NSW) (**Crimes Act**). In New South Wales, an "intimate image" is defined in s 91N of the *Crimes Act* as:

- (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.

"Engaged in a private act" is also defined in s 91N of the *Crimes Act* and means:

- (a) in a state of undress, or
- (b) using the toilet, showering or bathing, or
- (c) engaged in a sexual act of a kind not ordinarily done in public, or
- (d) engaged in any other like activity.

There are similar provisions in respect of the non-consensual distribution of intimate or invasive images in all States and Territories of Australia.

## Tendering sensitive or intimate images

These definitions suggest that the context in which an image is collected or shared, including cultural expectations, may be relevant. Accordingly, determining whether an image is sensitive or intimate will be a forensic exercise taken on a case-by-case basis.

Depending on the circumstances of the matter, due to the highly personal, graphic, violent or otherwise offensive nature of these images, their use may pose significant risks for individuals, including distress, disrespect, embarrassment, physical harm, psychological trauma or re-traumatisation for parties or children involved in the proceedings.

The use of these images may also have adverse implications for a client's case, by undermining their evidence and/or credit, or by generating delay and/or costs. Depending on the circumstances of how and for what purposes sensitive images were tendered, there may be professional conduct implications for the practitioner, bring the profession into disrepute to a material degree, as well as undermine public confidence in the administration of justice. We note international jurisprudence (set out in *Appendix A: Background*) where practitioner conduct was called into question in instances where sensitive images were tendered for the primary purpose of humiliating the other party; or to cause distress or harm; exacerbate the conflict between parties and result in adverse impacts on children; and where there were other instances of vulnerability to be considered, such as allegations of family or domestic violence or other abuse.



## Practitioner considerations

Set out in this document are considerations relevant to deciding whether, and how, to tender intimate or sensitive images in family law matters. In identifying these considerations, the Law Society of NSW has had regard to obligations that arise under legislation, recent jurisprudence, and the *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015* (NSW) (**Conduct Rules**), the details of which are provided in *Appendix A: Background*.

This document does not provide an exhaustive list of considerations, but rather aims to assist practitioners in identifying key issues and matters relevant to a decision whether to include sensitive images in evidence. Solicitors should exercise their professional judgment in applying the information in this document to each particular matter, and to each client's circumstances.

In complex circumstances where there may appear to be conflicting obligations under the Conduct Rules, options for practitioners include referring to the resource materials on the Law Society of NSW website (Ethics Committee section), calling the Law Society Ethics Helpline on (02) 9926 0114, and seeking the views of the Ethics Committee.

# CONSIDERATIONS RELEVANT TO TENDERING INTIMATE OR SENSITIVE IMAGES IN FAMILY LAW MATTERS

In deciding whether to tender sensitive images in evidence in family law matters, solicitors should have regard to what is legislatively permissible, the possible impact on parties and their children, their obligation to comply with the overarching purpose of the practice and procedure provisions in the *Family Law Act 1975* (Cth) (**Family Law Act**), and obligations under the Conduct Rules.

The following is a non-exhaustive list of issues to consider. It may be necessary to provide clients who seek to tender sensitive images with robust advice as to the relevance and probative value of the images; safety considerations, including consideration of adverse emotional and psychological impacts on individuals including children; the just and efficient resolution of the matter; and the administration of justice.

## Should the images be tendered?

1. Is there confidence that the image is authentic, and not, for example, generated or manipulated by artificial intelligence?
2. Does the image serve a valid purpose and have probative value at this particular stage in the proceedings? For example, this type of evidence may be relevant if annexed to a trial affidavit, but not relevant if annexed to an affidavit in an interlocutory application about a narrower issue.
3. Is tendering the image necessary to provide genuine, probative evidence of what is asserted?

For example, in the 2010 Family Court of Australia decision in *Coleman & Hindle and Ors*,<sup>1</sup> the maternal grandmother (who was a party in the proceedings) tendered a nude photograph of the husband, which she had downloaded from the wife's laptop without consent. The image was tendered on the basis that it could have been discovered on the laptop by the children. Watts J placed no evidential weight on the image, other than to note that it undermined the credit of the grandmother.

4. Would tendering the image offend ss 95 and 96 of the *Family Law Act*, or ss 91N and 91Q of the *Crimes Act*? Has the necessary consent to including the image been obtained, to avoid a risk that tendering images may constitute a criminal offence?

5. Would tendering the image comply with legislative privacy requirements, particularly in the absence of the affected person's knowledge and/or consent? Would obtaining consent from that person overcome such a breach?
6. Would tendering the image breach the Conduct Rules (particularly Rules 5, 17.1, 21.2 and 34)?<sup>2</sup>
7. What is the possible impact of including the image in evidence on the parties and children involved in the proceedings? Consider:
  - cultural attitudes towards matters such as dress, nudity, sexuality, or violence;
  - the need to respect the dignity and personal privacy of all individuals involved in the proceedings;
  - the likely psychological impact on parties and children, including the risk of re-traumatisation or other psychological harm to vulnerable persons;
  - whether the image, or information within the image, may increase a risk of family violence, including coercive control; and
  - the risk of vicarious harm to other participants involved in, or associated with, the proceedings, including, for example, other family members, an independent children's lawyer, independent experts and service providers.
8. Is there a risk that the image, and the possible impact on other parties or their children, will have adverse consequences for the client's matter?

For example, the Court may draw a negative inference if it considers that an image was tendered with the intention of embarrassing, harassing or distressing the other party. Or, inclusion of the image may be (or may be considered) inflammatory, heightening conflict between the parties in ways that impede progress towards resolution of the matter.

<sup>1</sup> [2010] FamCA 319.

<sup>2</sup> Rules 5, 17.1, 21.2 and 34 are set out in more detail on Page 7.



## Alternatives to tendering images in evidence

9. Consider whether there is another way of proving what is asserted, other than by including the image in evidence. For example:
  - include a statement in an affidavit along the lines of “I have not annexed those images to this affidavit but they are available for production if required”; or
  - describe the image rather than annexing it; or
  - provide a redacted copy, with an indication that unredacted versions (including metadata for forensic purposes) are available; or
  - provide the image separately to the Court.
10. Consider another way of having the image included in evidence. For example, annex a smaller sample of a bundle of intimate or sensitive images as examples, rather than the full bundle of images.
11. If it is considered necessary to tender the evidence, it may be appropriate to make a request of the Court in advance of filing the evidence. Be prepared to provide detailed reasoning and justification to the Court as to the relevance and probative value of the sensitive images.

## Managing the images

12. Are there systems in place to ensure that individuals are able to seek access to, and correct, personal information held by the firm, including sensitive images, in compliance with privacy legislation?
13. Are there measures in place to ensure sensitive images are being handled and stored securely to prevent unauthorised access or distribution?
14. Are there measures in place to manage the risk of vicarious trauma to lawyers and other staff handling or presenting sensitive images during family law proceedings?

# APPENDIX A: BACKGROUND

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The information above has been provided based on a consideration of existing legislative requirements, as well as relevant Australian and international jurisprudence.

## Statutory and professional conduct obligations

### Obligations under the Family Law Act

Tendering evidence in family law proceedings is governed by the *Family Law Act* and *Federal Circuit and Family Court of Australia Rules 2021* (Cth) (see s 95(4) of the *Family Law Act*).

Since the commencement of the *Family Law Amendment Act 2023* (Cth), s 96 of the *Family Law Act* imposes a duty on parties to conduct proceedings in a manner consistent with the overarching purpose of the practice and procedure provisions, and practitioners have a duty to assist them to do so, with costs implications for non-compliance. The Court must interpret and apply the family law practice and procedure provisions in a way that best promotes the overarching purpose (s 95(3), *Family Law Act*).

The overarching purpose includes facilitating the just resolution of disputes in a way that ensures the safety of families and children; promotes the best interests of children; and as quickly, inexpensively and efficiently as possible (s 95(1), *Family Law Act*). Also relevant is s 95(2) of the *Family Law Act*, which requires practitioners to consider their duty to the administration of justice, including the efficient use of judicial resources and to the courts' overall caseloads.

This emphasis on resolution, safety and the interests of children underscores the need for practitioners to ensure that sensitive images tendered in family law proceedings are genuine (for example, not manipulated or generated by artificial intelligence), necessary, relevant, probative and credible.

### Criminal law implications

In certain circumstances, tendering sensitive images may constitute a criminal offence. In New South Wales, it is an offence under s 91Q of the *Crimes Act* to intentionally distribute an intimate image, as defined in s 91N of the *Crimes Act*, of another person, knowing that they did not consent to that distribution, or being reckless as to their consent.

### Privacy law implications

Organisations to which the *Privacy Act* apply must comply with the Australian Privacy Principles (APPs). APP 3 prohibits the collection of sensitive information (including an image) without the consent of the person depicted in the image and unless doing so is reasonably necessary for, or directly related to, one of the organisation's functions or activities (APP 3.3, 3.4). This is subject to a number of exceptions, including where the collection (or use or disclosure) is reasonably necessary for the establishment, exercise of defence of a legal or equitable claim, or where the collection is required or authorised by or under an Australian law or a court/tribunal order. Sensitive information may only be used or disclosed for a purpose that is directly related to the purpose of collection, subject to exceptions, including those applicable to collection (APP 6). Firms may wish to opt into the *Privacy Act* as a matter of best practice, given solicitors' duties in respect of confidentiality.

### Obligations under the Conduct Rules

Professional obligations, as set out in the Conduct Rules, apply to solicitors in all areas of practice and provide a framework within which practitioners conduct family law matters. The Conduct Rules may be engaged if practitioners seek to tender sensitive images, including, but not limited to:

- Rule 5, which provides that a solicitor must not engage in conduct which is likely to be prejudicial to, or diminish the public confidence in, the administration of justice, or bring the profession into disrepute.
- Rule 17.1, which prohibits a solicitor from acting as the mere mouthpiece of the client and requires that the forensic judgments called for during the case are exercised independently.
- Rule 21.2, which requires that a solicitor takes care to ensure that their decisions to make allegations or suggestions under privilege against any person are not made principally in order to harass or embarrass a person.
- Rule 34.1.2, which prohibits a solicitor from threatening the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor's client is not satisfied.
- Rule 34.1.3, which prohibits a solicitor from using tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

## Australian jurisprudence

There is reported caselaw in Australia (predating the 2023 reforms to the *Family Law Act*, as well as the merged Federal Circuit and Family Court of Australia) which refer to sensitive images being tendered, without clear guidance from the Court on how solicitors should approach this issue. The caselaw also provides examples of where tendering sensitive images have served to undermine the client's case and, in some cases, deepened the conflict between the parties.

In the 2020 Family Court of Australia decision of *Ulbek & Ulbek*,<sup>3</sup> Watts J noted that an affidavit tendered by the husband, which annexed nude images of the wife, had been struck out and removed from the Court file by the Senior Judicial Registrar.

As noted above, in the 2010 Family Court of Australia decision in *Coleman & Hindle and Ors*,<sup>4</sup> the maternal grandmother (who was a party in the proceedings) tendered a nude photograph of the husband, which she had downloaded from the wife's laptop without consent. The image was tendered on the basis that it could have been discovered on the laptop by the children. Watts J placed no evidential weight on the image, other than to note that it undermined the credit of the grandmother.

In *Barton & Barton*,<sup>5</sup> a 2008 Family Court of Australia decision, the wife tendered nude images of herself which had been taken by the husband, alleging they had been taken without her consent. This allegation was questioned in cross-examination, with the wife being shown earlier images of herself partly unclothed, clearly taken with her consent. Stevenson J found that this raised issues as to the wife's credit:

She was forced to admit that she “*obviously was not unwilling*” but claimed, incredibly in my view, to have forgotten that these photos had been taken by the husband. I should note that she denied, most unconvincingly, that the person depicted in one of the photographs was herself.<sup>6</sup>

## Relevant international jurisprudence

The 2022 England and Wales High Court (Family Division) decision of *Re: M (A Child: Private Law Children Proceedings: Case Management: Intimate Images)* provides an example of a possible case management approach to be taken in respect of tendering sensitive images.<sup>7</sup> In the matter, the mother tendered video evidence in support of allegations of sexual violence in the context of a coercive relationship. In rebuttal, the father tendered numerous videos, including videos taken by the mother, depicting allegedly consensual intimacy. Intimate images of the father with a young child were also tendered. None of this evidence was tendered with the consent of the other party. In commenting on the Court's approach to such evidence, Knowles J noted:

If material is relevant and has probative value, other factors may come into play in both the court's assessment of proportionality and the ultimate control of its process. Put simply, the court must - in this case - undertake a balancing exercise between the father's right to a fair hearing when faced with extremely serious allegations and the mother's need to have a fair process which does not impact adversely on her ability, as a vulnerable witness, to give her best evidence to the court. The introduction into the proceedings of intimate material which is likely to be distressing to the mother and also embarrassing for the father is one of the considerations relevant to that exercise.<sup>8</sup>

Knowles J rejected certain items tendered by the father as being of poor probative value or irrelevant. Her Honour directed the parties to jointly produce a schedule itemising the material produced by the mother, describing its relevance, and indicating whether there were alternatives to including the images.<sup>9</sup>

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<sup>3</sup> *Ulbek & Ulbek* [2020] FamCA 1097, [149].

<sup>4</sup> *Coleman & Hindle and Ors* [2010] FamCA 319, [65]-[66].

<sup>5</sup> *Barton & Barton* [2008] FamCA 996.

<sup>6</sup> *Ibid* [40].

<sup>7</sup> *Re: M (A Child: Private Law Children Proceedings: Case Management: Intimate Images)* [2022] EWHC 986 (Fam).

<sup>8</sup> *Ibid* [67].

<sup>9</sup> *Ibid* [70]-[74].

Her Honour expressed ‘grave concerns about the use of intimate images in private law children’s proceedings where allegations of abuse, specifically domestic abuse, are made’.<sup>10</sup> She noted the content of a written guidance document jointly prepared by Counsel, which suggested:

- A party seeking to file intimate images as evidence in these proceedings should make an application to the Court before doing so and must establish the relevance and probative value of the material.
- In considering the application, a Court would consider all relevant factors including issues of vulnerability, the impact of the evidence, and whether the material is tendered in order to cause distress or harm.
- Such material would be rarely permitted, particularly without the other party’s consent, and if there are alternatives to permitting it.
- The Court should also consider minimising the volume of material permitted, and who can view it.
- Measures to protect the security of the material should be considered, both within the hearing and without.<sup>11</sup>

In the 2016 Canadian decision in *J.S. v M.M.*,<sup>12</sup> a parenting dispute heard in the Ontario Superior Court of Justice, Pazaratz J criticised the applicant for attaching a series of sexually explicit images and text conversations exchanged between the respondent and another person. His Honour questioned the relevance of the images to determining the dispute, and suggested that the intention to humiliate the respondent would serve to heighten tension between the parties, noting:

*[W]here behaviour is neither unusual, illegal nor disputed, there’s no need to inflame tensions by attaching texts and pictures that tell us nothing we need to know.*<sup>13</sup>

His Honour raised concerns about the admissibility of the evidence, given it was obtained without consent.<sup>14</sup> He also suggested that including the images would likely fuel intractable conflict between the parties and adversely impact the children.<sup>15</sup>

In a 2020 Canadian professional conduct matter of *Herrington*,<sup>16</sup> a lawyer admitted to having brought the administration of justice into disrepute by filing an affidavit containing inappropriate images. She also admitted to having failed to provide legal services to the standard of a competent lawyer.

In the course of a parenting dispute, the lawyer was preparing an emergency application to prevent the wife from leaving the jurisdiction with the children. Before executing an affidavit in support of the application, the lawyer’s client (the husband) attached explicit nude photographs of the wife. The lawyer reviewed the affidavit and sought the advice of colleagues in her office as to the inclusion of the images. She retained the images in the sworn affidavit as evidence of a pattern of behaviour for the wife, and also having regard to the time constraints. At the request of the opposing Counsel, the Court ordered the affidavit be refiled with redacted photographs.

In considering an appropriate sanction, the Hearing Committee of the Law Society of Alberta noted that:

[t]he sanctioning process is to ensure that the public is protected and maintains a high degree of confidence in the legal profession.<sup>17</sup>

The Hearing Committee determined that a reprimand was an appropriate sanction:

Ms. Herrington’s actions specifically affected the Wife negatively. Her actions did not affect the public generally. Ms. Herrington has learned her actions were inappropriate and the process of this hearing and a reprimand will deter her in the future. Ms. Herrington does not need to bear the brunt of general deterrence for the sake of the profession. General deterrence can be handled in better ways than making an example of Ms. Herrington.<sup>18</sup>

However, the Hearing Committee also found that there were ‘reasonable and probable grounds’ that the lawyer’s conduct contravened s 162.1 of the *Canadian Criminal Code*, which prohibits publication of an intimate image without consent. On that basis, the Hearing Committee was obliged to refer the matter to the Solicitor General.<sup>19</sup>

<sup>10</sup> Ibid [76].

<sup>11</sup> Ibid [76]-[78].

<sup>12</sup> *J.S. v M.M.*, 2016 ONSC 2179.

<sup>13</sup> Ibid [13].

<sup>14</sup> Ibid [14].

<sup>15</sup> Ibid [8].

<sup>16</sup> *Hearing Committee of the Law Society of Alberta, Canada: In the Matter of Part 3 of the Legal Profession Act, RSA 2000, c. L-8 and In the Matter of a Hearing regarding the conduct of Karen Herrington, a Member of the Law Society of Alberta* (12 November 2020).

<sup>17</sup> Ibid [46].

<sup>18</sup> Ibid [50].

<sup>19</sup> Ibid [57].

THE LAW SOCIETY OF NEW SOUTH WALES  
170 Phillip Street, Sydney NSW 2000  
ACN 000 000 699 ABN 98 696 304 966  
[lawsociety.com.au](http://lawsociety.com.au)

T +61 2 9926 0333 F +61 2 9231 5809  
E [lawsociety@lawsociety.com.au](mailto:lawsociety@lawsociety.com.au)