



Australian Government

Department of Communications and the Arts

Summary of the consultation workshops relating to a civil penalty regime for non-consensual sharing of intimate images

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Scope of this report

This summary report relates to workshops conducted by the Department of Communications and the Arts (**Department**) between 25 and 27 July 2017. The workshops were convened shortly after the closure of the public consultation period in respect of the Department's discussion paper on a civil penalty regime for the non-consensual sharing of intimate images.



The workshops

The workshops were arranged by the Department as part of a broad national consultation and occurred in the following locations:

- Canberra, on 25 July 2017
- Sydney, on 26 July 2017, and
- Melbourne, on 27 July 2017.

Participants from diverse organisations and backgrounds attended the workshops including:

- Individuals affected by non-consensual sharing of intimate images (victims)
- Academics who had subject matter expertise
- University student researchers
- Community legal centres including legal aid centres
- Office of the eSafety Commissioner
- Sexual assault support organisations
- Women's support organisations
- Child and family support organisations
- Education sector administrative organisations
- Legal profession organisations
- Government organisations at Commonwealth, State and Territory levels
- Social media services;
- An Industry representative organisation, and
- A private citizen.

General outcome of the workshops

Generally, the workshops supported the idea and direction of the proposed civil penalty regime outlined in the discussion paper issued by the Department. The workshop participants also reached a substantial consensus in respect of some, but not all, matters of detail. For clarity, where we refer to consensus we mean that there was an appearance of general agreement but not necessarily universal or unqualified agreement.

New and distinctive issues for further consideration

Several distinctive issues raised by participants appeared to have been well received and may be worthy of further consideration:

- In Canberra, individuals who identified as LGBTIQ, Aboriginal or Torres Strait Islander were noted as being individuals who could be disproportionately affected by the non-consensual sharing of intimate images. The Department suggested that it may conduct special consultations with relevant community groups to ascertain their views.
- In Melbourne and Sydney it was noted that the mere fact that the image exists was itself a pain point for many victims, and could cause considerable anxiety. This point was made mainly by the victims in Sydney with additional support in Melbourne. This anxiety was the product of an implicit threat to share the image, and of the subject's knowledge that the image was in the possession and control of another. In Canberra, the same issue was acknowledged in the context of domestic abuse, typically of women, where the possession of the image is used to control and threaten the victim. The suggested enforcement tool was to require the removal of the image

from the perpetrator's electronic devices, possibly supported by a power to require the perpetrator to provide access to the relevant devices or cloud storage services to ensure that the image is erased and no longer in the possession of the perpetrator.

Some participants argued that the most appropriate framework was for a letter of warning to be sent, followed by a fine and some type of intervention order.

Areas of consensus

Substantial consensus was reached in the workshops on the following issues.

	Issue	Consensus
1	Intimate images	<ul style="list-style-type: none"> • The definition of intimate images should be gender neutral and not overly restrictive. • Images that are intimate by virtue of their context (including intimacy in respect of cultural and sexual orientation issues) should be covered and may perhaps be addressed by the definition including images taken in "circumstances in which a reasonable person would have reasonably expected to have been afforded privacy". • Altered and manipulated images should also be covered. • It is not necessary for the victim to be identifiable from the image.
2	Sharing	<ul style="list-style-type: none"> • Sharing on social media should be within the scope of the proposed laws. • Sharing should not be assessed on a quantitative basis. Sharing with one person may be as harmful as sharing with multiple persons in some circumstances. • Ideally, sharing should not be restricted to online sharing or exposure in the digital world. However, it was acknowledged that a broader application of a civil penalty regime may be legislatively challenging, especially since the discussion paper originates with the Department and there may be limitations in respect of the constitutional powers of the Commonwealth. • Perpetrators at any point of the chain should be liable when images are shared, not just the person who initially made the images available.
3	Consent	<ul style="list-style-type: none"> • Sharing should require positive consent at each and every stage of sharing (e.g. the initial sharing and any on-sharing).
4	Intent to cause harm	<ul style="list-style-type: none"> • Intent to cause harm should not be an element of the prohibition, but should be taken into account when determining remedies and penalties. It would be preferable to focus on the harm to the victim rather than the intent of the perpetrator.



	Issue	Consensus
5	Electronic service, social media service and relevant electronic service	<ul style="list-style-type: none"> The definition of the prohibition should not be limited to digital services and, if possible, should cover offline sharing. However, the constitutional limitations on the powers of the Commonwealth were noted.
6	Proposed civil penalty regime	<ul style="list-style-type: none"> With some exceptions, the participants at the workshops were generally supportive of the need for a new civil enforcement regime and of the direction of the regime proposed in the discussion paper. Various participants noted that victims had reported generally unsatisfactory experiences with law enforcement agencies in respect of image-based abuse. This suggested that the existing criminal provisions are not generally sufficient or effective. Education is required for individuals about the rights that they have in relation to images of themselves. The age of both perpetrators and victims was seen as a relevant factor when considering enforcement tools. The new regime could be promoted as being additional to discussions, education and laws relating to sexting and child pornography. It would be an adjunct to the criminal law and not a replacement.
7	Information gathering powers	<ul style="list-style-type: none"> Despite being acknowledged as a potentially useful tool, search warrants were considered to be more appropriate to a criminal law regime. However, it was also noted that many companies require a court order to ensure checks and balances and to ensure that they are legally authorised to provide information and access to facilities. A certain minimum amount of information would need to be collected from the victim in order to undertake the investigation of a complaint. Notification of an incident to a parent, guardian, responsible adult or school was seen as a matter of substantial sensitivity and complexity. The wrong approach might make it less likely for victims to seek help, and an inappropriate notification could inadvertently cause additional harm or embarrassment to the victim.



	Issue	Consensus
8	Complaints process	<ul style="list-style-type: none"> • There are three main options about how a victim might make a complaint or otherwise seek a remedy: <ul style="list-style-type: none"> • The victim is first obliged to try social media takedown processes • The victim is first required to make a complaint to the Office of the eSafety Commissioner to commence the civil enforcement process; or • The victim is free to choose either of the two approaches above: to try the social media takedown process, or to make a complaint to the Office of the eSafety Commissioner to commence the civil enforcement process. • The victim should have options, and there may be variations on the options described above. Different victims may prefer to take different actions. There should be a multitude of avenues to assist the victim. • The victim’s consent should be obtained before a complaint is referred by the eSafety Commissioner to other law enforcement bodies, such as the police. Despite this, there was acknowledgement of certain existing mandatory reporting obligations in relation to offences where the victims are minors, or where there are child protection issues. • The process needs to be simple to understand so that it can be easily accessible to all people regardless of language, technical capability or background.
9	Enforcement tools and powers	<ul style="list-style-type: none"> • There should be an ability to impose financial penalties, with reference to a sliding scale depending on various factors such as intent to cause harm. However, it was noted that the establishment of financial penalties risks “putting a price” on the harm that has been caused. This may be difficult to do generally, and the eSafety Commissioner would also need to ensure consistency in the calculation of the penalties. • Minors are to be subject to the enforcement regime, but the eSafety Commissioner should have discretion to refer them for rehabilitation in lieu of imposing fines or other penalties. There was consensus that rehabilitation is important for minors. • The eSafety Commissioner should be able to order website blocking, presumably if the website fails to comply with determinations or orders under the new laws, or in respect of serious and repeated incidents. • A power to require offenders to attend education classes relating to the relevant issues was regarded favourably.

Source: Stakeholder feedback at workshops held in Canberra, Sydney and Melbourne July 2017



Areas of notable non-consensus

The table above identified all the instances of consensus on particular issues. There was no identifiable consensus on the remaining issues that were either put to, or raised by, participants at the workshops. That is not to say that those remaining issues were necessarily areas of disagreement, but no meaningful agreement was shown in respect of them. However, some issues were the subject of notable disagreement among the participants:

Requirement for express consent: Some participants proposed that consent must be clear and express, while others argued that consent should also be able to be implied. It was felt that implied consent would better reflect ordinary social relationships (especially of young people). No clear consensus emerged on this issue.

Onus of proof in establishing consent or lack of consent: Some participants argued that the perpetrator should bear the onus of proving that they had the consent of the victim to share the image. It was argued that this position favoured the victim who would, on making the complaint, have already withdrawn their consent in respect of future sharing. Other participants argued that this was too strong a position and that it reversed the ordinary position in which the burden of proof rests on the complainant.

Additional penalties on the first person to share an image: This proposal was controversial because, although it sought to provide additional discouragement for the initial sharing of an image, the proposal did not take into account that subsequent sharing could be malicious, reckless or harmful in a manner that also warranted higher penalties. In Sydney, this issue arose in a different form where it was proposed that aggravated penalties be awarded against a perpetrator who obtains the relevant images in the context of a professional (e.g. medical) relationship or a personal relationship. There was no consensus on this proposal.

Receipt of unsolicited images: There was disagreement about whether the receipt of unsolicited intimate images (sometimes called “dick pics”) should be covered by the regime. Participants acknowledged that, in some circumstances, the unsolicited receipt of intimate images could be a form of abuse, intimidation or harassment. However, others argued that this scenario did not fit well within the regime that was largely focussed on the sharing of images where the image depicted the victim rather than the perpetrator.

Softer penalties for perpetrators who are minors: This particular issue arose mainly in Melbourne. It was suggested that perpetrators who are minors may be dealt with by the Office of the eSafety Commissioner in a manner that was less focussed on penalising the minor and more focussed on educating the minor in an effort to avoid future incidents. This issue may be worth further consideration but was not the subject of consensus.

Power to remove images from perpetrators’ devices and storage services: In Sydney, one participant proposed that the regime should include a power to order the removal of images from perpetrators’ devices and storage services. The suggestion was made on the reasonable basis that the continued possession by the perpetrator of the image constituted a continuing threat. If implemented, the proposed power could be a useful and powerful tool but could also be considered to be intrusive and akin to a warrant.

