



Our **Mission** is to prevent child sexual assault in our society.
Our **Vision** is to make Australia the safest place in the world to raise a child.

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To Whom It May Concern:

Bravehearts is pleased to provide this submission in relation to the Discussion Paper, *Civil penalties regime for non-consensual sharing of intimate images*.

As an agency that works with, and advocates for, survivors of child sexual assault we regularly provide support for young people who have been victimised through the sharing of intimate images, and would like to provide this submission with a particular concern for the impact on young people.

Bravehearts notes that young people are reportedly increasingly sharing intimate images with peers and that the transmission of intimate and sexual images, while more often occurring via mobile phone, also involves technology including image sharing apps, social networking and chat sites.

The growing trend of sharing of intimate images creates a challenge as we struggle to craft an appropriate response. Clearly, across Australian jurisdictions, depending on its content, images may meet the definition of child pornography under legislation, and as identified in the current Discussion Paper, there are both federal and state-based criminal offences. Citron and Franks (2014) argue that “[c]riminal law is essential to send the clear message to potential perpetrators that non-consensual [sharing of intimate images] inflicts grave privacy and autonomy harms that have real consequences and penalties.”

However, as the current discussion paper explores non-consensual sharing of intimate images also may have repercussions under civil law such as defamation law, privacy law etc. We believe that the availability of civil penalties scheme is an essential additional avenue for addressing the issue and protecting those who may be victimised through the non-consensual sharing of intimate images.

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Consultation Questions

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

The prohibition should also include reference to the sharing of images outside of the online space.

The suggested framing of the prohibition could possibly extend not just from referring to 'a person' but explicitly reference to content hosts to clearly provide for the responsibility of content hosts to respond appropriately when they become aware of a lack of consent.

For example:

"A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, on a relevant electronic service or social media service or through a physical form, without that other person's consent. A content host engages in prohibited behaviour if they share an intimate image of a person, or causes an image to be shared, or do not take down an image, after they have received notice that the image has been shared or posted without consent."

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)?

Bravehearts supports the inclusion of an Australian link in order for the prohibition to come into effect where either the person sharing the image, the subject of the image or the content host is Australian (or in the case of a content host, based in Australia or owned by an Australian company).

However, if there is no Australian connection, our position would be that wherever possible there should be a requirement, to forward information on to the relevant authority, especially in relation to images of minors. For example, in the case of images of minors information could be referred to the Australian Federal Police.

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

We believe that a holistic approach to a civil penalties regime will provide the Commissioner with adequate options to enforce the most appropriate and effective response, with consideration to the circumstances of individual matters. We support regime that includes, as noted in the Discussion Paper:

- Civil penalties (including scaled points for first time offenders to repeat offenders)
- Enforceable undertakings; and
- Injunctions

As well as:

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- Infringement notices;
- Formal warnings;
- Take down notices; and
- Other actions that the Commissioner thinks appropriate.

We would additionally note that enforcement of civil penalties should also include consideration of severity of the offence, for example, (a) the intent of the person sharing the image, (b) how the image came into the possession of the person who has them and (c) how, and how widely, the image is subsequently used and/or redistributed.

Which enforcement measure is utilised, under what circumstances, must be clearly defined. There must be transparency in application of the measures to ensure the appropriate responses and victim expectations are met.

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

Bravehearts believes that it is absolutely imperative that the Commissioner not only be able to share information with domestic and international law enforcement agencies, but that the Commissioner be compelled to do so when there is an identification of criminal actions. In the case of the non-consensual sharing of intimate images where the image is identified as being, or potentially may be, a child or young person.

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 person (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?

As noted above under Consultation Question 4., when the Commissioner becomes aware of intimate images of children and young people, Bravehearts believes that the Commissioner should be mandated to report to either domestic or international law enforcement agencies. An intimate image of a child or young person (under the age of 18) may constitute an offence and the Commissioner, with knowledge of such an image, has a duty of care to report the image to the authorities.

In relation to whether or not the Commissioner should be required to notify the minor's parent or guardian, Bravehearts would suggest caution. Given that in some cases it may not be easy to determine if a parent or carer is involved.

Bravehearts would advocate that, in relation to intimate images of children or young people (under the age of 18), the Commissioner be mandated to report to domestic and/or international law enforcement agencies, who can determine if the minor's parent or guardian should be informed.

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In relation to non-consensual sharing of intimate images involving adult victims, our position is that adult victims should be supported to report to the police to determine if a criminal offence has occurred. Alternative reporting options should be made available to adult victims. For example, aside from direct contact with police (which some victims may find intimidating and hold concerns around insensitive responses or victim blaming) a reporting system modelled on Bravehearts' Sexual Assault Disclosure Scheme (SADS) should be made available.

Due to the nature of child sexual assault, and similar to the experiences of victims of non-consensual sharing of intimate images, individuals often feel a sense of powerlessness over their situation. SADS has been successful in reinstating some of the power back to the individual, and in turn, helping to increase the number of assaults reported to the police.

SADS was created by Bravehearts with two broad aims: (1) to assist as a vehicle by which adult survivors of child sexual assault could notify the police in an anonymous, non-threatening manner and (2) the provision of information to police which would otherwise not be reported and which would assist in identifying ongoing and repeat offending behaviour.

The Scheme allows for adult victims to report officially and anonymously, if they wish, through Bravehearts who act as a conduit of information to the police (www.bravehearts.org.au/report-sexual-assault/sexual-assault-disclosure-scheme/).

The scheme has been replicated by both Queensland (ARO) and New South Wales (SARO) police services.

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?

Bravehearts is of the view that legislation responses need to be carefully constructed to ensure the protection of young people (and other individuals who may be victim of non-consensual sharing of images), while avoiding the unnecessary criminalisation of adolescent behaviours.

We would advocate that different processes are necessary for matters where an intimate image is shared without consent by a minor, and would suggest that there are four potential scenarios, rather than the two posed in this consultation question:

- i. Matters where an intimate image of a minor is shared without consent by another minor;
- ii. Matters where an intimate image of an adult is shared without consent by a minor;
- iii. Matters where an intimate image of a minor is shared by an adult; and

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- iv. Matters involving the non-consensual sharing of an image of an adult by another adult.

A more effective consequence for young people involved in sharing intimate images would be a diversionary program focussed on awareness and education, such as the restorative justice approach of conferencing or a therapeutic approach such as Bravehearts' Turning Corners program (<http://www.bravehearts.org.au/services/do-you-need-support/youth-support-services>). It would be preferable that young people realise the severe moral, personal and social costs of their actions and that such acts may have serious legal consequences.

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

It may be appropriate to include, as part of the civil penalty regime, a diversionary approach for young people. As noted above, a diversionary program would have the capacity to reduce the likelihood of criminalising a young person and assisting them in realising the potentially serious moral, personal and social costs of their actions and that such acts may have serious legal consequences.

In some cases however, it may be appropriate to utilise existing criminal laws. Our position is that there should be a scaled approach that takes into consideration a range of potentially mitigating or aggravating factors such as:

- The nature and context of the image;
- Whether the victim is considered a vulnerable person;
- Whether there is the ability to, and informed or actual consent;
- The intent of the person who sent the original image;
- The capacity of the person who sent the original image;
- How the images were created and how they came into the possession of the person who has them;
- How those images or videos are subsequently used and/or distributed; and
- The degree to which the privacy of the victim has been impacted on.

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

Bravehearts believes that the establishment of a hierarchal approach to a civil penalty regime is necessary. As stated under Consultation Question 7., there are a range of mitigating and aggravating factors that may need to be considered when determining appropriate penalties ,including, but not limited to,:

- The nature and context of the image;
- Whether the victim is considered a vulnerable person;
- Whether there is the ability to, and informed or actual consent;
- The intent of the person who sent the original image;
- The capacity of the person who sent the original image;
- How the images were created and how they came into the possession of the person who has them;
- How those images or videos are subsequently used and/or distributed; and
- The degree to which the privacy of the victim has been impacted on.

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

The implementation of a hierarchy of penalties may lengthen the process, where further information is required to establish the details needed to make a determination around factors in relation to specific matters. However, Bravehearts believes that the process can be expedited through careful consideration and consultation that predetermines the weight given to both potential mitigating and aggravating factors. Any delays need to be minimised as much as possible to ensure that any impacts on the victim are reduced.

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

While Bravehearts would defer commenting in respect of those within the sector who have greater technological knowledge, we would suggest that the reporting and complaint mechanisms available must consider the needs and vulnerabilities of victims. We know that there are a raft of barriers to disclosing victimisation. The level of shame, silence and secrecy means that we need to ensure that avenues for notification is sensitively handled.

We know, for example, that young people may be reluctant to disclose victimisation for fear of repercussions (including personal and social, loss of access), feeling responsible or embarrassed, or simply the belief that no one will care and nothing can be done. In response to these issues Bravehearts, along with Queensland Police Service's Task Force Argos and supported by Google, developed the Join the Dots scheme (www.bravehearts.org.au/report-sexual-assault/join-the-dots/) to provide young people with a safe, anonymous (if they wish) reporting mechanism. Join the Dots is currently being revamped in conjunction with the Queensland Family and Child Commission and the Queensland Department of Science, Information Technology and Innovation.

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

It is absolutely vital for the success of any regimes responding to the non-consensual sharing of intimate images that the Commissioner establish strong cooperative

relationships with not only social media services, but also public sites that are identified as being commonly utilised for sharing these images (such as pornhub, redtube etc.). A cooperative arrangement will expedite the taking down of non-consensually shared intimate images and will protect those services and sites from being penalised, ensuring that the outcome for victims is not delayed.

We would recognise that some sites commonly used for sharing non-consensual intimate images, such as revenge sites, may not be willing to cooperate, which emphasises the importance of instilling a penalties regime.

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

Individual circumstances must be considered in any matter. As noted above under Consultation Questions 7 and 8., there are a range of mitigating and aggravating factors that may need to be considered when determining appropriate penalties, including, but not limited to,:

- The nature and context of the image;
- Whether the victim is considered a vulnerable person;
- Whether there is the ability to, and informed or actual consent;
- The intent of the person who sent the original image;
- The capacity of the person who sent the original image;
- How the images were created and how they came into the possession of the person who has them;
- How those images or videos are subsequently used and/or distributed; and
- The degree to which the privacy of the victim has been impacted on.

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

Bravehearts would support the inclusion of a penalty for those who have knowledge of, or participate in, the sharing of non-consensual intimate images, as currently included in the *Regulatory Powers (Standard Provisions) Act 2014* that includes civil penalty provisions for individuals who may be “in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision”.

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?

There needs to be a range of options available to the Commissioner, especially in cases where individual sites may be considered ‘repeat offenders’ or continually refuse to remove non-consensual intimate images. In such cases, we would support the Commissioner seeking a court order to request Internet Service Providers block such sites.

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

Yes. Bravehearts supports the Commissioner being given information gathering powers to ensure that information and evidence relevant to the administration of the civil penalties regime is attained.

16. Should the Commissioner be granted search warrant powers?

Bravehearts believes that the Commissioner should be provided with adequate powers to enforce the administration of the civil penalties regime.

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

As noted previously, Bravehearts recognises that there are many barriers to disclosing victimisation and lodging complaints. The silence, secrecy and shame that many experience means that we need to ensure that avenues for notification are sensitively handled. Our position would be that considering the needs and vulnerabilities of victims, individuals should be encouraged to lodge complaints or concerns through whichever body they feel most comfortable doing so with. While victims should be provided with a range of options, including established complaint processes, if victims do not feel confident or comfortable in these options, it is important that the Commissioner supports them through the process.

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?

Bravehearts believes that, as with the current cyberbullying complaints system administered by the Commissioner, a 48 hour response period is appropriate. Additionally, Bravehearts would suggest that Bravehearts would suggest that once a notice to remove material has been issued, social media sites should be provided with a maximum timeframe of 24 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?

Bravehearts would 100% support the introduction of a legal obligation on content hosts to remove images as directed by the Commissioner. As noted above, we recognise that some sites commonly used for sharing non-consensual intimate images, such as revenge sites, may not be willing to cooperate, which emphasises the importance of introducing legal obligations and a civil penalties regime.

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?

As noted above under Consultation Question 14, “There needs to be a range of options available to the Commissioner, especially in cases where individual sites may be considered ‘repeat offenders’ or continually refuse to remove non-consensual intimate images. In such cases, we would support the Commissioner seeking a court order to request Internet Service Providers block such sites”.

In relation to the penalties that apply, we believe that a penalty regime should be developed with consideration given to similar regimes in place.

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

Bravehearts position is that ‘consent to share’ may only be established through explicit verbal or written permission to do so, and that that consent may be revoked through explicit verbal or written form. The burden of proof that consent had been provided, must be with the individual who is alleged to have shared the intimate images without consent.

We recognise the complexity in determining consent, and know that in matters of sexual assault, for example, oft times the offender will admit sexual activity but claim a belief that it was consensual.

In relation to sharing of intimate images, we believe that the starting point should be that the original image was shared by the victim on the belief that the image was for the intended recipient only. Unless there is explicit verbal or written evidence that there was consent to forward or share the image, it must be assumed that consent to share does not exist.

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 shared in a different context to that 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).

Our position is that if consent is given to share an image in one specific context and the image is then shared within a broader or different context, consent to share can only be applied to the original context. The context or medium through which an image is shared can vastly vary the audience the image is shared with, the breadth of exposure of the image and the overall impact on the victim of the image being shared.

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

As stated above (Consultation Questions 7, 8 and 12) there are a number of factors that should be considered when responding to non-consensual sharing of intimate images. The victimisation of a vulnerable person is one such factor as the capacity to provide consent is impacted on. When an individual uses force or threats of force to bring about the compliance in sexual activities, there is little doubt that consent is not given. Confusion arises when there is no obvious coercion and the question turns to one of ability to consent.

Vulnerable people may be defined as individuals who may be unable to give informed or actual consent, whether that is because of age, impaired capacity or because there is an imbalance of power between the victim and the perpetrator.

If a person is seen to be a vulnerable person, their ability to give fully informed or actual consent may be limited and as such any ‘consent’ given will need to be carefully considered in light of all relevant circumstances.

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

Unless there is explicit verbal or written evidence of consent to share the image, it must be the responsibility of the person who shared the image to prove how they believed they had permission to share an image.

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

In matters where consent to share an image was originally provided, and later withdrawn, a common sense approach needs to be taken. If the intimate images were shared while consent was given, the person sharing the images should not be subject to penalty. Any intimate images shared after consent has been withdrawn should be treated and responded to by the Commissioner in the same way as the sharing of intimate images where no consent was provided.

If an individual provides consent to share images, but later withdraws consent, they should have the option to request that any images shared be taken down and/or deleted from devices where the image is held.

26. What should the definition of ‘intimate images’ be for the purposes of prohibition? Bravehearts supports a broad definition of ‘intimate image’.

Our concern with the Canadian definition provided in the discussion paper is that it specifies that “at the time of recording” there was a “reasonable expectation of

privacy". While this may be relevant in many cases, such a clause in the definition would exclude matters where consent to share was initially given or where consent to share in one context was provided.

A broad definition that includes:

- Images were obtained consensually or otherwise, either within the contexts of, or outside of, an intimate relationship
- The person is engaged in or seemingly engaged in a sexual activity or sexual pose
- The person is nude, is exposing all or part of his or her genitals, anal region or her breasts
- Digital or non-digital photograph or videos
- Images that have been digitally manipulated or created to include the victim
- Images distributed either digitally or outside of the digital space

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?

Bravehearts would suggest that digitally manipulated or created images that includes the victim should be included.

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

In assessing whether an image is an intimate image and whether the image has been shared without consent, factors that should be considered include:

- The nature and context of the image;
- Whether the victim is considered a vulnerable person;
- Whether there is the ability to, and informed or actual consent;
- The intent of the person who sent the original image;
- The capacity of the person who sent the original image;
- How the images were created and how they came into the possession of the person who has them;
- How those images or videos are subsequently used and/or distributed; and
- The degree to which the privacy of the victim has been impacted on.

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

The definition of sharing should be all-encompassing and include sharing at a broad level as well as at an individual level, including:

- Distributing via digital means, through uploading, distributing, sending, publishing or posting online, via websites, social media, email, texts and other avenues.
- Distributing via non-digital means, such as printing and physical formats.

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? (for example, a still digital image that is printed and then shared in physical form).

Bravehearts supports the extension of the definition of sharing to include sharing of images outside of the digital space.

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?

The level of harm or distress is not contingent on the size of the audience, and for some victim may be more dependent on who the images were shared with. It may well be that one victim experiences tremendous harm when an image has been shared with one or two individuals, and another experiences less distress when an image has been shared more widely among a number of unknown individuals.

Experience of harm and distress can vary greatly depending on the individual.

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.)

As noted above under Consultation Question 12., individual circumstances must be considered in any matter and there are a range of mitigating and aggravating factors that may need to be considered when determining appropriate penalties, including, but not limited to,:

- The nature and context of the image;
- Whether the victim is considered a vulnerable person;
- Whether there is the ability to, and informed or actual consent;
- The intent of the person who sent the original image;
- The capacity of the person who sent the original image;
- How the images were created and how they came into the possession of the person who has them;
- How those images or videos are subsequently used and/or distributed; and
- The degree to which the privacy of the victim has been impacted on.

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

Yes. See response under Consultation Question 32.

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?

Yes. See response under Consultation Question 32.

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?

The actual level of harm or distress may vary greatly by victim. We would argue that if an image has been shared without consent, both any actual harm or distress (emotional or otherwise) and the likelihood of harm occurring should be sufficient for purposes of determining what level of action should be taken.

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?

Both. See response under Consultation Question 31 and 35.

37. Are the definitions in the EOSC Act suitable for cases involving non-consensual sharing of intimate images?

Bravehearts supports the Commissioner drawing on existing definitions of the terms 'electronic media', 'social media service' and 'relevant electronic service' contained in the *Enhancing Online Safety for Children act 2015*.

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

As discussed under Consultation Question 30, Bravehearts supports the extension of the definition of sharing, and therefore distribution methods, to include sharing of images outside of the digital space and in fact, to include any not yet apparent new platforms or methods.

Education and prevention

Although not within the scope of this consultation,

While it is notionally true that parents and carers must take ultimate responsibility for educating and protecting their children, it is also true that the internet and communication platforms and services are foreign to many parents thus reducing their ability to protect their children. The reality is that more often than not, children know more about the internet and mobile phone technologies than adults do. Continuing calls for parents to educate themselves are falling on the predominately 'out of their depth', baffled and frightened ears of parents and carers.

A more appropriate preventative approach would include a school-based 'Social Studies'

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education approach that would teach young people about the dangers – legal and personal – associated with sharing of images, as well as safe mobile phone and internet usage.

Research

Much more research is needed into this area. Recent studies have highlighted links between sharing of intimate images, cyberbullying, harassment, and in some cases interpersonal violence. The context, as well as the implications of the non-consensual sharing of intimate images, need further study.

In most instances, when sharing intimate images, young people (and indeed many adults) are merely acting impulsively or within the boundaries of a personal relationship; generally, young people are not sex offenders or pornographers. It is Bravehearts position that we need to take a sensible, preventative approach that does not criminalise teenage 'impulsiveness' or explorative behaviours. At the same time, we need to balance these approaches with child protection needs.

We thank you for the opportunity to provide this submission. Please contact us on research@bravehearts.org.au if any further information is required.

Kind Regards,



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