

7<sup>th</sup> July 2017

The Director, Online Content Section  
Department of Communication and the Arts  
GPO Box 2154  
Canberra ACT 2601

Dear Director

**Submission: Prohibition of non-consensual sharing of intimate images**

Collective Shout is a grassroots campaigning movement mobilising and equipping individuals and groups to take action against the objectification of women and the sexualisation of girls. We also engage, more broadly, in efforts to address related issues such as violence against women, sexual violence and sexual exploitation.

Collective Shout is often engaged to work with children and young people at schools across Australia. This work gives us the opportunity to hear first hand experience from those who have been targeted or impacted by non-consensual sharing of intimate images. Collective Shout supports the Government's efforts toward a prohibition on non-consensual sharing of intimate images, including the empowerment of the e-Safety Commissioner to enforce such a regime.

Thank you for this opportunity to contribute to your deliberations. We would welcome the opportunity to supply more information, or address the Committee in person.

Kind regards,

Laura McNally, Director

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## Summary of Collective Shout key recommendations:

- *Key Recommendation 1: Collective Shout recommends that the framing include other forms of distribution, such as print. For example, if a photograph is printed and distributed around a school or workplace. Under the proposed definition this situation would not be covered.*
- *Key Recommendation 2: Collective Shout recommends that if “implied consent” forms part of the definition of consent, any interpretation should be interpreted in the favour of the complainant/victim and for the non-sharing of intimate images, and the onus should be on the perpetrator to disprove otherwise.*
- *Key Recommendation 3: Collective Shout strongly recommends that an Australian link should not be required as this will provide a means of evading provisions.*
- *Key Recommendation 4: Collective Shout recommends a set of principles introduced to ensure that the overriding consideration is the protection of complainants/victims, and complainants/victims should be empowered in the process, especially if they are identified as a vulnerable complainant.*
- *Key recommendation 5: Collective Shout strongly recommends that a takedown notice should be issued as first recourse in all cases. This is essential to minimise future harm, hurt, and humiliation of complainant/victim.*
- *Key Recommendation 6: Collective Shout recommends an expedited process for complainants/victims of non-consensual sharing of intimate images. The Commissioner should be the first recourse in order to urgently issue take down notices in a time sensitive manner.*
- *Key Recommendation 7: Collective Shout recommends that there must be a legal obligation for content hosts to removed images identified by the Commissioner.*
- *Key Recommendation 8: Collective Shout recommends that evidence of consent to share intimate images should show that any agreement was obtained entirely free of duress, including financial duress.*
- *Key Recommendation 9: Collective Shout recommends that likelihood or potential for harm should be sufficient in determining action to be taken. While the complainant/victim may provide a Victim Impact Statement, the onus should not fall on the victim to prove harm.*
- *Key Recommendation 10: Collective Shout recommends that the drafting of definitions should be such that further technologies and distributions methods can be added as required in view of the rapidly changing state of technology and communications.*

## Further Comments: Issues for consideration

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

- *Key Recommendation 1: Collective Shout recommends that the framing include other forms of distribution, such as print. For example, if a photograph is printed and distributed around a school or workplace. Under the proposed definition this situation would not be covered. Therefore, Collective Shout recommends the definition should be broader than the posting of images via electronic service.*
- *Key Recommendation 2: Collective Shout recommends that if “implied consent” forms part of the definition of consent, any interpretation should be interpreted in the favour of the complainant/victim and for the non-sharing of intimate images, and the onus should be on the perpetrator to disprove otherwise.*
- Collective Shout also recommends that definition of “intimate” should take on a broad definition to include the feelings and experiences of complainants/victims from diverse cultures and religions (and take a wider interpretation than just a ‘western’ interpretation and meaning). Any interpretation should be interpreted in the favour of the complainant/victim; the onus should be on the perpetrator to disprove otherwise.

### 2. Should an Australian link should 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?)

- *Key Recommendation 3: Collective Shout strongly recommends that an Australian link should not be required as this will provide a means of evading these provisions. However, it is noted that enforcement of these provisions in respect to individuals in foreign jurisdictions may be impracticable.*

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

- Collective Shout recommends that a range of enforcement tools should be available to the Commissioner which should include penalties and take down notices. We also recommend further tools such as the power to issue an Order to restrain or injunct from future offending, and referrals pathways with partnership organisations for education for the perpetrators about boundaries and behaviour change.

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

- Collective Shout recommends that the Commissioner should be able to share information as required for law enforcement purposes. We strongly recommend

that the process has a focus on the victim/complainant at all times, including quick decision making. For example, that the Commissioner deal with the incident as a matter of priority, and should there be a need to share with domestic and international law enforcement agencies that this be done either once for example the image has been removed, or concurrently. The focus here is on reducing delay and minimising hurt, shame, and embarrassment of the complainant/victim.

**5. What triaging processes should be implemented by the Commissioner for the handling of complaints? For example, if an intimate image is of a minor (a person under the age of 18), should the Commissioner be required to notify police and/or the parents/guardians of the minor? Should there be any circumstances in which the minor should have the option to request that police or family are not notified?**

- Collective Shout recommends that the Commissioner should be required to notify police and parents/guardians in the case of a minor unless there are circumstances that would merit an exception being made – such as the minor being over 16 and living independently of their parents. However, Collective Shout also recommends that any notification of parents is done with sensitivity for the victim/complainant. For example, a notification should not include showing the image to the parent/guardian, as this is likely to cause more harm.

**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?**

- Collective Shout recommends that the same process should be followed, but penalties should vary according to the age and circumstances of the perpetrator. For example, images posted for commercial gain or malicious intent should attract a different penalty to images that may have been 'leaked' by accident. In all cases they should be compelled to takedown the image, but not all cases should attract penalties.

**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 images is shared)?**

- Collective Shout recommends that cases involving minors are first used as an opportunity for education. A minor should be mandatorily ordered to complete a rehabilitation program, and in failing, possible referral to prosecution agencies. The focus for minors should be on rehabilitation through education and support, as well as counselling support for the victim. Collective Shout recommends using criminal and punitive measures for minors if reoffending occurs.

**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 images through various forums.)

- Collective Shout recommends that penalties be imposed on a case by case basis – more serious cases or repeat offenders should be referred for criminal prosecution at the discretion of the Commissioner.

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

- *Key Recommendation 4: Collective Shout recommends a set of principles introduced to ensure that the overriding consideration is the protection of complainants/victims, and complainants/ victims should be empowered in the process, especially if they are identified as a vulnerable complainant.*
- *Key recommendation 5: Collective Shout strongly recommends that a takedown notice should issue as first recourse in all cases. This is essential to minimise future harm, hurt, and humiliation of victim. Following that, the Commissioner could revert to use other available penalties.*
- Collective Shout recommends that for repeat offending an order to restrain from future offending should be applied. If there is a breach of the injunction then referral to prosecution is advisable. The breach of an injunction could result in criminal sanctions.
- A hierarchy of penalties should not lengthen the complaint process if it is appropriately administered.

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

- Collective Shout recommends that the Commissioner should have those tools necessary to carry out its functions.

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

- Collective Shout recommends that a cooperative arrangement should be established with social media services.

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

- Collective Shout recommends that the penalties should vary depending on the intent of the image sharer.

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

- Collective Shout recommends that the definition should list different scenarios to aid in clear enforcement actions against other persons, other than the final person who shared the image. Providing examples under the definition will provide more certainty and efficiency for the Commissioner. It should be noted if any examples are provided under the definition, that it be noted, that it not be limited to those examples, and include, inter alia.
- For example, there was an intention on the part of a group/ enterprise, and each person ultimately played a role in causing the image to be shared. For example, one person's role was to take the image, the other person had a role to upload to a group chat, and the third person had the role to distribute and upload to social media. This is arguably a joint enterprise, and each person were part of the joint enterprise and caused the sharing of the picture.

**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?**

- Collective Shout recommends that the balance should be in favour of the victim/ complainant. Such action is recommended in cases where those websites are in the business of posting exploitative images taken or posted without the consent of the parties.

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

- As stated in key recommendation 4, Collective Shout recommends that a set of principles are espoused. One of the principles should include that the lives of complainants/ victims and particularly those belonging to vulnerable groups (such as young persons) should be protected as much as possible with their privacy upheld insofar as possible.

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

- Collective Shout recommends that cases in which search warrants are required should be conducted in tandem with police authorities. Search warrants should only be in the domain of the criminal law only, except if the Commissioner has to go through the same processes as police to obtain a search warrant.
- Search warrants have to be conducted appropriately to uphold basic human rights and civil liberties of privacy and protection from state intrusion.

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

- *Key Recommendation 6: Collective Shout recommends an expedited process for victims/ complainants of non-consensual sharing of intimate images. The Commissioner should be the first recourse in order to urgently issue take down notices in a time sensitive manner.*

- Requiring complainants/victims to exhaust other complaints processes first may significantly slow the process and leave victims vulnerable to hurt and humiliation.

**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?**

- Collective Shout recommends that complainants/victims should be empowered to take their complaint directly to the Commissioner. Any length of time may cause more harm to the victim/ complainant.

**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?**

- *Key Recommendation 7: Collective Shout recommends that there must be a legal obligation for content hosts to removed images identified by the Commissioner.*

**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?**

- Collective Shout recommends penalties are available for the Commissioner for non-compliant content hosts including financial penalties and the blocking of sites.

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

- *Key Recommendation 8: Collective Shout recommends that evidence of consent to share intimate images should show that any agreement was obtained entirely free of duress, including financial duress.*
- Collective Shout recommends that implied consent should be interpreted in the favour of the victim/ complainant, and the onus be on the perpetrator/ offender to disprove otherwise. Verbal or Implied consent may be sufficient in so long as the offender is willing to remove the image if the complainant subsequently withdraws consent.

**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?)**

- Collective Shout recommends that a narrow interpretation of consent is applied. An image could only be shared or used within the context in which consent was given. Context: intended purpose of original image- and issue of consent.

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

- Collective Shout recommends special consideration be given to vulnerable people. Definitions of vulnerable must include but not be limited to: young persons, persons with a mental illness or intellectual disability.

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

- Collective Shout recommends primary consideration is the victim/ complainant. If the perpetrator/ offender wants to disprove non-consensual sharing, the onus rests on that person.

**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?**

- Collective Shout recommends in such cases the offender must be willing to remove an intimate image where the complainant subsequently withdraws consent.

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

- Collective Shout recommends a broad definition be applied. This may include images taken of individuals who are nude or in a state of undress or which is focused on their genital regions, or images of them engaged in private activities including sexual activities, using the bathroom or toilet, getting changed, sleeping or otherwise behaving in an uninhibited fashion within a private context – such as within their own home or in a public changing room, dressing room or toilet, and where they would not expect to be photographed or filmed. A combination of the two definitions provided in the discussion paper should cover most circumstances.
- The definition should cover images where the individual is identifiable, even if the image has been manipulated – such as adding them to a sexually explicit photo. If the victim is not readily identifiable but the victims asserts it is of them and they did not consent at the time it was taken, it should fall within the prohibition.



**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?**

- Collective Shout recommends that digitally manipulated photos where a victim is identifiable should be covered by the definition.

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

- Collective Shout recommends an appropriate test could be applied, considering whether distribution of the image is capable of causing an individual to feel shame, humiliation, embarrassment, anxiety or fear for their safety. This will vary a great deal depending on individual circumstances.

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

- Collective Shout recommends sharing should be defined broadly to cover distributing so that it may be viewed by one or more other individual/s. It should also include other forms of distribution; such as prints. For example if a photograph is printed and thus shared around a school or workplace.

**30. To the extent the Commonwealth is able to legislate, should the definition of sharing be confined to the digital space, or should the definition should consider sharing beyond this? (For example, a still digital image that is printed and then shared in physical form.)**

- *Key Recommendation 1: Collective Shout recommends that the framing include other forms of distribution, such as print. For example, if a photograph is printed and distributed around a school or workplace. Under the proposed definition this situation would not be covered. Therefore, Collective Shout recommends the definition should be broader than the posting of images via electronic service.*

**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?**

- Collective Shout recommends that any form of sharing be considered under the regime. The act of sharing without consent is harmful in itself, whether to an individual or group.

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

- Collective Shout recommends that if the victim is unable to provide consent, then the image should fall within the prohibition. If the image is shared accidentally, the consequence should be a takedown order rather than any penalty.

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

- Collective Shout recommends these elements be taken into account in relation to the penalty imposed rather than in the framing of the prohibition. Sometimes an intent to profit or to derive pleasure will be central, rather than an intent to cause harm – and this should also result in increased culpability.

**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?**

- Collective Shout recommends that “intent to cause harm” and “seriousness” should be taken into account in relation to penalty.

**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?**

- *Key Recommendation 9: Collective Shout recommends that likelihood or potential for harm should be sufficient in determining action to be taken. While the complainant/victim may provide a Victim Impact Statement, the onus should not fall on the victim to prove harm (emotional or otherwise).*

**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?**

- Collective Shout recommends that likely degree of harm should be sufficient to determine culpability.

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

- Collective Shout recommends that definitions in the EOSC may be suitable, unless any limitations are identified with these definitions.

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

- *Key Recommendation 10: Collective Shout recommends that the drafting of definitions should be such that further technologies and distributions methods can be added as required in view of the rapidly changing state of technology and communications.*

