

Women's Health Tasmania Inc.

Submission on the Discussion Paper

'Civil penalties for non-consensual sharing of intimate images'

June 2017



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The Director

Online Content Section
Department of Communications and the Arts
GPO Box 2154
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**Submission on the discussion paper
'Civil penalties for non-consensual sharing of intimate images'**

Thank you for the opportunity to contribute to the development of a federal civil penalty regime in relation to the non-consensual sharing of intimate images.

About Women's Health Tasmania

Women's Health Tasmania (WHT) is a universal service, available to all women in Tasmania. It seeks to increase the range of services, and its reach, to women vulnerable to inequitable health outcomes due to social or economic determinants. WHT acknowledges the impact of societal influences such as income, education, gender, sexual orientation, ethnicity, disability and isolation on health outcomes, and seeks to reduce the negative effects of these factors on individual women.

WHT is part of a national network of women's health centres. It is a health promotion charity funded by the Tasmanian Department of Health and Human Services, guided by the World Health Organisation's definition of health – "Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity". WHT provides a safe, supportive environment for women. It is run by women, for women, and aims to promote positive health outcomes by providing a diverse range of services, taking a holistic approach. This perspective on women's health has seen WHT at the forefront of preventative health in Tasmania.

WHT's vision is for Tasmanian women to be informed, supported and active decision makers in their own health and well-being. As a result, WHT has also been a key advocate on issues such as a woman's right to make informed choices about her health. Our leadership has been evident in a wide range of health policy, in social justice and gender equity. WHT consistently advocates on behalf of women with both State and Commonwealth governments, on a range of legislation and policies impacting on women's health. In recent years, WHT has broadened its service delivery component by undertaking outreach activities, offering a state-wide information telephone line and using electronic technologies. It currently provides services to women from 74 different postcode areas.

WHT continues to provide direct services to individual women and to advocate for, and promote, the health and well-being of all Tasmanian women. Our knowledge and expertise is based on 29 years' experience working with, and for, the women of this state.

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Submission on the discussion paper 'Civil penalties for non-consensual sharing of intimate images'

WHT acknowledges all previous submissions made to government concerning NCSII many of which have contributed to informing this submission. The approach WHT has taken in this submission is to ensure any definition is broad enough to capture the specific context relevant to the individuals involved.

Framing of the prohibition

WHT believes it is important that legislation focuses on the behaviour, and threatened behaviour, and lack of consent. The intent of the perpetrator or harm to the victim are not relevant in the framing of the prohibition. Similarly, notions of community standards and decency of the material inappropriately focus on the act of the victim rather than the perpetrator and implies the offence is against the public rather than the victim.

WHT suggests

“A person engages in prohibited behaviour if the person shares an intimate image of another person, or causes an image to be shared, without that other person's consent”.

WHT also acknowledges the threat to share images must also be included as an offence and supports the creation of separate offences for threatening rather than actually sharing intimate images. A maximum of three years for threatening NCSII and up to five years for NCSII encourages people to report a threat when they may not have if additional penalties did not exist.

WHT suggests

“A person engages in prohibited behaviour if the person threatens to share an intimate image of another person, or causes a threat of an image to be shared, without that other person's consent”.

In relation to threats, whether the image exists or not is not relevant, and it must be made clear the law applies in any case. Furthermore, provisions must be made for it to be an offence to threaten to share images of a third party. This is particularly relevant in cases of family violence where children may be involved.

Civil penalty regime

WHT supports Government actions to expand the role of the eSafety Commissioner by granting additional powers to investigate claims and apply for enforcement measures in cases of NCSII involving adults in the same way it is able to deal with cases of cyber bullying and NCSII involving minors.

WHT believes a specific criminal offence and civil penalties regime at the Commonwealth level, in relation to acts and threats of NCSII, is required. While many state and federal laws exist that may be appropriate in some cases, the types of behaviours and harms associated with NCSII appear to be falling outside of established legislation. New Commonwealth legislation will promote clear and consistent regulation, aid in communication between jurisdictions and where parties reside in different states.

The establishment of both a civil penalties regime and specific criminal legislation acts as a powerful deterrent if people believe the penalty will be enforced and also importantly sends a strong public message that the behaviour is unacceptable.

It is clear that victims of NCSII are overwhelmingly women and children and therefore the issue must be considered from a gendered perspective and in the context of family/domestic violence. NCSII is a contemporary manifestation of an abuse of power. WHT notes recent Government measures to address this issue through the *National Plan to Reduce Violence Against Women and their Children*. However, NCSII does affect both genders and people who are not in an intimate relationship. It is a broad issue that requires broad strategies relevant to all members of the community, and is further reason why a specific criminal offence and civil penalties regime at the Commonwealth level, in relation to acts and threats of NCSII, is required.

WHT sees the eSafety Commissioner as best placed to not only enforce civil measures, but also effectively deal with the priorities for victims, including the fast removal of images, help to deal with the situation that led to the image being online, perpetrators being brought to account and referral for victims to support agencies. Furthermore, it is important for victims to be offered a range of conflict resolution options including criminal, civil or other alternatives such as dispute resolution and mediation, which in turn encourages a sense of agency and empowerment.

WHT views the establishment of a civil penalties regime as an important strategy in terms of rebalancing some of the power and control back into the hands of the victim. Of equal importance, it must be part of a bigger campaign to not only provide support for victims but also provide community education and awareness in an attempt to create change in societal power dynamics particularly in relation to gender.

Consent

WHT believes while the notion of consent is complex and difficult to define there are a number of clear factors to consider. Consent is context specific in that the limitations to personal agency must be considered. WHT agrees that a useful tool to test these limitations is the 'Model of Positive Consent' as applied in sexual assault laws, making explicit that consent is informed, and expressly and freely given. It also contains clear articulation of the right to withdraw consent at any time. Limitations to personal agency may include factors such as disability, age, duress, deception, intoxication or domestic violence context.

Any new legislation must make explicit that the onus is on the person sharing the material to seek consent and be able to demonstrate it was expressly and freely given. Furthermore, it must be made explicit that upon ending a relationship any prior consent is withdrawn and that consent to share in one context does not imply consent to share in an different context.

Intimate image

WHT believes a definition of intimate image for the purpose of prohibition must encompass the behaviours noted below:

- pornographic images that have been digitally manipulated including the victim's face or other identifying features;
- images of sexual assault;
- images obtained from the use of hidden devices to record another person;
- stolen images from a person's computer or other device; and
- images obtained (consensually or otherwise) by strangers, friends, acquaintances or

intimate partners.

WHT considers the wording 'intimate image' is inclusive of all gender identities and of intimate material not necessarily sexual in nature.

It must be explicitly stated that intimate images are not restricted to 'digitally manipulated or created' images and must include handmade recordings such as drawings that are reproduced and shared.

Sharing

A definition of sharing must include all means of sharing material from posting online to sending a single text, be it via a relevant electronic service or social media service, as the prohibition is seeking to capture all cases of NCSII. It must also reach further than the digital space to include printed images distributed in physical form.

WHT believes the issue of whether an intimate image which is shared with only one person, as opposed to a wider audience should be considered less harmful, is not relevant to forming the definition. The aim is not to define the level of harm of a particular act of sharing, it is to define the act itself.

WHT congratulates the Government's commitment to addressing the increasingly concerning issue of the non-consensual sharing of intimate images and looks forward to future initiatives, especially those aimed at promoting community discussion, awareness and cultural change.