

The Director, Online Content Section
Department of Communications and the Arts
Via email: onlinesafety@communications.gov.au

To the Director, Online Content Section,

Re: Consultation process on a proposed civil penalty regime for the non-consensual sharing of intimate images

Thank you in advance for considering the feedback of Family Planning Tasmania (FPT) in your consultation process on a proposed civil penalty regime for the non-consensual sharing of intimate images. Family Planning Tasmania has chosen to submit this letter in response to the consultation document provided. This letter is divided into four distinct sections:

1. Overview of Family Planning Tasmania
2. Challenges with existing legislation
3. Questions raised in consultation paper
4. Case study demonstrating the complexity of non-consensual image-sharing

1. Overview of Family Planning Tasmania

Family Planning Tasmania is a state-wide, not for profit organisation providing sexual and reproductive health clinic and education services to all Tasmanians. Family Planning Tasmania is the leading agency in Tasmania working in the area of sexual and reproductive health.

Family Planning Tasmania provides non-judgmental sexual and reproductive health services to Tasmanians of all ages; education and health promotion services to Tasmanian schools and communities; up-to date evidence based skills and knowledge through clinical training; and reliable, expert guidance and advice to government; community leaders and organisations.

Family Planning Tasmania undertake extensive work within the Tasmanian community with a focus on servicing vulnerable populations. From July to December 2016 Family Planning Tasmania Clinical Services saw:

- 5,766 occasions of service clinic
- 42% were Health Care or Pension cardholders
- 58% of services were for clients living in low socio-economic areas.

Family Planning Tasmania Education Services saw:

- 11,604 participants in group education (includes school programs Kinder – year 12)
- 38% of sessions were delivered in rural or remote areas
- 51% of sessions were delivered in low socio-economic areas.

Family Planning Tasmania has extensive networks within the Tasmanian community including schools and organisations and provide professional development for teachers and school staff.

During implementation of Family Planning Tasmania's SafeLanding Project (2014 – 2016), Family Planning Tasmania:

- Delivered 2 day Relationships and Sexuality Education workshops to 120 teachers, school staff, and community workers
- Worked with more than 60 professionals to support RSE implementation within schools.

Cybersafety and the exchange of intimate images has been incorporated into Family Planning Tasmania's Relationships and Sexuality Education Programs for over seven years as technology has become an integral aspect of young people's friendships and sexual relationships.

2. Challenges with existing legislation

While the scope of this consultation does not extend to the effectiveness or operation of existing criminal offences, Family Planning Tasmania would like to identify that the application of existing child pornography laws to consensual and private images taken, distributed and stored by youth under 18, but over the ages of consent, is problematic for a number of reasons:

- Young people are able to consent to sexual activity, but not to sharing of sexual images;
- Sharing of sexual images increases with students who are having sexual relationships;
- This law has informed the approach commonly taken with sexting education, for example, students are often taught "just don't do it";
- Often the blame is placed on the person who takes the photo when they become a victim of non-consensual sharing of these images; and
- This may reduce the likelihood of the young person reporting the non-consensual sharing of images due to fear of legal consequences and internalised victim blaming – for example "I was asking for this because I did the wrong thing by taking an intimate photo of myself".

Introduction of civil penalties and the inclusion of information regarding this in education programs and public awareness campaigns could assist in shifting focus to the abusive behaviour and therefore reassure victims of non-consensual sharing of images and increase reporting.

3. Questions raised in consultation paper

The following section outlines Family Planning Tasmania's feedback in response to issues and questions raised in the consultation paper.

- **Complaints handling** – Family Planning Tasmania assert that young people should have the option of requesting that police or family are not notified in the event of a complaint.
- **Complaint handling** – At the time a complaint is made, the Commissioner should assess:
 - Age and maturity of the young person;
 - What is in the best interests of the young person; and
 - The young persons' ability to make an informed choice.
- **Adult vs young person process** – The process to handle a case whereby an intimate image of a young person is shared with another young person without consent should be different to the process of handling a case where only adults are involved. When a case involves young people, factors including intent to harm should be considered.
- **Criminal vs civil penalties** – While the scope of this consultation does not extend to the effectiveness or operation of existing criminal offences, Family Planning Tasmania would like to identify that the application of existing child pornography laws to consensual and private images taken, distributed and stored by youth under 18, but over the ages of consent, is problematic:
 - Young people are able to consent to sexual activity, but not to sharing of sexual images;
 - Sharing of sexual images increases with students who are having sexual relationships;
 - This law has informed the approach commonly taken with sexting education, for example, students are often taught "just don't do it";
 - Often the blame is placed on the person who takes the photo when they become a victim of non-consensual sharing of these images; and

- This may reduce the likelihood of the young person reporting the non-consensual sharing of images due to fear of legal consequences and internalised victim blaming – for example “I was asking for this because I did the wrong thing by taking an intimate photo of myself”.

Introduction of civil penalties and the inclusion of information regarding this in education programs and public awareness campaigns could assist in shifting focus to the abusive behaviour and therefore reassure victims of non-consensual sharing of images and increase reporting.

- **Cooperative arrangement with social media services** – Family Planning Tasmania endorses the existing cyberbullying complaints scheme and the cooperative arrangement with social media services. Family Planning Tasmania recommends a cooperation arrangement with social media services is established for non-consensual image sharing, in a similar manner to the existing cyberbullying complaints scheme.
- **Different penalties for intent of the image-sharer** – Family Planning Tasmania recommends imposing different penalties based on the intent of the image-sharer.
- **Enforcement actions applicable to parties other than the image-sharer** – Family Planning Tasmania recommends enforcement actions can be applied to parties other than the image-sharer.
- **Victims be compelled to use established complaints processes prior to lodging a complaint** – Family Planning Tasmania recommends victims are obligated to use existing complaints processes prior to lodging a complaint.
- **Legal obligation on content hosts to remove the images** – Family Planning Tasmania recommends content hosts have a moral and legal obligation to remove images when required by the Commissioner.
- **Consent to share** – Family Planning Tasmania assumes that intimate images sent in a private forum ie one-to-one, are not intended to be shared. Consent to share intimate images should be aligned to a young person providing informed consent for other sexual activities (for example: age; ability to understand the choice; must be sober; without pressure or coercion).
- **Vulnerability** – Family Planning Tasmania recommends ‘vulnerability’ does not require special consideration. However, the following issues must be considered with all cases, and these may define vulnerability:
 - Age;
 - Ability to understand the choice;
 - Must be sober; and
 - Without pressure or coercion.
- **Proof of consent** – Family Planning Tasmania believes the person sharing an image should be required to prove consent such that a reasonable person would accept this proof of consent.
- **Consent given then withdrawn** – If requested, a person must take reasonable steps to delete or retrieve an image. Any further sharing of images after consent has been withdrawn should be addressed in the complaints process.
- **Definition of ‘intimate image’** – Family Planning Tasmania endorses the definition of ‘intimate image’ from Canada “where an intimate image means a visual recording of a person made by any means including a photographic, film or video recording:
 - a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
 - b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectations of privacy; and
 - c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.”

- **Applying community standards to ‘intimate image’** – when applying community standard to define an ‘intimate image’ Family Planning Tasmania recommends cultural standards and differences are carefully considered.
- **Digital vs physical sharing of ‘intimate image’** – where possible, legislation that addresses sharing of digital intimate image(s) should equally apply to sharing physical copies of intimate image(s).
- **Informed consent from sharer** – Family Planning Tasmania assumes that the sender of intimate images can provide informed consent and this should be aligned to a young person providing informed consent for other sexual activities (for example: age; ability to understand the choice; must be sober; without pressure or coercion).
- **Actual harm to the victim** – Family Planning Tasmania recommends that the victim does not have to experience actual harm for the Commissioner to take action against the perpetrator. To enact positive social change, it is important that all perpetrators of non-consensual image-sharing are pursued, regardless of the harm caused.
- **Likely harm to victim vs actual harm** – Family Planning Tasmania recommends that the Commissioner considers the likely harm to a victim when determining the action to take.

4. Case study demonstrating the complexity of non-consensual image-sharing



Improved capacity after receiving FPT education services

Scenario

Family Planning Tasmania was contacted by a school after being identified in the media as one of the schools that had student’s photos shared on a national porn ring site and provided respectful relationships sessions to all 8 students. One of the learning exercises involved identification of healthy attitudes and actions in relationships. The lesson uses a traffic lights system and poses many scenarios that can be categorised as such – green for go, orange for questionable or stop and think moments and red for disrespectful or unsafe behaviours.

Response

After participating in the workshop one student approached the Educator, wanting to let the Educator know that the relationship she was currently in had many of the orange and some red light behaviours. The Educator reassured the student that saying something was the right thing to do and helped her to identify support services and trusted adults to talk to within the school community. The Educator went on to consult with the student’s teacher and subsequently the grade coordinator, and informed other members of senior staff as agreed with the student.

Outcome

Immediate action was taken by the school including consultation with parents, authorities and making appointments with the school psychologist.

Emails of support and thanks from the school’s senior staff and psychologist were received by Family Planning Tasmania Educators not only for the timely and relevant content but also for their diligence in following up matters.



Thank you for considering our submission. My contact details are provided below and I can be contacted directly to discussion the contents of our letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Cedric Manen', with a stylized flourish at the end.

Cedric Manen
Chief Executive Officer
Family Planning Tasmania
Phone (03) 6169 2035
Mobile 0414 698906
cmanen@fpt.asn.au