

Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017

Purpose	Amends the <i>Enhancing Online Safety Act 2015</i> to prohibit the posting of, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated internet service; establish a complaints and objections system to be administered by the eSafety Commissioner; provide the commissioner with powers to issue removal notices or remedial directions; establish a civil penalty regime to be administered by the commissioner; enable the commissioner to seek a civil penalty order from a relevant court, issue an infringement notice, obtain an injunction or enforce an undertaking, or issue a formal warning for contraventions of the civil penalty provisions; and makes a consequential amendment to the <i>Broadcasting Services Act 1992</i>
Portfolio	Communications and the Arts
Introduced	Senate, 6 December 2017
Rights	Fair trial; criminal process (see Appendix 2)
Previous report	1 of 2018
Status	Concluded examination

Background

2.159 The committee first reported on the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 (the bill) in its *Report 1 of 2018*, and requested a response from the Minister for Communications by 21 February 2018.¹

2.160 The minister's response to the committee's inquiries was received on 21 February 2018. The response is discussed below and is reproduced in full at **Appendix 3**.

Civil penalty provision

2.161 Proposed section 44B of the bill would prohibit posting, or threatening to post, an intimate image without consent on a social media service, relevant electronic service or a designated internet service.²

1 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018* (6 February 2018) pp 30-33.

2 See, Item 3; Statement of compatibility (SOC), p. 10.

2.162 Under the bill, the e-Safety Commissioner may issue a removal notice, requiring removal of the intimate image, to: a provider of a social media service or relevant electronic service,³ an end-user who posts an intimate image on the service,⁴ or a hosting service provider which hosts the intimate image.⁵ If a person has contravened or is contravening proposed section 44B, then the e-Safety Commissioner may give that person a written direction ('remedial direction') to take specified action to ensure they do not contravene section 44B in future.⁶

2.163 The bill is framed so that it triggers the civil penalty provisions of the *Regulatory Powers (Standard Provisions) Act 2014* in relation to a contravention of the prohibition on the non-consensual sharing of intimate images, and in relation to failure to comply with a removal notice or remedial direction. This means that a civil penalty of up to 500 penalty units (\$105,000) applies to such a contravention.⁷

Compatibility of the measure with criminal process rights

2.164 As set out in the statement of compatibility, the civil penalty provisions in the bill are 'aimed at protecting the privacy and reputation of vulnerable people'.⁸

2.165 Under Australian domestic law, civil penalty provisions are dealt with in accordance with the rules and procedures that apply in relation to civil matters (the burden of proof is on the balance of probabilities). However, civil penalty provisions engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) where the penalty is regarded as 'criminal' for the purposes of international human rights law. The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is described as 'civil' under Australian domestic law.

2.166 Where a penalty is 'criminal' for the purposes of international human rights law this does not mean that it is necessarily illegitimate or unjustified. Rather it means that criminal process rights, such as the right to be presumed innocent (including the criminal standard of proof) and the right not to be tried and punished twice (the prohibition against double jeopardy) and the right not to incriminate oneself, are required to apply.

2.167 The committee's *Guidance Note 2* sets out some of the key human rights compatibility issues in relation to provisions that create offences and civil penalties.

3 See proposed section 44D of the *Enhancing Online Safety Act 2015*.

4 See proposed section 44E of the *Enhancing Online Safety Act 2015*.

5 See proposed section 44F of the *Enhancing Online Safety Act 2015*.

6 See proposed section 44K of the *Enhancing Online Safety Act 2015*.

7 SOC, p. 10.

8 SOC, p. 9.

The statement of compatibility for the bill usefully provides an assessment of whether the civil penalty provisions may be considered 'criminal' for the purposes of international human rights law.⁹

2.168 Applying the tests set out in the committee's *Guidance Note 2*, the first step in determining whether a penalty is 'criminal' is to look to its classification under domestic law. In this instance, as noted in the statement of compatibility, the penalties are classified as 'civil' under domestic law meaning they will not automatically be considered 'criminal' for the purposes of international human rights law.

2.169 The second step is to consider the nature and purpose of the penalty. The penalty is likely to be considered to be 'criminal' if its purpose is to punish or deter, and the penalty applies to the public in general (rather than being restricted to people in a specific regulatory or disciplinary context). As the penalties under the bill may apply to a broad range of internet and social media users it appears that the penalties apply to the public in general. However, in relation to purpose, the statement of compatibility states that the penalty seeks to encourage compliance rather than to punish. To the extent that this is the purpose of the penalty, the initial analysis stated that this is one indicator that the penalty should not be considered 'criminal' under this step of the test.

2.170 The third step is to consider the severity of the penalty. A penalty is likely to be considered 'criminal' where it carries a penalty of a substantial pecuniary sanction. This must be assessed with due regard to regulatory context, including the nature of the industry or sector being regulated and the relative size of the pecuniary penalties being imposed. As noted in the initial analysis, in this case an individual could be exposed to a significant penalty of up to \$105,000. The statement of compatibility states that this 'reflects the extremely serious nature of the non-consensual sharing of intimate images'.¹⁰ However, the potential application of such a large penalty to an individual in this context raises significant questions about whether this particular measure ought to be considered 'criminal' for the purposes of international human rights law. The statement of compatibility points to the court's discretion in the amount of penalty to be imposed as a reason why the penalty should not be considered criminal. Yet, it is the maximum penalty that may be imposed which is relevant to considering whether a civil penalty is 'criminal' for the purposes of international human rights law.

2.171 If the penalty is considered to be 'criminal' for the purposes of international human rights law, the 'civil penalty' provisions in the bill must be shown to be compatible with the criminal process guarantees set out in articles 14 and 15 of the ICCPR. In this case, the initial analysis assessed that the measure does not appear to

9 SOC, p. 10.

10 SOC, p. 10.

accord with criminal process guarantees. For example, the burden of proof is on the civil standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt as required by the right to be presumed innocent.

2.172 The committee therefore sought the advice of the minister as to:

- whether the severity of the civil penalties that may be imposed on individuals is such that the penalties may be 'criminal' in nature for the purposes of international human rights law (having regard to the committee's *Guidance Note 2*); and
- if the penalties are considered 'criminal' for the purposes of international human rights law:
 - whether they are compatible with criminal process rights including specific guarantees of the right to a fair trial in the determination of a criminal charge such as the presumption of innocence (article 14(2)), the right not to incriminate oneself (article 14(3)(g)), the right not to be tried and punished twice for an offence (article 14(7)) and a guarantee against retrospective criminal laws (article 15(1));
 - whether any limitations on these rights imposed by the measures are permissible;¹¹ and
 - whether the measures could be amended to accord with criminal process rights.

Minister's response

2.173 The minister's response outlines a range of factors as to why the civil penalty provisions should not be considered 'criminal' for the purposes of international human rights law, including that:

- the penalties included in the Bill are expressly civil and not criminal under Australian law;
- the civil penalties set a maximum, pecuniary-only penalty, with no possibility of imprisonment for contravention of a civil penalty provision;
- non-payment of a civil penalty order does not result in imprisonment;
- the Federal Court and Federal Circuit Court retain discretion both as to whether to issue a civil penalty order, and the specific amounts of the order, up to the maximum amounts under the Bill; and

11 Some criminal process rights may be subject to permissible limitations where they pursue a legitimate objective, are rationally connected to that objective and are a proportionate means of achieving that objective. However, other criminal process rights are absolute and cannot be subject to permissible limitations.

- in practice, the Bill prescribes a graduated approach of remedies and enforcement mechanisms, and civil penalty orders will only be sought [in] extreme cases.

Given these factors, which are outlined in more detail below, the Government considers that the penalties are not 'criminal' in nature and therefore do not engage any of the applicable criminal process rights, or require any permissible limitations or amended measures to accord with these rights.

2.174 In relation to there being no criminal sanction under Australian domestic law, the minister's response further states:

A contravention of a civil penalty provision does not result in the possibility of imprisonment or resultant criminal record, nor does the non-payment of any civil penalty order. Additionally, the civil penalties are pecuniary only, and are necessarily high as they are intended to change behaviour, acting as a deterrent to those who are tempted to engage in this behaviour.

2.175 However, as noted in the initial human rights analysis, the classification of a penalty as civil under Australian law is not determinative. A penalty or other sanction may be 'criminal' for the purposes of the ICCPR even though it is described as 'civil' under Australian domestic law.

2.176 In this respect, a penalty is likely to be considered criminal in nature if the purpose of the penalty is to punish or deter *and* the penalty applies to the public in general. While the statement of compatibility stated that the purpose of the penalty was to encourage compliance, the minister's response now states that the purpose of the penalty is to deter. Given this, the penalty would be likely to be considered 'criminal' for the purposes of international human rights law. This is because the measure also applies to the public in general as it captures the conduct of a broad range of social media users. Accordingly, the nature of the penalty satisfies the test of being to deter *and* applying to the public in general. This is the case irrespective of the severity of the penalty.

2.177 Even if the penalty was not 'criminal' on the above aspect of test, the penalty may still be 'criminal' for the purposes of international human rights law if it is sufficiently severe. In this respect, it is relevant that the penalty does not result in imprisonment as deprivation of liberty is a typical criminal penalty. However, fines and pecuniary penalties may also be considered 'criminal' if they involve sufficiently significant amounts with reference to the regulatory context. In relation to the severity of the penalty, the minister's response further states:

Maximum penalties

Under the Bill, civil penalty order provisions contained in the *Regulatory Powers (Standards Provisions) Act 2014* are triggered if a person shares an intimate image without consent or threatens to share an intimate image without consent or fails to comply with a removal notice. The penalty

amounts are up to \$105,000 for a person and up to \$525,000 for a corporation.

These penalties are intended to be a strong deterrent to not engage in the sharing of intimate images without consent. They are, however, the maximum penalty amounts that may be awarded and a range of matters must first be considered by the courts before the actual amount is decided (as outlined below).

Court discretion in applying civil penalties

If the eSafety Commissioner decides to pursue a civil penalty he/she must apply to the Federal Court or the Federal Circuit Court. The courts have discretion as to whether to issue a penalty order and will decide on the penalty having regard to any relevant matter, including:

- a) the nature and extent of the contravention; and
- b) the nature and extent of any loss or damage suffered because of the contravention; and
- c) the circumstances in which the contravention took place; and
- d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

This discretion means that a perpetrator will not automatically receive the maximum penalty and ensures there are processes in place to ensure that any penalty is proportionate to the contravention.

In addition to the penalties, the Bill gives the eSafety Commissioner the power to first pursue a range of responses if there has been a contravention of the prohibition. These remedies include lighter touch remedies such as informal mechanisms, formal warnings and infringement notices. In practice, the stronger remedies, including civil penalties, are expected to only be used in exceptional cases such as a repeat offender where other remedies have been ineffective.

2.178 However, assessing the severity of the penalty for the purpose of determining whether it is 'criminal' involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant, but does not detract from the importance of the maximum initially at stake. While the civil penalties may be intended only to apply in more serious cases, there appear to be no specific legislative safeguards in this respect. In light of the severity of the maximum penalty that may be imposed for an individual (of \$105,000), the stated purpose of the penalty as being to deter and the potentially broad application of the penalty, the penalty appears likely to be considered 'criminal' for the purposes of international human rights law.

2.179 The minister's response also provides some further information about consultation processes that have been undertaken and harms associated with the non-consensual sharing of intimate images:

When drafting the Bill, my Department consulted with the Attorney-General's Department and considered the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Given the impact that the non-consensual sharing of intimate images can have on victims, the Government remains satisfied that there is sufficient justification for the civil penalty amounts and that they are not 'criminal' in nature for the purposes of international human rights law.

2.180 However, the level of harm caused by particular conduct does not mean that a penalty relating to that conduct is not 'criminal' for the purposes of international human rights law. Significantly, as noted in the initial human rights analysis, where a penalty is considered 'criminal' for the purposes of international human rights law this does not mean that it is illegitimate, unjustified or does not pursue important goals.

2.181 Rather (as noted above), where a penalty is considered 'criminal' for the purposes of international human rights law it means that criminal process rights, such as the right to be presumed innocent (including the criminal standard of proof) (article 14(2) of the ICCPR); the right not to be tried and punished twice (the prohibition against double jeopardy) (article 14(7)); the right not to incriminate oneself (article 14(3)(g)); and a guarantee against retrospective criminal laws (article 15(1), are required to apply.

2.182 As noted in the initial human rights analysis, the measure does not appear to accord with each of these criminal process guarantees. For example, the burden of proof is on the civil standard of the balance of probabilities rather than the criminal standard of beyond reasonable doubt as required by the right to be presumed innocent. Further, if there were equivalent criminal provisions for the conduct prohibited by the civil penalty provisions this may raise concerns that a person could be tried and punished twice for the same conduct unless there were specific safeguards to prevent this from occurring.

2.183 While the committee requested the advice of the minister as to whether the measures were compatible with criminal process rights including whether any limitations on these rights are permissible, the minister's response does not provide any information in this respect. Accordingly, it is not possible to conclude that the civil penalty provisions accord with these rights.

Committee response

2.184 The committee thanks the minister for his response and has concluded its examination of this issue.

2.185 Based on the information provided by the minister, it appears that the penalties are likely to be considered criminal for the purposes of international

human rights law. This means that criminal process rights under articles 14 and 15 of the ICCPR are required to apply. However, it is unclear that the measure is compatible with these rights.