



Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018

No. 96, 2018

An Act to amend the *Enhancing Online Safety Act 2015*, and for other purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

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Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018

No. 96, 2018

An Act to amend the *Enhancing Online Safety Act 2015*, and for other purposes

[Assented to 31 August 2018]

The Parliament of Australia enacts:

1 Short title

This Act is the *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018*.

No. 96, 2018 Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018 1

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	1 September 2018

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Review of operation of amendments

- (1) Within 3 years after the commencement of this section, the Minister must cause to be conducted an independent review of the operation of the amendments made by this Act.
- (2) The Minister must cause to be prepared a written report of the review.
- (3) The Minister must cause copies of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the report is given to the Minister.

Schedule 1—Amendments

Broadcasting Services Act 1992

1 After paragraph 169A(a)

Insert:

- (aa) section 19C of the *Enhancing Online Safety Act 2015*; or

Enhancing Online Safety Act 2015

2 Section 3

After:

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| (b) administering a complaints system for cyber-bullying material targeted at an Australian child; and |
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insert:

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| (ba) administering a complaints and objections system for non-consensual sharing of intimate images; and |
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3 At the end of section 3

Add:

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| <ul style="list-style-type: none">• The complaints and objections system for non-consensual sharing of intimate images includes the following components:<ul style="list-style-type: none">(a) a person who posts, or threatens to post, an intimate image may be liable to a civil penalty;(b) the provider of a social media service, relevant electronic service or designated internet service may be given a notice (a removal notice) requiring the provider to remove an intimate image from the service;(c) an end-user of a social media service, relevant electronic service or designated internet service who posts an intimate image on the service may be given a notice (a |
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- removal notice*) requiring the end-user to remove the image from the service;
- (d) a hosting service provider who hosts an intimate image may be given a notice (a *removal notice*) requiring the provider to cease hosting the image.

4 Section 4

Insert:

consent, when used in relation to an intimate image, has the meaning given by section 9E.

data storage device means any article or material (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device.

designated internet service has the meaning given by section 9A.

exempt post, when used in relation to an intimate image, has the meaning given by section 44M.

hosting service has the meaning given by section 9C.

hosting service provider means a person who provides a hosting service.

internet carriage service has the same meaning as in Schedule 5 to the *Broadcasting Services Act 1992*.

intimate image has the meaning given by section 9B.

objection notice means a notice under section 19B.

on-demand program service has the meaning given by section 9D.

5 Section 4 (definition of *posted*)

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

6 Section 4 (at the end of the definition of *posted*)

Add:

Note: Other parts of speech and grammatical forms of “posted” (for example, “post”) have a corresponding meaning (see section 18A of the *Acts Interpretation Act 1901*).

7 Section 4 (definition of *provided*)

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

8 Section 4 (definition of *provider*)

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

9 Section 4

Insert:

removal notice means a notice under section 44D, 44E or 44F.

10 Section 4 (definition of *removed*)

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

11 Section 4

Insert:

stored material means material kept on a data storage device. For this purpose, disregard any storage of material on a highly transitory basis as an integral function of the technology used in its transmission.

Note: Momentary buffering (including momentary storage in a router in order to resolve a path for further transmission) is an example of storage on a highly transitory basis.

threat includes a threat made by any conduct, whether express or implied and whether conditional or unconditional.

12 Section 6 (heading)

Repeal the heading, substitute:

6 When material is provided on a social media service, relevant electronic service or designated internet service

13 Section 6

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

14 Section 7 (heading)

Repeal the heading, substitute:

7 When material is posted by an end-user of a social media service, relevant electronic service or designated internet service

15 Section 7

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

16 Section 8 (heading)

Repeal the heading, substitute:

8 When material is removed from a social media service, relevant electronic service or designated internet service

17 Section 8

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

18 After section 9

Insert:

9A Designated internet service

- (1) For the purposes of this Act, *designated internet service* means:
- (a) a service that allows end-users to access material using an internet carriage service; or
 - (b) a service that delivers material to persons having equipment appropriate for receiving that material, where the delivery of the service is by means of an internet carriage service;

but does not include:

- (c) a social media service; or
 - (d) a relevant electronic service; or
 - (e) an on-demand program service; or
 - (f) a service specified under subsection (2).
- (2) The Minister may, by legislative instrument, specify one or more services for the purposes of paragraph (1)(f).

9B Intimate image

- (1) This section sets out the circumstances in which material is an ***intimate image*** of a person for the purposes of this Act.

Depiction of private parts

- (2) Material is an ***intimate image*** of a person if:
- (a) the material consists of a still visual image or moving visual images; and
 - (b) the material depicts, or appears to depict:
 - (i) the person's genital area or anal area (whether bare or covered by underwear); or
 - (ii) if the person is female or a transgender or intersex person identifying as female—either or both of the person's breasts;in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

Depiction of private activity

- (3) Material is an ***intimate image*** of a person if:
- (a) the material consists of a still visual image or moving visual images; and
 - (b) the material depicts, or appears to depict, the person:
 - (i) in a state of undress; or
 - (ii) using the toilet; or
 - (iii) showering; or
 - (iv) having a bath; or

- (v) engaged in a sexual act of a kind not ordinarily done in public; or
- (vi) engaged in any other like activity; in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

Depiction of person without attire of religious or cultural significance

- (4) Material is an **intimate image** of a person if:
 - (a) the material consists of a still visual image or moving visual images; and
 - (b) because of the person's religious or cultural background, the person consistently wears particular attire of religious or cultural significance whenever the person is in public; and
 - (c) the material depicts, or appears to depict, the person:
 - (i) without that attire; and
 - (ii) in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

Interpretative provisions

- (5) For the purposes of this section, it is immaterial whether material has been altered.
- (6) For the purposes of this section, if material depicts, or appears to depict, a part of the body of a person, the material is taken to depict the person, or to appear to depict the person, as the case requires.

9C Hosting service

For the purposes of this Act, if:

- (a) a person (the **first person**) hosts stored material that has been posted on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
- (b) the first person or another person provides:
 - (i) a social media service; or

(ii) a relevant electronic service; or
(iii) a designated internet service;
on which the hosted material is provided;
the hosting of the stored material by the first person is taken to be
the provision by the first person of a *hosting service*.

9D On-demand program service

- (1) For the purposes of this Act, *on-demand program service* means a service:
- (a) that is provided to end-users using an internet carriage service; and
 - (b) to the extent to which the service provides material that is identical to a program that has been, or is being, transmitted on:
 - (i) a commercial television broadcasting service provided under a commercial television broadcasting licence; or
 - (ii) a subscription television broadcasting service provided under a subscription television broadcasting licence; or
 - (iii) a subscription television narrowcasting service; or
 - (iv) a television broadcasting service provided by the Australian Broadcasting Corporation; or
 - (v) a television broadcasting service provided by the Special Broadcasting Service Corporation.
- (2) For the purposes of subsection (1), in determining whether material is identical to a program, disregard any differences that are attributable to the technical characteristics of the provision or transmission (for example, video resolution or sound quality).
- (3) For the purposes of subsection (1), in determining whether material is identical to a program, disregard the presence or absence of:
- (a) a watermark-type logo; or
 - (b) a watermark-type insignia.
- (4) An expression used in paragraph (1)(b) has the same meaning in that paragraph as it has in the *Broadcasting Services Act 1992*.

9E Consent

For the purposes of the application of this Act to an intimate image, *consent* means consent that is:

- (a) express; and
- (b) voluntary; and
- (c) informed;

but does not include:

- (d) consent given by a child; or
- (e) consent given by an adult who is in a mental or physical condition (whether temporary or permanent) that:
 - (i) makes the adult incapable of giving consent; or
 - (ii) substantially impairs the capacity of the adult to give consent.

19 Section 13

After:

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| (b) administering a complaints system for cyber-bullying material targeted at an Australian child; and |
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insert:

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|----------------------------------------------------------------------------------------------------------|
| (ba) administering a complaints and objections system for non-consensual sharing of intimate images; and |
|----------------------------------------------------------------------------------------------------------|

20 Part 3 (heading)

Repeal the heading, substitute:

Part 3—Complaints and objections

21 Before section 17

Insert:

Division 1—Introduction

22 At the end of section 17

Add:

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- | |
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| <ul style="list-style-type: none">• There is a complaints and objections system for non-consensual sharing of intimate images. |
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23 Before section 18

Insert:

Division 2—Complaints about cyber-bullying material**24 At the end of Part 3**

Add:

Division 3—Complaints about, and objections to, intimate images**19A Complaints***Complaint made by a person depicted in an intimate image*

- (1) If a person has reason to believe that section 44B has been contravened in relation to an intimate image of the person, the person may make a complaint to the Commissioner about the matter.
- (2) If the complainant is not able to identify the person who allegedly contravened section 44B, the complainant must make a statement to the Commissioner to that effect.

Complaint made on behalf of a person depicted in an intimate image

- (3) If a person (the **authorised person**) has reason to believe that section 44B has been contravened in relation to an intimate image of another person (the **depicted person**), the authorised person may, on behalf of the depicted person, make a complaint to the Commissioner about the matter, so long as:
 - (a) the depicted person has authorised the authorised person to make a complaint about the matter; or
 - (b) both:

- (i) the depicted person is a child who has not reached 16 years; and
 - (ii) the authorised person is a parent or guardian of the depicted person; or
- (c) both:
 - (i) the depicted person is in a mental or physical condition (whether temporary or permanent) that makes the depicted person incapable of managing his or her affairs; and
 - (ii) the authorised person is a parent or guardian of the depicted person.
- (4) The authorised person must make a declaration to the Commissioner to the effect that the authorised person is entitled to make the complaint on behalf of the depicted person.
- (5) If the authorised person is not able to identify the person who allegedly contravened section 44B, the authorised person must make a statement to the Commissioner to that effect.

19B Objection notice

Objection notice given by a person depicted in an intimate image

- (1) If a person (the **depicted person**) has reason to believe that:
 - (a) an intimate image of the depicted person is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
 - (b) the intimate image was posted on the service by an end-user of the service; and
 - (c) the posting of the intimate image on the service did not constitute an exempt post; and
 - (d) any of the following conditions is satisfied:
 - (i) the depicted person is ordinarily resident in Australia;
 - (ii) the end-user is ordinarily resident in Australia;
 - (iii) the intimate image is hosted in Australia by a hosting service;

the depicted person may give the Commissioner a notice (an **objection notice**) objecting to the provision of the intimate image on the service.

- (2) The depicted person may give the objection notice even if the depicted person consented to the posting of the intimate image on the service.

Objection notice given on behalf of a person depicted in an intimate image

- (3) If a person (the **authorised person**) has reason to believe that:
- (a) an intimate image of another person (the **depicted person**) is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
 - (b) the intimate image was posted on the service by an end-user of the service; and
 - (c) the posting of the intimate image on the service did not constitute an exempt post; and
 - (d) any of the following conditions is satisfied:
 - (i) the depicted person is ordinarily resident in Australia;
 - (ii) the end-user is ordinarily resident in Australia;
 - (iii) the intimate image is hosted in Australia by a hosting service;

the authorised person may, on behalf of the depicted person, give the Commissioner a notice (an **objection notice**) objecting to the provision of the intimate image on the service, so long as:

- (e) the depicted person has authorised the authorised person to give the objection notice; or
- (f) both:
 - (i) the depicted person is a child who has not reached 16 years; and
 - (ii) the authorised person is a parent or guardian of the depicted person; or
- (g) both:

- (i) the depicted person is in a mental or physical condition (whether temporary or permanent) that makes the depicted person incapable of managing his or her affairs; and
 - (ii) the authorised person is a parent or guardian of the depicted person.
- (4) The authorised person must make a declaration to the Commissioner to the effect that the authorised person is entitled to give the objection notice on behalf of the depicted person.
- (5) The authorised person may give the objection notice even if the depicted person consented to the posting of the intimate image on the service.

Transitional

- (6) If an intimate image was posted on:
 - (a) a social media service; or
 - (b) a relevant electronic service; or
 - (c) a designated internet service;before the commencement of this section, this section does not apply to the intimate image unless the intimate image was provided on the service after the commencement of this section.

19C Investigation of complaints

- (1) The Commissioner may investigate a complaint made to the Commissioner under section 19A.
- (2) An investigation under this section is to be conducted as the Commissioner thinks fit.
- (3) The Commissioner may, for the purposes of an investigation, obtain information from such persons, and make such inquiries, as he or she thinks fit.
- (4) Subsections (1), (2) and (3) have effect subject to Part 13 of the *Broadcasting Services Act 1992* (which confers certain investigative powers on the Commissioner).

Termination of investigation

- (5) The Commissioner may terminate an investigation under this section.

19D Commissioner’s response to objection notices

If an objection notice is given to the Commissioner under section 19B in relation to an intimate image, the Commissioner may consider whether to give a removal notice in relation to the intimate image.

25 Part 5 (heading)

Repeal the heading, substitute:

Part 5—End-user notices relating to cyber-bullying material

26 After Part 5

Insert:

Part 5A—Non-consensual sharing of intimate images

Division 1—Introduction

44A Simplified outline of this Part

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| <ul style="list-style-type: none">• A person who posts, or threatens to post, an intimate image without the consent of the person depicted in the image may be liable to a civil penalty.• The provider of a social media service, relevant electronic service or designated internet service may be given a notice (a <i>removal notice</i>) requiring the provider to remove an intimate image from the service. |
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- An end-user of a social media service, relevant electronic service or designated internet service who posts an intimate image on the service may be given a notice (a *removal notice*) requiring the end-user to remove the image from the service.
- A hosting service provider who hosts an intimate image may be given a notice (a *removal notice*) requiring the provider to cease hosting the image.

Division 2—Intimate images must not be posted without consent etc.

44B Posting an intimate image

- (1) A person (the *first person*) must not post, or make a threat to post, an intimate image of another person (the *second person*) on:
- (a) a social media service; or
 - (b) a relevant electronic service; or
 - (c) a designated internet service;
- if:
- (d) the first person is ordinarily resident in Australia; or
 - (e) the second person is ordinarily resident in Australia.

Civil penalty: 500 penalty units.

Consent

- (2) Subsection (1) does not apply if the second person consented to the posting of the intimate image by the first person.

Note: In proceedings for a civil penalty order against a person for a contravention of subsection (1), the person bears an evidential burden in relation to the matter in this subsection (see section 96 of the *Regulatory Powers (Standard Provisions) Act 2014*).

Depiction of second person without attire of religious or cultural significance

- (3) Subsection (1) does not apply if:

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- (a) the intimate image is covered by subsection 9B(4) because it depicts, or appears to depict, the second person without particular attire of religious or cultural significance; and
 - (b) the first person did not know that, because of the second person's religious or cultural background, the second person consistently wears that attire whenever the second person is in public.

Note: In proceedings for a civil penalty order against a person for a contravention of subsection (1), the person bears an evidential burden in relation to the matter in this subsection (see section 96 of the *Regulatory Powers (Standard Provisions) Act 2014*).

Exempt post

- (4) Subsection (1) does not apply if the post of the intimate image is, or would be, an exempt post.

Note: In proceedings for a civil penalty order against a person for a contravention of subsection (1), the person bears an evidential burden in relation to the matter in this subsection (see section 96 of the *Regulatory Powers (Standard Provisions) Act 2014*).

44C Formal warning

The Commissioner may issue a formal warning if a person contravenes section 44B.

Division 3—Removal notices

44D Removal notice given to the provider of a social media service, relevant electronic service or designated internet service

- (1) If:
 - (a) an intimate image of a person is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
 - (b) the intimate image was posted on the service by an end-user of the service; and
 - (c) the intimate image is the subject of:

- (i) a complaint made to the Commissioner under section 19A; or
 - (ii) an objection notice given to the Commissioner under section 19B; and
 - (d) if subparagraph (c)(i) applies—the Commissioner is satisfied that the person did not consent to the posting of the intimate image on the service; and
 - (e) the posting of the intimate image on the service did not constitute an exempt post;
- the Commissioner may give the provider of the service a written notice, to be known as a **removal notice**, requiring the provider to:
- (f) take all reasonable steps to ensure the removal of the intimate image from the service; and
 - (g) do so within:
 - (i) 48 hours after the notice was given to the provider; or
 - (ii) such longer period as the Commissioner allows.
- (2) So far as is reasonably practicable, the intimate image must be identified in the removal notice in a way that is sufficient to enable the provider of the service to comply with the notice.

Notice of refusal to give a removal notice

- (3) If the Commissioner decides to refuse to give a removal notice under subsection (1), the Commissioner must give written notice of the refusal to:
- (a) if subparagraph (1)(c)(i) applies—the person who made the complaint mentioned in that subparagraph; or
 - (b) if subparagraph (1)(c)(ii) applies—the person who gave the objection notice mentioned in that subparagraph.

44E Removal notice given to an end-user

- (1) If:
- (a) an intimate image of a person is, or has been, provided on:
 - (i) a social media service; or
 - (ii) a relevant electronic service; or
 - (iii) a designated internet service; and

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- (b) the intimate image was posted on the service by an end-user of the service; and
 - (c) the intimate image is the subject of:
 - (i) a complaint made to the Commissioner under section 19A; or
 - (ii) an objection notice given to the Commissioner under section 19B; and
 - (d) if subparagraph (c)(i) applies—the Commissioner is satisfied that the person did not consent to the posting of the intimate image on the service; and
 - (e) the posting of the intimate image on the service did not constitute an exempt post;
- the Commissioner may give the end-user a written notice, to be known as a **removal notice**, requiring the end-user to:
- (f) take all reasonable steps to ensure the removal of the intimate image from the service; and
 - (g) do so within:
 - (i) 48 hours after the notice was given to the end-user; or
 - (ii) such longer period as the Commissioner allows.
- (2) So far as is reasonably practicable, the intimate image must be identified in the removal notice in a way that is sufficient to enable the end-user to comply with the notice.

Notice of refusal to give a removal notice

- (3) If the Commissioner decides to refuse to give a removal notice under subsection (1), the Commissioner must give written notice of the refusal to:
- (a) if subparagraph (1)(c)(i) applies—the person who made the complaint mentioned in that subparagraph; or
 - (b) if subparagraph (1)(c)(ii) applies—the person who gave the objection notice mentioned in that subparagraph.

44F Removal notice given to a hosting service provider

- (1) If:
- (a) an intimate image of a person is, or has been, provided on:
 - (i) a social media service; or

- (ii) a relevant electronic service; or
 - (iii) a designated internet service; and
 - (b) the intimate image was posted on the service by an end-user of the service; and
 - (c) the intimate image is the subject of:
 - (i) a complaint made to the Commissioner under section 19A; or
 - (ii) an objection notice given to the Commissioner under section 19B; and
 - (d) if subparagraph (c)(i) applies—the Commissioner is satisfied that the person did not consent to the posting of the intimate image on the service; and
 - (e) the intimate image is hosted by a hosting service provider; and
 - (f) the posting of the intimate image on the service did not constitute an exempt post;
- the Commissioner may give the hosting service provider a written notice, to be known as a **removal notice**, requiring the provider to:
- (g) take all reasonable steps to cease hosting the intimate image; and
 - (h) do so within:
 - (i) 48 hours after the notice was given to the provider; or
 - (ii) such longer period as the Commissioner allows.

- (2) So far as is reasonably practicable, the intimate image must be identified in the removal notice in a way that is sufficient to enable the hosting service provider to comply with the notice.

Notice of refusal to give a removal notice

- (3) If the Commissioner decides to refuse to give a removal notice under subsection (1), the Commissioner must give written notice of the refusal to:
 - (a) if subparagraph (1)(c)(i) applies—the person who made the complaint mentioned in that subparagraph; or
 - (b) if subparagraph (1)(c)(ii) applies—the person who gave the objection notice mentioned in that subparagraph.

44G Compliance with removal notice

A person must comply with a requirement under a removal notice to the extent that the person is capable of doing so.

Civil penalty: 500 penalty units.

44H Formal warning

The Commissioner may issue a formal warning if a person contravenes section 44G.

44J Transitional

If an intimate image was posted on:

- (a) a social media service; or
- (b) a relevant electronic service; or
- (c) a designated internet service;

before the commencement of this section, this Division does not apply to the intimate image unless the intimate image was provided on the service after the commencement of this section.

Division 4—Miscellaneous**44K Remedial direction***Scope*

- (1) This section applies if a person has contravened, or is contravening, section 44B.

Remedial direction

- (2) The Commissioner may give the person a written direction requiring the person to take specified action directed towards ensuring that the person does not contravene section 44B in the future.

Note: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (3) A person must not contravene a direction under subsection (2).

Civil penalty: 500 penalty units.

Remedial direction is not a legislative instrument

(4) A direction under subsection (2) is not a legislative instrument.

44L Formal warning

The Commissioner may issue a formal warning if a person contravenes a direction under subsection 44K(2).

44M Exempt post of an intimate image

- (1) For the purposes of this Act, if an end-user of:
- (a) a social media service; or
 - (b) a relevant electronic service; or
 - (c) a designated internet service;
- posts an intimate image of a person (the *depicted person*) on the service, the post is an *exempt post* if:
- (d) the post is necessary for, or of assistance in:
 - (i) enforcing a law of the Commonwealth, a State or a Territory; or
 - (ii) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
 - (e) the post is for the purposes of proceedings in a court or tribunal; or
 - (f) the post is for a genuine medical or scientific purpose; or
 - (g) an ordinary reasonable person would consider the post acceptable, having regard to the following matters:
 - (i) the nature and content of the intimate image;
 - (ii) the circumstances in which the intimate image was posted;
 - (iii) the age, intellectual capacity, vulnerability or other relevant circumstances of the depicted person;
 - (iv) the degree to which the posting of the intimate image affects the privacy of the depicted person;
 - (v) the relationship between the end-user and the depicted person;
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- (vi) whether the depicted person has died, and if so, how much time has elapsed since the depicted person's death;
 - (vii) any other relevant matters; or
 - (h) both:
 - (i) the end-user is a protected person (within the meaning of section 91); and
 - (ii) the post was in connection with the exercise of a power, or the performance of a function, conferred on the Commissioner by or under this Act; or
 - (i) a condition determined under subsection (2) is satisfied.
- (2) The Minister may, by legislative instrument, determine one or more conditions for the purposes of paragraph (1)(i).

27 Section 45

Omit:

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| <ul style="list-style-type: none">• The Commissioner may accept an enforceable undertaking under Part 6 of the <i>Regulatory Powers (Standard Provisions) Act 2014</i> that relates to a social media service notice.• The Commissioner may seek an injunction under Part 7 of the <i>Regulatory Powers (Standard Provisions) Act 2014</i> that relates to:<ul style="list-style-type: none">(a) a social media service notice; or(b) an end-user notice. |
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substitute:

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| <ul style="list-style-type: none">• The following enforcement powers are available:<ul style="list-style-type: none">(a) infringement notices;(b) enforceable undertakings;(c) injunctions. |
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28 Subsection 46(3)

Before “Federal Circuit Court of Australia”, insert “Federal Court of Australia and the”.

29 Subsection 46(3)

Omit “is a relevant court”, substitute “are relevant courts”.

30 After section 46

Insert:

46A Infringement notices

Provisions subject to an infringement notice

- (1) The following provisions of this Act are subject to an infringement notice under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*:
- (a) section 44B;
 - (b) section 44G;
 - (c) section 44K.

Note: Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* creates a framework for using infringement notices in relation to provisions.

Infringement officer

- (2) For the purposes of Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*, a member of the staff of the ACMA authorised, in writing, by the Commissioner for the purposes of this subsection is an infringement officer in relation to the provisions mentioned in subsection (1).

Relevant chief executive

- (3) For the purposes of Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*, the Commissioner is the relevant chief executive in relation to the provisions mentioned in subsection (1).
- (4) The relevant chief executive may, in writing, delegate any or all of his or her powers and functions under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* to a person who is:
- (a) a member of the staff of the ACMA; and
 - (b) an SES employee or an acting SES employee.

-
- (5) A person exercising powers or performing functions under a delegation under subsection (4) must comply with any directions of the relevant chief executive.

Extension to external Territories etc.

- (6) Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*, as it applies in relation to the provisions mentioned in subsection (1), extends to:
- (a) every external Territory; and
 - (b) acts, omissions, matters and things outside Australia.

31 Subsection 47(1)

Repeal the subsection, substitute:

Enforceable provisions

- (1) The following provisions of this Act are enforceable under Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014*:
- (a) section 36;
 - (b) section 44B;
 - (c) section 44G;
 - (d) section 44K.

32 Subsection 47(2)

Omit “section 36 of this Act”, substitute “the provisions mentioned in subsection (1)”.

33 Subsection 47(3)

Before “Federal Circuit Court of Australia”, insert “Federal Court of Australia and the”.

34 Subsection 47(3)

Omit “is a relevant court”, substitute “are relevant courts”.

35 Subsections 47(3) and (4)

Omit “section 36 of this Act”, substitute “the provisions mentioned in subsection (1)”.

36 At the end of subsection 48(1)

Add:

- ; (c) section 44B;
- (d) section 44G;
- (e) section 44K.

37 Subsection 48(3)

Before “Federal Circuit Court of Australia”, insert “Federal Court of Australia and the”.

38 Subsection 48(3)

Omit “is a relevant court”, substitute “are relevant courts”.

39 At the end of section 88

Add:

Removal notice

- (8) An application may be made to the Administrative Appeals Tribunal for a review of a decision of the Commissioner under section 44D, 44E or 44F to give a removal notice.

Remedial direction

- (9) An application may be made to the Administrative Appeals Tribunal for a review of a decision of the Commissioner under section 44K to give a remedial direction.

40 At the end of subsection 89(1)

Add:

- ; (c) the making of a complaint under section 19A;
- (d) the giving of an objection notice under section 19B;
- (e) the making of a statement to, or the giving of a document or information to, the Commissioner in connection with an investigation under section 19C;
- (f) the making of a statement to, or the giving of a document or information to, the Commissioner in connection with a consideration under section 19D.

41 At the end of subsection 89(2)

Add:

; or (d) a removal notice.

42 Paragraph 92(1)(a)

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

43 Paragraph 93(a)

Omit “or relevant electronic service”, substitute “, relevant electronic service or designated internet service”.

44 At the end of subsection 94(1)

Add “or 19C or for the purposes of a consideration under section 19D”.

45 Section 105 (heading)

Repeal the heading, substitute:

105 Provider of social media service, relevant electronic service or designated internet service

46 Subsections 105(1) and (2)

Omit “or relevant electronic service” (wherever occurring), substitute “, relevant electronic service or designated internet service”.

Schedule 2—Amendment of the Criminal Code Act 1995

Criminal Code Act 1995

1 Section 473.1 of the *Criminal Code*

Insert:

private sexual material means:

- (a) material that:
 - (i) depicts a person who is, or appears to be, 18 years of age or older and who is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); and
 - (ii) does so in circumstances that reasonable persons would regard as giving rise to an expectation of privacy; or
- (b) material the dominant characteristic of which is the depiction of:
 - (i) a sexual organ or the anal region of a person who is, or appears to be, 18 years of age or older; or
 - (ii) the breasts of a female person who is, or appears to be, 18 years of age or older;

where the depiction is in circumstances that reasonable persons would regard as giving rise to an expectation of privacy.

Note: For material that relates to a person who is, or appears to be, under 18 years of age, see:

- (a) the definition of ***child pornography material***; and
- (b) the child pornography offences in Subdivision D.

subject of private sexual material means:

- (a) if the material is covered by paragraph (a) of the definition of ***private sexual material***—the person first mentioned in that paragraph; or
- (b) if the material is covered by paragraph (b) of the definition of ***private sexual material***—the person mentioned in whichever of subparagraph (b)(i) or (ii) of that definition is applicable.

2 Section 473.4 of the *Criminal Code*

Before “The matters”, insert “(1)”.

3 At the end of section 473.4 of the *Criminal Code*

Add:

(2) If:

(a) a particular use of a carriage service involves the transmission, making available, publication, distribution, advertisement or promotion of material; and

(b) the material is private sexual material;

then, in deciding for the purposes of this Part whether reasonable persons would regard the use of the carriage service as being, in all the circumstances, offensive, regard must be had to whether the subject, or each of the subjects, of the private sexual material gave consent to the transmission, making available, publication, distribution, advertisement or promotion of the material.

(3) Subsection (2) does not limit subsection (1).

Definition

(4) In this section:

consent means free and voluntary agreement.

4 After section 474.17 of the *Criminal Code*

Insert:

474.17A Aggravated offences involving private sexual material— using a carriage service to menace, harass or cause offence

Standard aggravated offence

(1) A person commits an offence against this subsection if:

(a) the person commits an offence (the *underlying offence*) against subsection 474.17(1); and

- (b) the commission of the underlying offence involves the transmission, making available, publication, distribution, advertisement or promotion of material; and
- (c) the material is private sexual material.

Penalty: Imprisonment for 5 years.

- (2) There is no fault element for the physical element described in paragraph (1)(a) other than the fault elements (however described), if any, for the underlying offence.
- (3) To avoid doubt, a person does not commit the underlying offence for the purposes of paragraph (1)(a) if the person has a defence to the underlying offence.

Special aggravated offence

- (4) A person commits an offence against this subsection if:
 - (a) the person commits an offence (the ***underlying offence***) against subsection 474.17(1); and
 - (b) the commission of the underlying offence involves the transmission, making available, publication, distribution, advertisement or promotion of material; and
 - (c) the material is private sexual material; and
 - (d) before the commission of the underlying offence, 3 or more civil penalty orders were made against the person under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to contraventions of subsection 44B(1) of the *Enhancing Online Safety Act 2015*.

Penalty: Imprisonment for 7 years.

- (5) There is no fault element for the physical element described in paragraph (4)(a) other than the fault elements (however described), if any, for the underlying offence.
- (6) To avoid doubt, a person does not commit the underlying offence for the purposes of paragraph (4)(a) if the person has a defence to the underlying offence.
- (7) Absolute liability applies to paragraph (4)(d).

Note: For absolute liability, see section 6.2.

Double jeopardy etc.

- (8) A person who has been convicted or acquitted of an offence (the ***aggravated offence***) against subsection (1) may not be convicted of an offence against subsection 474.17(1) or subsection (4) of this section in relation to the conduct that constituted the aggravated offence.
- (9) Subsection (8) does not prevent an alternative verdict under section 474.17B.
- (10) A person who has been convicted or acquitted of an offence (the ***aggravated offence***) against subsection (4) may not be convicted of an offence against subsection 474.17(1) or subsection (1) of this section in relation to the conduct that constituted the aggravated offence.
- (11) Subsection (10) does not prevent an alternative verdict under section 474.17B.
- (12) A person who has been convicted or acquitted of an offence (the ***underlying offence***) against subsection 474.17(1) may not be convicted of an offence against subsection (1) or (4) of this section in relation to the conduct that constituted the underlying offence.

When conviction must be set aside

- (13) If:
 - (a) a person has been convicted by a court of an offence against subsection (4) on the basis that 3 or more civil penalty orders were made against the person under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to contraventions of subsection 44B(1) of the *Enhancing Online Safety Act 2015*; and
 - (b) one or more of those civil penalty orders are set aside or reversed on appeal; and
 - (c) if the civil penalty orders covered by paragraph (b) had never been made, the person could not have been convicted of the offence; and
 - (d) the person applies to the court for the conviction to be set aside;

the court must set aside the conviction.

- (14) If:
- (a) a person has been convicted by a court of an offence (the ***aggravated offence***) against subsection (4); and
 - (b) the court sets aside the conviction under subsection (13);
- the setting aside of the conviction does not prevent proceedings from being instituted against the person for an offence against subsection 474.17(1) or subsection (1) of this section in relation to the conduct that constituted the aggravated offence.

474.17B Alternative verdict if aggravated offence not proven

- (1) If, on a trial for an offence (the ***aggravated offence***) against subsection 474.17A(1), the trier of fact:
- (a) is not satisfied that the defendant is guilty of the aggravated offence; but
 - (b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence against subsection 474.17(1);
- it may find the defendant not guilty of the aggravated offence but guilty of the offence against subsection 474.17(1), so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.
- (2) If, on a trial for an offence (the ***aggravated offence***) against subsection 474.17A(4), the trier of fact:
- (a) is not satisfied that the defendant is guilty of the aggravated offence; but
 - (b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence against subsection 474.17(1) or subsection 474.17A(1);
- it may find the defendant not guilty of the aggravated offence but guilty of the offence against subsection 474.17(1) or subsection 474.17A(1), so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

*[Minister's second reading speech made in—
Senate on 6 December 2017
House of Representatives on 15 August 2018]*

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*No. 96, 2018 Enhancing Online Safety (Non-consensual Sharing of Intimate Images) 33
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