2016-2017-2018

The Parliament of the
Commonwealth of Australia

THE SENATE

As read a third time

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

No. 31, 2018

A Bill for an Act to amend the Enhancing Online Safety Act 2015, and for other purposes
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A Bill for an Act to amend the Enhancing Online Safety Act 2015, and for other purposes

The Parliament of Australia enacts:

1 Short title

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

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

Commencement information

<table>
<thead>
<tr>
<th>Provisions</th>
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<tr>
<td>1. The whole of this Act</td>
<td>The day after this Act receives the Royal Assent.</td>
<td></td>
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</table>

1. This table relates only to the provisions of this Act as originally enacted.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.

3. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

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 Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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

5. 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.

6. The Minister must cause to be prepared a written report of the review.

7. 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:
   (b) administering a complaints system for cyber-bullying material targeted at an Australian child; and

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

3 At the end of section 3
   Add:

   • The complaints and objections system for non-consensual sharing of intimate images includes the following components:
     (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...
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:
Amendments  Schedule 1

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
Schedule 1 Amendments

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

Depiction of person without attire of religious or cultural significance

4 (4) Material is an intimate image of a person if:
5 (a) the material consists of a still visual image or moving visual images; and
6 (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
7 (c) the material depicts, or appears to depict, the person:
8 (i) without that attire; and
9 (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, \textit{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:

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

insert:

(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:
There is a complaints and objections system for non-consensual sharing of intimate images.

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

- 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 removal notice) requiring the provider to remove an intimate image from the service.
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:
(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
(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.

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**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.
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.

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

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.

This section applies if a person has contravened, or is contravening, section 44B.

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.

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;
Amendments Schedule 1

No. 2018 Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018

27 Section 45

Omit:

- The Commissioner may accept an enforceable undertaking under Part 6 of the Regulatory Powers (Standard Provisions) Act 2014 that relates to a social media service notice.

- The Commissioner may seek an injunction under Part 7 of the Regulatory Powers (Standard Provisions) Act 2014 that relates to:
  (a) a social media service notice; or
  (b) an end-user notice.

substitute:

- The following enforcement powers are available:
  (a) infringement notices;
  (b) enforceable undertakings;
  (c) injunctions.

28 Subsection 46(3)

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

No. 2018 Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018
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.


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)”.

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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.
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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:
   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”.

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Schedule 2—Amendments to the Criminal Code Act 1995

1 Section 473.1 of the Criminal Code

Insert:

intimate image has the meaning given by section 9B of the Enhancing Online Safety Act 2015, but does not include an intimate image under subsection 9B(4).

2 After Subdivision D of Division 474 of the Criminal Code

Insert:

Subdivision DA—Offences relating to use of carriage service for transmitting, etc. intimate images

474.24D Concurrent operation intended

(1) This Subdivision is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

(2) Without limiting subsection (1), this Subdivision is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:

(a) an act or omission that is an offence against a provision of this Subdivision; or

(b) a similar act or omission;

an offence against the law of the State or Territory.

(3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:

(a) provides for a penalty for the offence that differs from the penalty provided for in this Subdivision;

(b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Subdivision;
(c) provides for a defence in relation to the offence that differs
from the defences applicable to the offence under this
Subdivision.

474.24E  Using a carriage service for transmitting, etc. intimate
images

(1) A person commits an offence if:
   (a) the person transmits, makes available, publishes, distributes,
       advertises or promotes material; and
   (b) the material is an intimate image; and
   (c) the person engages in the conduct mentioned in paragraph (a)
       without the consent of a subject of the material; and
   (d) the person knows of, or is reckless as to, the subject’s lack of
       consent; and
   (e) the person engages in the conduct mentioned in paragraph (a)
       using a carriage service.

Penalty:
   (a) in the case of an aggravated offence (see section 474.24H)—
       imprisonment for 5 years;
   (b) in any other case—imprisonment for 3 years.

Transmission etc. to subject of material

(2) In a prosecution for an offence against subsection (1), the
   prosecution must prove that the conduct mentioned in
   paragraph (1)(a) did not consist solely of a transmission, making
   available, publication, distribution, advertisement or promotion of
   an intimate image to a subject in the intimate image.

Consent

(3) For the purposes of paragraph (1)(c):
   (a) a subject in an intimate image consents to the conduct
       mentioned in paragraph (1)(a) if the subject gives either:
       (i) a general consent covering conduct of the kind engaged
           in by the first person; or
       (ii) consent to the particular instance of conduct engaged in
           by the first person; and
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(b) the consent may be given expressly or by necessary implication.

Use of carriage service

(4) Absolute liability applies to paragraph (1)(e).

Note: For absolute liability, see section 6.2.

Defences

(5) As well as the general defences provided for in Part 2.3, defences are provided for under section 474.24J in relation to this section.

Definitions

(6) In this section:

consent means free and voluntary agreement.

474.24F Using a carriage service—making a threat about intimate images

(1) A person (the first person) commits an offence if:

(a) the first person makes a threat to another person (the second person) to transmit, make available, publish, distribute, advertise or promote an intimate image of which the second person or a third person is a subject; and

(b) the first person intends the second person to fear that the threat will be carried out; and

(c) either or both of the following apply:

(i) the first person makes the threat using a carriage service;

(ii) the threat is to transmit, make available, publish, distribute, advertise or promote the intimate image using a carriage service.

Penalty:

(a) in the case of an aggravated offence (see section 474.24H)—imprisonment for 5 years;

(b) in any other case—imprisonment for 3 years.
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Actual fear not necessary

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.

Intimate image need not exist

(3) For the purposes of subsection (1), it is irrelevant whether the intimate image actually exists.

Use of carriage service

(4) Absolute liability applies to paragraph (1)(c).

Note: For absolute liability, see section 6.2.

Definitions

(5) In this section:

fear includes apprehension.

474.24G Possessing, controlling, producing, supplying or obtaining an intimate image for use through a carriage service

(1) A person commits an offence if:

(a) the person:

(i) has possession or control of material; or

(ii) produces, supplies or obtains material; and

(b) the material is an intimate image; and

(c) the person has that possession or control, or engages in that production, supply or obtaining, with the intention that the material be used:

(i) by that person; or

(ii) by another person;

in committing an offence against section 474.24E (using a carriage service for transmitting, etc. intimate images) or 474.24F (using a carriage service—making a threat about intimate images); and
(d) the person has that possession or control, or engages in that
production, supply or obtaining:
   (i) for a commercial purpose; or
   (ii) for the purpose of obtaining (whether directly or
indirectly) a benefit.

Penalty:
   (a) in the case of an aggravated offence (see section 474.24H)—
       imprisonment for 10 years;
   (b) in any other case—imprisonment for 5 years.

(2) A person may be found guilty of an offence against
subsection (1) even if committing the offence against section 474.24E or 474.24F
is impossible.

(3) It is not an offence to attempt to commit an offence against
subsection (1).

474.24H Aggravated offences

(1) For the purposes of this Subdivision, an offence committed by a
person (the offender) where the intimate image is of a person who
is, or the offender believes to be, under 16 years of age is an
aggravated offence.

(2) If the prosecution intends to prove an aggravated offence, the
charge must allege the relevant aggravated offence.

(3) If, on a trial for an aggravated offence, the trier of fact is not
satisfied that the defendant is guilty of the aggravated offence, but
is otherwise satisfied that the defendant is guilty of the
 corresponding (non-aggravated) offence against section 474.24E,
474.24F or 474.24G, it may find the defendant not guilty of the
aggravated offence, but guilty of the relevant corresponding
offence.

(4) Subsection (3) only applies if the defendant has been afforded
procedural fairness in relation to the finding of guilt for the
 corresponding (non-aggravated) offence against section 474.24E,
474.24F or 474.24G.
474.24J Defences in respect of intimate images

Public benefit

(1) A person is not criminally responsible for an offence against section 474.24E (using a carriage service for transmitting, etc. intimate images) or 474.24G (possessing etc. an intimate image for use through a carriage service) because of engaging in particular conduct if the conduct:
   (a) is of public benefit; and
   (b) does not extend beyond what is of public benefit.

In determining whether the person is, under this subsection, not criminally responsible for the offence, the question whether the conduct is of public benefit is a question of fact and the person’s motives in engaging in the conduct are irrelevant.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

(2) For the purposes of subsection (1), conduct is of public benefit if, and only if, the conduct is necessary for or of assistance in:
   (a) enforcing a law of the Commonwealth, a State or a Territory; or
   (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
   (c) the administration of justice; or
   (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.

Media activities

(3) A person is not criminally responsible for an offence against section 474.24E (using a carriage service for transmitting, etc. intimate images) or 474.24G (possessing etc. an intimate image for use through a carriage service) because of engaging in particular conduct if:
   (a) the person engaged in the conduct for the purposes of collecting, preparing for the dissemination of, or disseminating:
(i) material having the character of news, current affairs, information or a documentary; or
(ii) material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary; and
(b) the person did not intend the conduct to cause harm to a subject of the material; and
(c) the person reasonably believed the conduct to be in the public interest.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

Duties of law enforcement officer, or intelligence or security officer

(4) A person is not criminally responsible for an offence against section 474.24E (using a carriage service for transmitting, etc. intimate images) or 474.24G (possessing etc. an intimate image for use through a carriage service) if:
(a) the person is, at the time of the offence, a law enforcement officer, or an intelligence or security officer, acting in the course of his or her duties; and
(b) the conduct of the person is reasonable in the circumstances for the purpose of performing that duty.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3).

Prohibited content and content filtering technology

(5) A person is not criminally responsible for an offence against section 474.24E (using a carriage service for transmitting, etc. intimate images) or 474.24G (possessing etc. an intimate image for use through a carriage service) if the person engages in the conduct in good faith for the sole purpose of:
(a) assisting the Children’s e-Safety Commissioner to detect:
   (i) prohibited content (within the meaning of Schedule 7 to the Broadcasting Services Act 1992); or
   (ii) potential prohibited content (within the meaning of that Schedule);
in the performance of the Commissioner’s functions under
Schedule 5 or Schedule 7 to that Act; or
(b) manufacturing or developing, or updating, content filtering
technology (including software) in accordance with:
   (i) a recognised alternative access-prevention arrangement
       (within the meaning of clause 40 of Schedule 5 to the
Broadcasting Services Act 1992); or
   (ii) a designated alternative access-prevention arrangement
       (within the meaning of clause 60 of that Schedule).

Note: A defendant bears an evidential burden in relation to the matter in this
subsection, see subsection 13.3(3).

474.24K Consent to commencement of proceedings where defendant
under 18

(1) Proceedings for an offence against this Subdivision must not be
commenced without the consent of the Attorney-General if the
defendant was under 18 at the time he or she allegedly engaged in
the conduct constituting the offence.

(2) However, a person may be arrested for, charged with, or remanded
in custody or on bail in connection with, such an offence before the
necessary consent has been given.

3 Subsections 475.1A(1) and (2) of the Criminal Code

After “D,”, insert “DA,”.

4 Paragraphs 475.1B(1)(a) and (2)(a) of the Criminal Code

After “D,”, insert “DA,”.