



Australian Government

Attorney-General's Department

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Senate Legal and Constitutional Affairs Legislation Committee

Criminal Code Amendment (Deepfake Sexual Material) Bill 2024

Attorney-General's Department Submission

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Introduction

The Attorney-General's Department (Department) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (Committee) on the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 (the Bill). This submission provides further detail to assist this Committee's consideration of the Bill and should be read alongside the Bill and its explanatory materials.

Reasons for Reform

A deepfake (a portmanteau of 'deep learning' and 'fake') is a digital photo, video or sound file that has been generated or edited, in particular using artificial intelligence (AI) or machine learning algorithms, to create a realistic but false depiction of a person or event.

AI technologies—including graphic and video editing and creation technologies—present a range of opportunities to grow our economy, create jobs and improve the lives of the Australian community. However, the possibilities for its use in technology-facilitated abuse are growing exponentially as such technologies become more publicly accessible and the tools to create deepfakes become relatively cheap, user-friendly and mainstream.

Deepfakes are already being utilised in technology-facilitated abuse, especially as such technologies become more publicly accessible and the tools to create deepfakes become relatively cheap, user-friendly and mainstream. The ability to digitally alter images for this purpose, for example by using photo or video editing software is not new. However, the use of AI substantially reduces the expertise, cost and time required to generate sexually-explicit deepfakes.

The Bill delivers on a commitment made by the Australian Government following the National Cabinet held in May to address gender-based violence. This commitment recognised the urgent and collective need to respond to the growing challenges associated with artificially generated sexual material.

This commitment comes alongside concerns raised by the Commonwealth Director of Public Prosecutions (CDPP) that the current offences (aggravated offences under section 474.17A of the Criminal Code and the definition of 'private sexual material') may not cover artificially generated material depicting a person in circumstances where there is not a 'reasonable expectation of privacy' in the source material depicting the person—for example where a publicly-available image of a person has been altered or used to create fake, sexually explicit material.

Whether real or fake, image-based abuse involving the sharing of intimate or sexual images of a person without their consent is a damaging and deeply distressing form of abuse. The sharing without consent of digitally created or altered sexual material can be a method of degrading, humiliating and dehumanising victims. Such acts are overwhelmingly targeted towards women and girls, perpetuating harmful gender stereotypes and contributing to gender-based violence.

Overview of the Bill

The Bill amends the *Criminal Code Act 1995* (Criminal Code) to modernise and strengthen offences for the non-consensual sharing of sexual material online (currently termed as ‘private sexual material’ under the Criminal Code). The Bill:

- repeals and replaces existing Commonwealth criminal offences in Part 10.6 of the Criminal Code (Telecommunications Services) for the online sharing of sexual material without consent to ensure they apply to material created or altered using technology (like AI-generated deepfakes), and
- establishes a new aggravated offence where a person uses a carriage to transmit sexual material of another adult without consent, where the person was responsible for the creation or alteration of the material.

The proposed new criminal offences have been developed in close consultation with government stakeholders, including the Australian Federal Police and the CDPP, and are detailed further, below.

This Bill will also complement existing state and territory criminal offences to criminalise the non-consensual sharing of intimate images.

New Offences

The Bill repeals the existing aggravated offences relating to private sexual material under section 474.17A in Part 10.6 of the Criminal Code and proposes three new offences. These are:

- **Section 474.17A** – Using a carriage service to transmit sexual material without consent
- **Section 474.17AA** – Aggravated offence – transmission of sexual material without consent after certain civil penalty orders were made
- **Section 474.17AA(5)** – Aggravated offence – creation or alternation of sexual material transmitted without consent

Section 474.17A – Using a carriage service to transmit sexual material without consent

The proposed new section 474.17A is now a standalone offence that applies where:

- a person (the first person) uses a carriage service to transmit material of another person; and
- the person is, or appears to be, 18 years of age or older; and
- the material depicts, or appears to depict:
 - The other person engaging in a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - a sexual organ or the anal region of the other person; or
 - if the other person is female—the other person’s breasts; and
- the first person:
 - knows that the other person does not consent to the transmission of the material; or
 - is reckless as to whether the other person consents to the transmission of the material.

Subsection 474.17A(2) stipulates that for the purposes of the offence provision (subsection 1), it is irrelevant whether the material transmitted is in an unaltered form (such as a photo), or has been created, or altered in

any way using technology. This importantly removes any doubt that realistic but false depictions of the person are captured by the proposed new section 474.17A.

The offence includes a note which specifies that the offence includes images, videos or audio depicted a person that have been edited or entirely created using digital technology, generating a realistic but false depiction of the person.

The proposed new offence will be punishable by a maximum penalty of 6 years' imprisonment, which is consistent with the maximum penalty for the current, standard aggravated offence in s 474.17A(1) of the Criminal Code.

Interaction with Child Abuse Offences

Proposed new paragraph 474.17A(1)(b) provides that the new offence applies only where the other person is, or appears to be 18 years of age or older. This ensure that the new offences only apply to material depicting or appearing to depict adults. This is appropriate given the offences contain consent requirements, which would not be appropriate in the context of sexual material concerning children or young people.

The Criminal Code continues to criminalise the use of a carriage service for child abuse material, including child abuse material generated by AI in Division 474, Subdivision D. These offences carry penalties of up to 30 years' imprisonment.

Consent

The proposed new offence reframes the existing offence around whether the alleged offender had knowledge (subparagraph 474.17A(1)(d)(i)) that the person depicted did not consent to the transmission of the sexual material, or was reckless (subparagraph 474.17A(1)(d)(ii)) as to that fact. That knowledge or recklessness as to consent applies separately for each instance of transmission of the material. Consent is not defined under this section and relies on the ordinary meaning. This is generally understood as 'free' and/or 'voluntary' decision or agreement, which excludes instances of obtaining consent through fear, force or deception. The offences will not cover private communication between consenting adults or interfere with private sexual relationships involving adults.

Expectation of Privacy

The non-consensual sharing of sexual material can have significant impacts on a person's privacy. The existing offences relied on the definition of 'private sexual material', which relates to sexual material depicting a victim in circumstances 'that reasonable persons would regard as giving rise to an expectation of privacy'. Schedule 1 of the Bill repeals the definition in section 473.1 of the Criminal Code. As noted above, the CDPP raised in its submission to the Parliamentary Joint Committee on Law Enforcement inquiry into the capability of law enforcement to respond to cybercrime that the definition of 'private sexual material' under section 473.1 of the Criminal Code is problematic because it's questionable whether certain types of artificially generated simulated imagery or videos created without the actual involvement of the victim would meet this threshold. Accordingly, uncertainty as to whether the definition of 'private sexual material' artificially generated simulated imagery or videos may mean that the existing definition is potentially limited in that respect.

Depictions of fictional characters

The first element of the offence requires the person to transmit material of *‘another person’*. This will require a real person to be depicted in the material and the offence will not apply to, for example, artistic or AI depictions of fictional characters.

Aggravated offences

Subsection 474.17AA(1) - Aggravated offence – transmission of sexual material without consent after certain civil penalty orders were made

The Bill will repeal the existing special aggravated offence in subsection 474.17A(4) of the Criminal Code and replace it with a new, similar aggravated offence that will apply where a person commits an offence against proposed new section 474.17A of the Criminal Code (the underlying offence), and before the commission of the underlying offence there were three or more civil penalty orders were made against the person for contraventions of relevant provisions of the *Online Safety Act 2021* (Online Safety Act). The civil penalty orders relate to the non-consensual sharing of intimate images (section 75 of the Online Safety Act) or non-compliance with removal notices issued under the Adult Cyber Abuse Scheme operated by the Office of the eSafety Commissioner (section 91 of the Online Safety Act), which provides pathways for those experiencing harmful online abuse to have material removed from the internet.

The proposed new aggravated offence will be punishable by a maximum penalty of 7 years’ imprisonment. This is appropriate because the aggravated offence applies where a person commits an offence to the criminal standard and after repeatedly being found liable for repeated contraventions of the Online Safety Act concerning either the non-consensual sharing of intimate images, or adult cyber abuse. These circumstances would indicate that the person has had a continued disregard of the harmful impacts that their conduct can have upon victims, justifying the imposition of a higher maximum penalty where that person subsequently disseminates sexual material concerning the victim online without consent.

Subsection 474.17AA(5) - Aggravated offence – creation or alteration of sexual material transmitted without consent

This proposed new aggravated offence applies where a person commits an offence against section 474.17A of the Criminal Code, and the person was responsible for the creation or alteration of the sexual material. The creation of sexual material and sharing of that material without consent—either by recording real sexual material, or creating deepfake sexual material, and sharing it without consent is objectively more serious than a situation where a person transmits pre-existing material without consent. This is especially the case where the creation of such conduct can be used as a tool for sexual exploitation, extortion and harassment. An example is where Person A uses an AI software to generate a deepfake image of Person B engaging in a sexual pose and sends that image to a group chat without the consent of Person B.

The proposed new aggravated offence will be punishable by a maximum penalty of 7 years’ imprisonment.

Exceptions

To ensure that the offences are proportionate and reflect community standards on both artificial and real sexual material, the Bill includes exceptions to ensure legitimate scenarios involving the transmission of the sexual material without consent are not criminalised. These include:

Paragraph 474.17A(3)(a) - Transmitting the material is necessary for, or of assistance in:

- Enforcing a law of the Commonwealth, a State or a Territory; or
- Monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or Territory.

It is appropriate that a person be able to transmit sexual material for the purposes of criminal investigations and prosecutions. For example, where a law enforcement officer transmits sexual material that is subject to a criminal investigation to a prosecutor. It is also critical that others, such as regulators (e.g. Office of the eSafety Commissioner) be able to transmit sexual material with a law enforcement agency (such as the Australian Federal Police) who may be investigating whether the transmission of the material amounted to a criminal offence under the proposed new offences.

Paragraph 474.17A(3)(b) – Transmitting the material is for the purposes of proceedings in a court or tribunal

Sexual material may be transmitted for the purposes of proceedings in a court or tribunal. For example, if a person applied to the Administrative Appeals Tribunal in relation to a decision to issue a removal notice under the Online Safety Act, the eSafety Commissioner could electronically provide the Tribunal with the sexual material for the purposes of a review of the decision.

Paragraph 474.17A(3)(c) - Where transmission is for a genuine medical or scientific purpose

Sexual material may be transmitted for a genuine medical or scientific purpose. For example, an image taken of a person by a doctor to send to a colleague to discuss treatment options, where that image may otherwise amount to sexual material under the proposed new offences.

Paragraph 474.17A(3)(d) – Where a reasonable person would consider transmitting the material to acceptable, having regard to a range of things set out between subparagraph 474.17A(3)(d).

This exception importantly introduces a reasonable persons' test to ensure that conduct that would otherwise be acceptable by a reasonable person is not subject to overly broad criminalisation. The Bill provides for a range of things to have regard to when considering whether the conduct would be acceptable by a reasonable person, these are set out below:

- The nature and content of the material,
- The circumstance in which the material was transmitted,
- The age, intellectual capacity, vulnerability, or other relevant circumstances of the person depicted, or appearing to be depicted, in the material,
- The degree to which the transmission of the material affects the privacy of the person depicted, or appearing to be depicted, in the material,
- The relationship between the person transmitting the material and the person depicted, or appearing to be depicted, in the material, or
- Any other relevant matters.

This test is an objective test and the exception means that material considered socially acceptable to transmit, can in fact be transmitted, notwithstanding they may meet the meaning of sexual material under subsection 474.17A(1). For example, a person has downloaded material that was published online and expected that consent was provided for the material due to the commercial nature of such material and its availability.