



SCARLET ALLIANCE & NSWCCL SUBMISSION

SENATE STANDING COMMITTEES ON LEGAL AND CONSTITUTIONAL AFFAIRS

CRIMINAL CODE AMENDMENT (DEEPPFAKE SEXUAL MATERIAL) BILL 2024

19 July 2024

NSWCCL



Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About the Scarlet Alliance

Scarlet Alliance, Australian Sex Workers Association, is the national peak body for sex workers and sex worker organisations in unceded Australia.

Through our objectives, policies, and programs, we work to advance sex worker rights through equality and social, legal, political, cultural, health and economic justice for past and present workers in the sex industry. We work to enable sex workers to be self-determining agents, build our own alliances, and choose where and how we live and work.

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About the New South Wales Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1. EXECUTIVE SUMMARY

The NSW Council of Civil Liberties (**NSWCCL**) and Scarlet Alliance, Australian Sex Workers Association (Scarlet Alliance) submits that the *Criminal Code Amendment (Deepfake Sexual Material) Bill 2024* [Provisions] (the **Bill**) fails to enhance the civil rights of the Australian public. Generative AI is an increasingly fast moving and adaptive technology. Any response to address the harm that can be caused through the abuse of this technology must be built on a holistic government approach, and not simply through increased criminal measures. Even where new criminal measures are enacted these must add to, and not cut across or confuse, the existing protection and legislative frameworks which already exist at federal, state and territory levels.

The issue of non-consensual dissemination of sexual material and deepfakes is complex and an approach to combatting harm that is solely focused on increasing criminalisation will not adequately prevent such harm, nor will it, more importantly, provide avenues to address the harm suffered by victims. Principally, a focus on increased criminalisation is reactionary in nature, and as this submission will demonstrate, measures taken to address the harm caused by the abuse of AI is more effective where a proactive approach to harm minimisation and eradication is taken.

The NSWCCL and Scarlet Alliance's overarching submission is that the proposed legislation overlaps with existing legislation at a federal, state and territory level, and therefore to the extent of that overlap is unneeded. Further, the intent and focus of the Bill on increasing criminal penalties fails to recognise there are other more effective ways to prevent and minimise the harm caused by non-consensual dissemination of sexual material.

This submission focuses on two areas. First, a critique of the proposed legislation. Second, analysis on how criminal legislation should play but one part in the ultimate pursuit of reducing and eliminating harm suffered by the abuse of AI.

The NSWCCL and Scarlet Alliance recommend that the Bill, and the issues associated with the Bill more broadly, would benefit from further consultation, research and engagement with experts. In its current form, the Bill should be rejected.

2. INTRODUCTION

The NSWCCL and Scarlet Alliance welcomes the opportunity to make this submission in relation to the Bill.

The prevention of the dissemination of sexual material without consent is a complex issue that cannot be solved solely through the imposition of criminal penalties. The Bill's focus on criminal penalties is a reactive policy which aims to punish offenders, rather than creating a proactive framework geared towards preventing the non-consensual creation and distribution of sexual material, and developing measures aimed at the objective of assisting those who have suffered harm as a result. Additionally, the imposition of further criminalisation efforts where there are already existing avenues at a federal level to punish aggravated offences under the *Criminal Code Act 1995* (Cth) (**Criminal Code**), further highlights that the proposed regime under the Bill is not necessary. Not only is there already existing federal legislation, but there are also existing state and territory laws that have been tackling non-consensual distribution of intimate images with existing laws on the subject matter.¹

¹ *Crimes Act 1900* (ACT) ss 72C, 72E; *Crimes Act 1900* (NSW) ss 91P-91R; *Criminal Code Act 1982* (NT) ss 208AAB-208AC; *Criminal Code 1899* (QLD) ss 227A-227B; *Summary Offences Act 1953* (SA) sub-ss 26B(2), 26C(1), 26D(3); *Police Offences Act 1935* (Tas) ss 13A-13C; *Crimes Act 1958* (Vic) ss 53R-53T; *Criminal Code Act Compilation Act 1913* (WA) ss 221BD, 338B-338C.

Overlap aside, as of 2021, there had only been one reported case of conviction for the existing aggravated offence under the Criminal Code, further casting doubt on the utility of reliance on the criminal law to address the social harm. Additionally, whereas the Criminal Code has a broader preventative framework, *Part 6 of the Online Safety Act 2021 (Cth) (Online Safety Act)* sets out a more specific prohibition in relation to the sharing or threatening to share an intimate image without the consent of another person. If there is to be a regime replacing the existing legislative patchwork, there must be a clear reason and it is unclear from the explanatory memorandum what this reason is. It is also imperative to ensure both state and federal legislation provides a combined combative approach to eliminating non-consensual distribution of intimate images. With the focus on criminalisation, the Bill also reflects little to no consideration as to the protection of the victims who are likely to be called as witnesses in the prosecution and trial process. The Bill fails to balance a prompt removal of the material, with requiring victims to suffer through a criminal trial process.

The proposed penalties under the Bill are also not without issue. The Bill imposes a new maximum sentence of six years for individuals convicted of the new offence and a maximum sentence of seven years' imprisonment for the two aggravated offences.² It is questionable whether these penalties are "appropriate", "reasonable", and "reflect the seriousness" of the crime as the explanatory memorandum suggests. Moreover, it is also alarming that a seven-year maximum sentence for the two aggravated offences stands in stark contrast to the three-year maximum sentences under state-based legislation, for example sections 91P, 91Q, and 91R of the *Crimes Act 1900 (NSW) (Crimes Act)*.

Beyond a consideration of 'reasonableness' and 'appropriateness' of the sentence, the imposition of a seven-year maximum prison sentence raises significant concerns regarding the potential eligibility of individuals for post-sentence supervision and detention regimes. Historically, the high-risk offender regime was a mechanism to protect the public from individuals who had committed the most heinous of crimes. Increasingly, imposition of longer sentences is creating "scope creep" of the post-sentence supervision and detention regime, and this has the potential to result in unjustified restriction of liberty of the individual for acts that may not justify it. This is disproportionate to the offending covered, and further, would have implications for rehabilitation activities.

The NSWCCCL and Scarlet Alliance submits that the imposition of further criminalisation where sexual material is transmitted without the consent of an individual is ineffective in minimising and protecting against the harm that is caused. A holistic Government response is needed to address the social harm that is caused by the transmission of sexual material without consent, an approach which includes but is not limited to, regulatory changes, health responses, education and public awareness campaigns and criminal sanctions.

The Bill, and the issues associated with the Bill more broadly, would benefit from further consultation, research and engagement with experts. The NSWCCCL and Scarlet Alliance reject the Bill in current form.

3. CRITIQUE OF THE PROPOSED LEGISLATION

3.1 Existing aggravated offences under the Criminal Code negate the need for the proposed regime under the Bill

The NSWCCCL and Scarlet Alliance submits that the proposed imposition of a further criminal regime will overlap with existing federal and state legislation, and to that extent is therefore unnecessary. This section will outline existing legislation and in doing so highlight not only the shortfalls of the proposed legislation, but also its redundancy.

² House of Representatives, 'Criminal Code Amendment (Deepfake Sexual Material) Bill 2024', Explanatory Memorandum (2024), at [21] and [22].

(a) Aggravated offences under the Criminal Code

Under section 414.17A of the Criminal Code, the penalty for the commission of a standard aggravated offence is up to six years imprisonment.³ Relevantly, a standard aggravated offence includes using a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive, and the commission of the offence involves the transmission, making available, publication, distribution, advertisement or promotion of private sexual material.⁴

Additionally, the Criminal Code provides that a person who commits a special aggravated offence⁵ could face a seven-year imprisonment if the underlying offence were also committed by the person. An offence will be classified as a special aggravated offence, where, before the commission of the underlying offence, three or more civil penalty orders were made against the person in relation to contraventions of certain provisions in the Online Safety Act.

There are three aspects of the proposed legislation that deviate from existing aggravated offences under the Criminal Code, and this deviation clearly demonstrates that the proposed legislation fails to give due regard to the nuanced aspects involved in the deterring the communication of private sexual material. Alarming, these failures have the potential to capture conduct that should not be criminalised.

First, the existing aggravated offences under section 474.17A of the Criminal Code refer to “private sexual material”, which is defined under the Criminal Code to mean material where the *dominant characteristic* of which is the depiction of a ‘sexual organ’, the ‘anal region’ and ‘breasts of a female person’. The inclusion of ‘dominant characteristic of the material’ is a factor that is lacking in the proposed legislation. This omission results in a lack of specificity, which in turn creates the possibility of the offence capturing communications that should be not subject to criminal penalty.⁶

Second, the definition of ‘private sexual material’ under the Criminal Code requires the depiction to be in circumstances that reasonable persons would regard as giving rise to an expectation of privacy. Comparatively, the proposed legislation shifts this element and sets out an exception where a reasonable person would consider the transmission acceptable instead. This change, from a ‘reasonable expectation of privacy’ to a ‘reasonable consideration of acceptability’ shifts the realm of prosecution whereby not only is there not an onus to establish an expectation of privacy, but there is also an exception for defendants to plead in that a reasonable person would consider the transmission acceptable.

Third, the existing offences require a use of the carriage service that reasonable persons would regard as being, in all circumstances, menacing, harassing or offensive, this element is absent from the proposed legislation. The removal of use being “menacing, harassing or offensive”, along with the limitation of the mental element, i.e., knowledge or recklessness, to the absence of consent, reflect a move of criminalisation away from fault on the individual transmitting the materials and harms on persons depicted or appear to be depicted in the material, but towards a blanket prohibition on the transmission of materials covered by the legislation. Whereas existing legislation is apt to capture the nuance involved in the transmission of private sexual material, the proposed legislation under the Bill generalises the issue. The NSWCCCL and Scarlet Alliance has grave concerns that this is a sweeping attempt by the Government to broaden existing powers through a rushed and ill-considered approach.

It should also be noted that, as of 2021, there had only been one reported case of conviction for the existing aggravated offence under the Criminal Code Act.⁷ As the Government has provided little evidence on how existing non-consensual sharing of sexually explicit materials online could not be dealt

³ Criminal Code sub-s 474.17A(1).

⁴ Criminal Code sub-s 474.17A(1)(b), 474.17(1).

⁵ Ibid sub-s 474.17A(4).

⁶ Ibid subparagraphs 474.17A(1)(c)(ii) and (iii).

⁷ Singh v R [2021] WASCA 135.

with by the existing offences, it is the NSWCCCL and Scarlet Alliances' view that the Government should first explore how the existing regime could be improved, before replacing the existing legislative regime with a poor variation may again be underused, or worse, have the potential to be misapplied.

(b) Image-Based Abuse Scheme under the Online Safety Act

Part 6 of the Online Safety Act sets out a general prohibition on sharing or threatening to share an intimate image without the consent of another person.⁸ The Online Safety Act also specifies requirements to comply with any removal notice and remedial direction given by the eSafety Commissioner.⁹

Given that the general prohibition covers non-consensual transmission of (deepfake) sexual materials, the NSWCCCL and Scarlet Alliance submit that providing the eSafety Commissioner with more resources to exercise its powers in dealing with image-based abuse and having them adopt a more robust enforcement approach would be a more effective use of Government funds than enacting another criminal regime with limited evidence of deterrence or value to the Australian public.

It is unclear to the NSWCCCL and Scarlet Alliance how the Australian Federal Police (“AFP”), who would be tasked with enforcement action under the proposed legislation and whether they would be more equipped or better suited than the eSafety Commissioner in the handling of non-consensual transmission of sexual materials. The eSafety Commissioner has the powers to issue online service providers with removal notices and to issue and publish service provider notifications.¹⁰ These powers, in addition to the making of informal requests, enable a more expeditious removal of the materials, which are better suited to reducing harm suffered by victims, compared with lengthy process of prosecuting the offender through the complex and already stressful criminal process. From 2017 until September 2023, eSafety has facilitated more than 90% of the removal of intimate images after receiving 22,045 complaints about image-based abuse.¹¹ It is unclear why the AFP are being tasked with functions that eSafety has experience, and a proven successful track record in the rapid identification and removal of non-consensual sexual materials, as well as better engagement with victims. In many instances, it is the speed of removal that is key for victims, and it is unclear how the Bill will facilitate this and worse, may potentially cause greater delays.

3.2 Criminalisation of the same conduct under state and territory laws

State and territory laws have already been tackling non-consensual distribution of intimate images with existing laws on the subject matter.¹² The proposed legislation on the Federal level, particularly the move away from the requirement that the use of a carriage service must be in a way that is “menacing, harassing or offensive”, will create overlap with the state and territory laws. While overlap in and of itself is not particularly concerning, it is concerning however where the overlap is inconsistent as this has potential to result in uncertainty in the law. Consistency and clarity is also key to effective and efficient enforcement. For example, as perpetrators of image-based abuse are typically someone the victims know,¹³ law enforcement agencies on the state and territory level are more suitable to take enforcement action and assist the victims compared to the AFP. Clear delineation between the use of enforcement powers and efforts is imperative in ensuring both state and Federal legislation provides a combined combative approach to eliminating non-consensual distribution of intimate images. The NSWCCCL and

⁸ *Online Safety Act* s 75.

⁹ *Ibid* ss 80, 83.

¹⁰ *Ibid* ss 77, 79, 85.

¹¹ eSafety, ‘Documents relating to Senate estimates’ (Document, 31 January 2024) https://www.esafety.gov.au/sites/default/files/2024-01/LOG_49_Document_Set.pdf?v=1721210238561

¹² *Crimes Act 1900* (ACT) ss 72C, 72E; *Crimes Act 1900* (NSW) ss 91P-91R; *Criminal Code Act 1982* (NT) ss 208AAB-208AC; *Criminal Code 1899* (QLD) ss 227A-227B; *Summary Offences Act 1953* (SA) sub-ss 26B(2), 26C(1), 26D(3); *Police Offences Act 1935* (Tas) ss 13A-13C; *Crimes Act 1958* (Vic) ss 53R-53T; *Criminal Code Act Compilation Act 1913* (WA) ss 221BD, 338B-338C.

¹³ Office of the eSafety Commissioner, *Image-based Abuse National Survey* (Summary Report, October 2017) 5.

Scarlet Alliance submits that the current drafting of the Bill fails to achieve the requisite level of coordination.

3.3 The penalties are excessive

The Bill imposes a new maximum sentence of six years for individuals convicted of the new offence and for the two aggravated offences, a maximum sentence of seven years' imprisonment.¹⁴ The NSWCCCL and Scarlet Alliance dispute and reject the assertions made in the explanatory memorandum to the Bill which state that the penalties are “appropriate”, “reasonable”, and “reflect the seriousness” of the offending in question.¹⁵

The NSWCCCL and Scarlet Alliance submit that the severity of the penalties are not proportionate with the gravity of the offence, particularly when juxtaposed with the existing maximum penalties under state legislation. The imposition of a six-year sentence for the new offence, and a further year for the aggravated offences, exceeds the punitive measures typically allocated to offences of a comparable nature.

Furthermore, the seven-year maximum sentence for the aggravated offences, may result in convicted individuals being eligible for post-sentence supervision and detention regimes. The NSWCCCL and Scarlet Alliance are concerned with the incremental broadening of the scope of offences included in such regimes. The proposed legislation, in the NSWCCCL and Scarlet Alliance's view, represents another step in that direction, thereby increasing the post-conviction consequences faced by offenders.

3.4 The penalties are disproportionate

When considering the appropriateness of the Bill's maximum sentence, the NSWCCCL and Scarlet Alliance considered the existing legal landscape, including state laws which address similar offences. A significant and abrupt increase in the maximum penalty for an offence, particularly when it exceeds established penalties for analogous or even more serious offences under state law, raises concerns about the proportionality and, as discussed above, the consistency of the legal system. For instance, the Bill's seven-year maximum sentence for the two aggravated offences stands in stark contrast to the three-year maximum sentences under sections 91P, 91Q, and 91R of the Crimes Act, which make it an offence to record, distribute, or threaten to record or distribute, intimate images without consent.¹⁶

Moreover, the legislature, by opting to have a significantly higher maximum penalty for this category of offences, sends a message regarding the perceived gravity of those offences. Raising the upper limit of punishment for an offence could be seen as an indication to the courts that the sentences for such infractions should be increased.¹⁷ Therefore, such a disparity—more than double in the instance of the aggravated offences—may lead to sentences that are disproportionate to the seriousness of the offence. This undermines the interests of justice, potentially resulting excessive sentences which reflect a reactionary stance and are punitive overreach.

The principle of proportionality seeks to limit arbitrary punishment by requiring a sentence to reflect the objective seriousness of that offence.¹⁸ This principle enables fairness and justice within the legal system. Maximum sentences provide a scale within which judicial discretion may operate, guiding the courts in

¹⁴ House of Representatives, 'Criminal Code Amendment (Deepfake Sexual Material) Bill 2024', Explanatory Memorandum (2024), at [21] and [22].

¹⁵ Ibid.

¹⁶ Sections 53T and 53S of the Crimes Act 1958 (Vic), section 221BD of the Criminal Law Amendment (Intimate Images) Act 2019 (WA), and section 223 of the Criminal Code (QLD) all also have a comparable offence with a maximum sentence of three years imprisonment. However, section 26C of the Summary Offences Act 1953 (SA) has a maximum sentence of four years for a comparable offence.

¹⁷ Judicial Commission of New South Wales, 'Sentencing Bench Book', Objective factors at common law at [10-000] and Muldrock v The Queen (2011) 244 CLR 120 at [31].

¹⁸ At [10-010] and DS v R (2022) 109 NSWLR 82 at [68].

the determination of a sentence that is proportionate and appropriate to the individual circumstances of each case. In essence, the maximum penalty acts as a comparative tool that helps gauge where a particular case stands in relation to the most extreme example of that offence.¹⁹ The maximum sentence should, therefore, not be an arbitrary figure but rather a carefully considered “yardstick” reflecting the legislature's view on the most severe manifestation of an offence.²⁰ The NSWCCCL and Scarlet Alliance submit that the explanatory memorandum to the Bill does not justify such an extreme departure from the maximum sentences under state law, nor does it explain how such lengthy sentences could be proportionate to the offence.

3.5 Eligibility under post-sentence supervision and detention regimes

The Bill introduces a seven-year maximum prison sentence for certain aggravated offences. The NSWCCCL and Scarlet Alliance submit that this provision raises significant concerns regarding the potential eligibility of individuals for post-sentence supervision and detention regimes, such as those under the *Crimes (High Risk Offenders) Act 2006* (NSW). The possibility of a seven-year sentence for the aggravated offences not only represents a significant escalation in the severity of punishment for this type of conduct, it also means, by extension, that individuals may be subjected to extended periods of supervision or detention after serving their initial sentence.

Historically, the high-risk offender regime was a mechanism to protect the public from individuals who had committed the most heinous of crimes. The original intent was to apply this regime cautiously, targeting a narrow category of offences that warranted such severe post-sentence controls. Over time, there has been a troubling trend towards including offences of a less severe nature within this regime, a trend that this Bill continues. The NSWCCCL and Scarlet Alliance submit that this would result in an unjustified restriction of liberty on the individual, which would have implications for their rehabilitation and would be disproportionate to the offending covered.

The NSWCCCL and Scarlet Alliance submit that the length of the proposed sentences and the general expansion of eligibility for less severe offences under the high-risk offender regime do not serve the interests of justice and contribute to an even more reactive and punitive legal landscape, which will only hinder rehabilitation efforts and lead to further marginalisation of individuals.

3.6 The legislation offers insufficient protection to the victims

It is possible for an individual to be a victim arising from a transmission of materials that leads to the *indication* that that individual is engaged in a sexual pose or sexual activity or that a sexual organ or the anal region, or (if applicable) breasts of that individual being exposed, without the material transmitted depicting such content.

As it stands, the proposed legislation provides it is an offence to use a carriage service to transmit sexual material of another person who is, or appears to be, over the age of 18 years, without their consent. In order to satisfy all elements of the offence the material is required to depict or appears to depict; (i) an individual engaging in a sexual pose or activity, whether or not in the presence of other persons, (ii) a sexual organ or anal region of an individual, or (iii) if the other person is female – that person's breast. The NSWCCCL and Scarlet Alliance believes that this drafting offers insufficient protections for victims of transmitted material that depicts or indicates sexually explicit material that has been created or altered using technology.

¹⁹ At [10-000].

²⁰ Judicial Commission of New South Wales, ‘Sentencing Bench Book’, Objective factors at common law at [10-000].

While it is evident that that transmission of non-consensual sexually explicit material has detrimental effects on the victim, such as an increase in depression and anxiety, it can also cause financial consequences including loss of employment or difficulty applying for new employment.²¹ The same applies to individuals who are victims of sexually explicit material that have been created or altered using technology and material that has been created or altered to purport to the individual participating in sexually explicit behaviour. The phrase ‘appears to depict’ is intended to cover material where the depiction reasonably or closely resembles an individual to the point that it could be mistaken for them, however it does not include material that alludes to the fact that the individual is participating in sexually explicit behaviours. The NSWCCCL and Scarlet Alliance believes this determination excludes a number of victims who although are not included under the drafting of the legislation, have the same detrimental impacts on their mental health and financial implications.

As discussed above, violation of the proposed legislation includes a penalty of a maximum of 6 years’ imprisonment. It is noted that the punishment has been determined as appropriate given the serious nature of the offending behaviour, it does nothing to provide necessary protection to potential victims. The Australian Government is addressing these behaviours through a range of measures, including victim support and an online reporting portal,²² these points are not addressed within the proposed legislation.

3.7 The response reflects little to no consideration as to the protection of the victims who are likely be called as witnesses in the prosecution and trial process

The Bill focuses excessively on the offenders and the prosecution of the offenders and does not provide sufficient reprieve to the victims in several aspects. One of these areas with lack of reprieve is the absence of protection provided to the victims wherein they act as witnesses in the prosecution or trial process. In the first instance, victims of image based sexual abuse (IBSA) often suffer from a lack of anonymity,²³ which in turn might make them more susceptible to other kinds of psychological distress; a common phenomenon amongst victims of IBSA.²⁴ Alternatively, it might make victims of IBSA more averse to reporting such crimes because of the excessive onerous attention that such reporting might attract. This may perhaps be inferred from the reporting and prosecution rates in jurisdictions that already have introduced legislation for IBSA such as South Australia and Victoria, where the prosecution rates remain low despite implementation of relevant legislation.²⁵

3.8 The response reflects little to no consideration as to the redress available to individual victims, who would prefer prompt removal of the material instead of going through a trial process.

The Bill claims that the amendment invokes Article 7 of the ICCPR prohibiting torture, or cruel, inhuman, and degrading treatment or punishment, in that it protects the victims of IBSA from torture, or cruel, inhuman, and degrading treatment or punishment.²⁶ However it is prudent to note that the legislation does little to actually prevent victims from having these experiences in the first instance, but rather serves as a reactionary mechanism that punishes perpetrators after the victims have undergone such treatment.

Some of the more common impacts experienced by victims of IBSA include feelings of embarrassment, fear for personal safety, being propositioned by strangers for sexual activities, disruption to daily life, and

²¹ Bates S (2017). *Revenge porn and mental health: A qualitative analysis of the mental health effects of revenge porn on female survivors*. *Feminist Criminology* 12(1): 22–42. <https://doi.org/10.1177/1557085116654565> and Henry N et al. (2021). *Image-based sexual abuse: A study on the causes and consequences of nonconsensual nude or sexual imagery*. London: Routledge

²² Australian Government, Attorney-General’s Department (2017) *Criminalisation of the non-consensual sharing of intimate images*. <https://www.ag.gov.au/crime/cybercrime/criminalisation-non-consensual-sharing-intimate-images#:~:text=The%20Office%20of%20the%20eSafety,consent%3B%20and%20access%20immediate%20support.>

²³ <https://theconversation.com/if-someone-posts-your-private-photos-online-there-has-been-little-you-can-do-about-it-how-changes-in-the-law-will-finally-help-victims-209048>

²⁴ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/~media/Committees/legcon_ctte/R_evenge_porn/report.pdf

²⁵ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/~media/Committees/legcon_ctte/R_evenge_porn/report.pdf

²⁶ Criminal Code Amendment (Deepfake Sexual Material) Bill 2024. Explanatory Memorandum

impacts on reputation in terms of personal standing in the community.²⁷ The Bill does little to address these and protect the victim in that a victim having to go through a lengthy trial process is likely to exacerbate some of these impacts even if it might mean some form of justice being served. Rather, the Bill should make references to some of the enforcement mechanisms offered by the *Enhancing Online Safety (Non-consensual sharing of intimate images) Bill 2017*, which includes several remedies such as enforceable undertakings, injunctions, removal notices to perpetrators and social media services alike, and penalties for non-compliance.²⁸

In addition to these, in the Australian Women Against Violence Alliance submissions to the Senate in their report on 'revenge porn', it was flagged that in some instances image based sexual abuse is committed as part of a domestic violence pattern to which the victim may be subject. The Bill needs to make provisions for these circumstances, to ensure that the victim is sufficiently protected from repeat offending particularly where it is a result of domestic violence.²⁹

4. TRANSMISSION OF SEXUAL MATERIAL WITHOUT CONSENT REQUIRES A MORE COMPREHENSIVE RESPONSE ON A SOCIETAL LEVEL

4.1 Criminal Law is inadequate to minimise harm to individuals when sexual material is distributed

The prevention of the dissemination of sexual material without consent is a complex issue that cannot be solved solely through the imposition of more onerous criminal penalties. The implementation of the Bill provides a reactive policy which aims to punish offenders, rather than a proactive framework geared towards preventing the non-consensual creation and distribution of sexual material. The NSWCCCL and Scarlet Alliance submits that the imposition of further criminalisation where sexual material is transmitted without the consent of an individual is inadequate in minimising and protecting against the harm that is caused.

(a) Harm

The transmission of sexual material without consent is a prevalent issue in the social and technological landscape of Australia. A survey in 2019 provided that 20.9% of people surveyed in Australia, New Zealand and the United Kingdom had a sexual image of themselves shared without their consent.³⁰ The harm that the dissemination of sexual images (including deepfakes) can have on an individual is significant. Victims suffer from a blatant violation of their right to privacy, sexual integrity and prohibition against degrading treatment.³¹ The significant harm and embarrassment caused by the transmission of this material can lead to more severe consequences such as social isolation and even suicide.³² In other instances, images and deepfakes can be used as blackmail in situations of domestic violence or for financial gain.³³ The complete eradication of images from the internet once they have been posted is almost impossible to achieve and therefore the nature of the harm caused can be not only ongoing but irrevocable.³⁴ Harm prevention is therefore essential.

²⁷https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/~media/Committees/legcon_ctte/Ravenge_pom/report.pdf

²⁸ <https://classic.austlii.edu.au/au/legis/cth/bill/eosfcab2017411/>

²⁹ <https://awava.org.au/wp-content/uploads/2016/04/AWAVA-submission-to-Senate-inquiry-on-phenomenon-colloquially-referred-to-as-revenge-porn> Jan-2016.pdf

³⁰ Western Australia, *Parliamentary Debates, Legislative Assembly*, 28 June 2018, 4156b-4159a (John Quigley) 1.

³¹ *International Covenant on Civil and Political Rights* Article 7

³² McGlynn, *Shattering Lives and Myths: A report on image-based sexual abuse* (2019).

³³ *Ibid*

³⁴ Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2016) 49 *Wake Forest Law Review* 345, 360,

(b) The effect of increased criminalisation

The NSWCCCL and Scarlet Alliance maintains that the harsher sentencing regimes proposed by the Bill do not work to remedy the harm, nor do they sufficiently deter the non-consensual transmission of sexual material in the first instance.

The best remedy for victims who are exposed by the dissemination of sexual material without their consent is the prompt removal of this material. The timing in which the material can be removed from circulation on the internet is therefore essential to harm reduction. A significant contribution to the harm suffered by victims is the knowledge that their intimate images are easily discoverable and accessible by people within their social circle, and a wider public audience; the longer these images stay online, the longer victims are inflicted to this ongoing harm.³⁵ Further criminalisation of criminal actions that are already protected under state and territory laws only lengthens the criminal process and fails to provide a framework that proactively prevents and remedies the harm.

As has been discussed above, the NSWCCCL and Scarlet Alliance also submits that the further criminalisation put forth by the Bill is an inept deterrent to the transmission and creation of sexual material without consent. The general deterrent of a crime occurs where a potential offender becomes less likely to offend³⁶ and given that there are already existing regimes in place to criminalise this behaviour, it is unclear how another regime will act as a further deterrent to prevent the commission of these crimes. Emeritus Professor Brown of UNSW expresses that “the severity of punishment, known as marginal deterrence, has no real deterrent effect, or the effect of reducing recidivism”.³⁷ And so, in turn, the NSWCCCL and Scarlet Alliance submits that given there is already a deterrent effect from existing criminal penalties and the imposition of further criminal sanctions will have no marginal deterrent effect. It is the position of the NSWCCCL and Scarlet Alliance that the harsher, catch-all sentencing regimes imposed by the Bill is an ineffective tool to deter perpetrators from committing the harmful actions. If perpetrators are not already deterred by existing criminal regimes, it is unclear whether a further regime will have any effect. The NSWCCCL and the Scarlet Alliance submit that there is no merit in enacting the legislation, while the benefits from the regime proposed by the Bill remain unclear.

4.2 Action/ Proposed Change

The NSWCCCL and Scarlet Alliance proposes that a holistic Government response is needed to address the social harm that is purported by the transmission of sexual material without consent. This includes but is not limited to, regulatory changes, health responses, education and public awareness campaigns and criminal sanctions.

(a) Regulatory approach

The NSWCCCL and Scarlet Alliance considers that the regulation of platforms which enable the distribution of sexual material is paramount to the preventing non-consensual distribution of such materials. The Online Safety Act governs the existing Image Based Abuse Scheme, which allows the eSafety Commissioner to seek the removal of intimate images or videos which were posted without the consent of the owner. The powers of eSafety Commissioner to seek the removal of an image are broad and discretionary. While the success of the eSafety Commissioner have been noted above, further improvement can still be made. For example, the sheer volume of submissions and the fact that complaints must be made through a 3rd party limits the haste at which the visibility of an image can be

³⁵ Nicolas Suzor, Bryony Seignoir and Jennifer Singleton (‘Suzor’), *Non-Consensual Porn and the responsibilities of Online Intermediaries* (2017) 40(3) Melbourne Law Review 10, 41.

³⁶ ‘Do harsher punishments deter crime’ UNSW (Web Page, 16 July 2020) <<https://www.unsw.edu.au/newsroom/news/2020/07/do-harsher-punishments-deter-crime>>.

³⁷ Ibid.

reduced. As has been noted above, it is imperative that actions taken to prevent the distribution of sexual material are focused on harm prevention. While criminalisation acts as a deterrent, the imposition of new legislative regimes should also focus on further empowering existing avenues that exist to reduce harm.

In addition to empowering existing government bodies who are capable and responsible for harm minimisation, the NSWCCCL and Scarlet Alliance also emphasise the need for the imposition of appropriate regulations on 3rd party content providers, including platforms that facilitate the creation and/or sharing of sexual deepfake materials through artificial intelligence. While there are potential benefits from additional regulation, this must not come at the cost of deplatforming³⁸ or shadowbanning³⁹ sex workers. For example, while mitigating the visibility of intimate images appearing in search engines, limiting the spread of material through influential social media sites or implementation of consent-based regulation may aid in reducing the dissemination of non-consensual content, implementation of such measures must also ensure that it doesn't have the effect of creating prohibitive procedures for sex workers, effectively resulting in deplatforming⁴⁰ and/or directly impacting on sex worker wellbeing and safety.⁴¹ Suzor, Seignior, and Singleton highlight that an online Reddit community titled 'Gonewild' requires that the users undergo a strict verification process to consent to the upload of sexually explicit material. This includes the posting of images which clearly identify the user's body and handwriting. The community also places power in the page's moderators to require further verification of a user if they deem it necessary and remove images where consent is not proven.⁴²

The NSWCCCL and Scarlet Alliance proposes that regulations imposing obligations on 3rd party content providers to have verification processes that assist in the prevention of non-consensual distribution, whilst ensuring that the regulations still protect the privacy of sex workers. The regulations need to balance the risk between ensuring there is a framework for verification of consent, yet at the same time protecting the privacy of content creators so as to not create potential safety risks. The ultimate goal of increased regulation is the reduction of harm through the strict regulation of the non-consented sexual material.

(b) Education

As part of a holistic Government approach, the NSWCCCL and Scarlet Alliance also proposes the introduction of an education and public awareness program to increase the knowledge and awareness of the harm that can be caused by the non-consensual creation and dissemination of sexual material. This may include greater investment into the Australian sexual education system, including the topic of consent. Furthermore, Government investment into awareness campaigns to increase public knowledge on the ramifications of spreading non-consented sexual material is recommended.

4.3 Conclusion

Ultimately, the NSWCCCL and Scarlet Alliance considers the issue of the non-consensual dissemination of sexual material and deepfakes to be complex and submits that the effect of increased criminalisation in the Bill does not provide an adequate harm prevention. The Bill, and the issues associated with the Bill more broadly, would benefit from further consultation, research and engagement with experts.

³⁸ Danielle Blunt and Zahra Stardust, *Automating Whorephobia: Sex, Technology and the Violence of Deplatforming: An Interview with Hacking//Hustling* (2021) Porn Studies 8 (4): 350–66. doi:10.1080/23268743.2021.1947883.

³⁹ Danielle Blunt, Ariel Wolf, Emily Coombes and Shanelle Mullin, *Posting Into the Void: Studying the Impact of Shadowbanning on Sex Workers and Activists* (2020) Hacking//Hustling <<https://hackinghustling.org/posting-into-the-void-content-moderation/>>.

⁴⁰ Suzor (n 35) 39.

⁴¹ See Danielle Blunt and Ariel Wolf, *Erased: The Impact of FOSTA-SESTA and the Removal of Backpage on Sex Workers* (2020) (14) Anti-Trafficking Review 117 <<https://www.antitraffickingreview.org/index.php/atjournal/article/view/448/363>>

⁴² Suzor (n 35) 39.

We trust this submission will be helpful to the committee.

Yours sincerely,

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