



THE LAW SOCIETY  
OF NEW SOUTH WALES

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15 July 2024

Dr James Popple  
Chief Executive Officer  
Law Council of Australia

By email: [Shounok.chatterjee@lawcouncil.com.au](mailto:Shounok.chatterjee@lawcouncil.com.au)

Dear Dr Popple,

### **Review of the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024**

Thank you for seeking the Law Society of NSW's views in respect of the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) review of the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 (**Bill**). The Law Society's Privacy and Data Law and Criminal Law Committees contributed to this submission.

In the brief time available we have prepared the following comments for your consideration, including comments on each of the six elements likely to feature in a Law Council submission.

#### **Consistency of approach**

We note that the Commonwealth Government is currently working on several significant initiatives that impact the regulation of digital spaces. To ensure a clear and consistent approach, it will be important that all reforms, including reforms to the Commonwealth criminal law, are considered together with related initiatives to support online safety and privacy, including in conjunction with the Privacy Act Review and Online Safety Act Review.

For example, we note that the development of a statutory tort of serious invasion of privacy, which may include the transmission of sexual material (including deepfake sexual material) without consent, is currently being considered. The statutory tort is intended to 'provide people with the ability to seek redress through the courts for serious invasions of privacy without being limited by the scope of the [Privacy] Act'.<sup>1</sup> The proposal is 'agreed in principle' by the Government<sup>2</sup> and supported by the Law Council.<sup>3</sup> It will be important that consideration of provisions under the Bill is complementary to, and harmonised with, the measures under the *Online Safety Act 2021* (Cth) and *Privacy Act 1988* (Cth) once reformed.

We also note, more broadly, the work being undertaken on new challenges arising from generative artificial intelligence for online safety, and consider that these challenges should be addressed with a coordinated, cross-government perspective. As noted in the Government's

<sup>1</sup> Australian Government, [Government response to the Privacy Act Review Report \(Privacy Act Review Response\)](#), (28 September 2023), 19.

<sup>2</sup> *Ibid.*, 36.

<sup>3</sup> Law Council, "Law Council supports statutory tort for serious invasion of privacy" (Media Release, 8 February 2022).

interim response to the Safe and Responsible AI in Australia consultation, 'existing laws likely do not adequately prevent AI-facilitated harms before they occur, and more work is needed to ensure there is an adequate response to harms after they occur'.<sup>4</sup>

These harms are at the heart of the reforms proposed in the Bill, and as such we consider it appropriate that they be considered in the context of broader work being undertaken on online safety, including discussions around mandatory safety guardrails for the use of generative artificial intelligence in high-risk settings.

## **Re-evaluating the adequacy of the Commonwealth criminal scheme**

### *Adequacy of the criminal framework*

Turning to the detail of the Bill, we agree with the Law Council's view that there is a need to re-evaluate the adequacy of Australia's criminal frameworks to ensure that the specific harms caused by non-consensual sharing of intimate images, including deepfake material, are subject to denunciation and deterrence. We also agree with the Law Council's proposition that it would be of benefit for changes to Commonwealth criminal offences to be informed by best practice principles drawn from the operation of similar offences proscribing intimate image abuse in states and territories, where those equivalent offences are operating well.

To this end, examination of the intimate image abuse provisions under Division 15C of the *Crimes Act 1900* (NSW) may assist. In particular, the Committee may wish to consider implementing a safeguard such as that operating under sections 91P, 91Q and 91S of Division 15C, namely that approval from the Director of Public Prosecutions is required before prosecutions can be commenced against persons under 16 years of age. In our view, this is an effective method to ensure the provisions operate as intended and do not disproportionately impact young people.

### *Adequacy of the civil framework*

Further, it is our view that the amendments proposed under the Bill should prompt further consideration of whether the civil framework is adequate to protect against these specific harms, in tandem with the criminal law framework. Specifically, it may be of benefit to consider whether civil penalty provisions are adequate to address conduct, noting that the aggravated offences proposed under section 474.17AA are intended to apply where the defendant has had three or more civil penalty orders made against them.

This may involve consideration of whether the civil penalty imposed by subsection 75(1) and section 91 of the *Online Safety Act 2021* (Cth), 500 penalty units, should more closely mirror penalties available under the *Privacy Act 1988*, Australian Consumer Law (ACL), and the *Online Safety Act 2023* (UK), where the maximum penalty for which an entity is liable is whichever is the greater of £18 million (approx. AUD35 million) or 10% of the entity's qualifying worldwide revenue. The concept of penalties that are arrived at by way of calculation of global turnover is not unfamiliar to Australian legislation.<sup>5</sup>

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<sup>4</sup> Australian Government, [Safe and Responsible AI in Australia Consultation – Australian Government's Interim Response](#), 17 January 2024, 5.

<sup>5</sup> See, for example, amendments introduced in 2022 to the *Competition and Consumer Act 2010* (Cth) where the maximum penalty for companies was raised to \$50 million; three times the value of the benefit obtained; or 30% of the company's adjusted turnover during the breach turnover period for the offence.

## **The need to change the *Criminal Code Act 1995***

We share the concerns expressed by the Commonwealth Director of Public Prosecutions (CDPP) about the ability for the current Commonwealth criminal law to adequately address intimate image abuse involving deepfake sexual material. We note the observations of the CDPP in their 2023 submission to the Parliamentary Joint Committee on Law Enforcement that:

While an individual's transmitting of deepfakes using a carriage service may constitute an offence contrary to s 474.17(1) of the Criminal Code, the CDPP considers that such conduct is unlikely to constitute an offence contrary to s 474.17A(1). That is, even if the deepfakes being transmitted depict a victim engaging in a sexual activity or purport to depict the victim's sexual organ, anal region, or breast region, such conduct is unlikely to contravene s 474.17A(1). This is because deepfakes of such a nature will not constitute "private sexual material" as defined in s 473.1.<sup>6</sup>

In light of these concerns, we agree that there may well be a gap in the Commonwealth law and support investigation into appropriate coverage for conduct involving deepfake material.

### **The potential for proposed section 474.17A to capture innocuous conduct**

We share the Law Council's concerns that the proposed offence could apply to a wide range of innocuous conduct, and agree that 'well-drafted offences should not be so broadly framed that they inadvertently capture a wide range of benign conduct and are thus overly dependent on the exercise of discretion not to charge'.<sup>7</sup>

### **Recklessness**

We query whether it is appropriate to develop an 'offence-specific' definition of recklessness for the proposed section 474.17A, when there is an existing definition of recklessness contained in Chapter 2 of the Criminal Code. This may increase complexity and potential inconsistency in the Commonwealth criminal law.

### **Difficulties with the proposed drafting**

We share the Law Council's concerns in respect of the proposed drafting, including the scope for unintended consequences to arise. We agree that the offence as currently drafted may well apply to obvious fakes, such as cartoons.

### **Maximum penalties**

We share the Law Council's concerns that the proposed maximum penalties of six and seven-years imprisonment may be disproportionately high for the proposed offences. By way of comparison, we note that offences involving intimate image abuse under Division 15C of the *Crimes Act 1900* (NSW) attract a maximum penalty of three years imprisonment.<sup>8</sup>

Some concerns have been expressed that the introduction of substantial penalties, both under civil and criminal law, could create an incentive for platforms to 'err on the side of over-moderating the online environment'.<sup>9</sup> This potential impact on freedom of speech may be

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<sup>6</sup> [Submission](#) by the CDPP: *The capability of law enforcement to respond to cybercrime*, December 2023, p. 6, [27].

<sup>7</sup> Law Council of Australia, Policy Statement—Rule of Law Principles (March 2011), Principle 1(b).

<sup>8</sup> Sections 91P, 91Q, 91R.

<sup>9</sup> Centre for Strategic and International Studies, [A New Chapter in Content Moderation: Unpacking the UK Online Safety Bill](#) (18 October 2023).

exacerbated by the fact that automated systems used to detect harm may not have the level of sophistication to distinguish illegal and harmful material from that which might be described as political satire, dissent etc.<sup>10</sup> In our view, there is therefore good sense to ensure penalties under the Bill can be imposed in a nuanced and proportionate way to respond to the harm posed.

We appreciate the opportunity to provide feedback on the proposed Bill and look forward to further opportunities to provide input as part of the law reform process. If you have any questions in relation to this letter, please contact Claudia Daly, Policy Lawyer on (02) 9926 0233 or by email: [claudia.daly@lawsociety.com.au](mailto:claudia.daly@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', with a long horizontal flourish extending to the right.

Brett McGrath  
**President**

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<sup>10</sup> Ibid.