



Australian
Human Rights
Commission

The Criminal Code Amendment (Deepfake Sexual Material) Bill 2024

Australian Human Rights Commission

Submission to the Senate Legal and Constitutional Affairs
Committee

18 July 2023

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Information Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Contents

1	Introduction	4
2	Deepfake sexual material.....	4
3	Harms	5
4	The Criminal Code Amendment (Deepfake Sexual Material Bill)	6
4.1	<i>Using a carriage service to transmit sexual material without consent</i>	7
4.2	<i>Aggravated offence - transmission of sexual material following certain civil penalty orders.....</i>	7
4.3	<i>Aggravated offences - creation or alteration of transmitted sexual material without consent</i>	8
4.4	<i>Penalties.....</i>	9
4.5	<i>The need for education to accompany reform</i>	9
5	Recommendations.....	10

1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee (Committee) in response to its [request for submissions on the Criminal Code Amendment \(Deepfake Sexual Material\) Bill 2024 \[Provisions\] \(Bill\)](#).
2. The role of the Commission is to work towards a world in which human rights are respected, protected, and fulfilled. The Commission welcomes further opportunities to engage with the Committee on the Bill.

2 Deepfake sexual material

3. This submission defines 'deepfakes' as:

A digital photo, video or sound file of a real person that has been edited to create an extremely realistic but false depiction of them doing or saying something that they did not actually do or say.¹

4. 'Deepfake sexual material', sometimes known as 'deepfake pornography', or a form of 'intimate image or video' refers to deepfakes that are sexual in nature. Such content may show or appear to show an individual naked or partially naked, their genitals or anal region, or engaging in sexual activity.²
5. These materials are often created using tools and artificial intelligence (AI) which can 'seamlessly blend the facial features of unsuspecting individuals onto explicit images or videos', making it difficult to detect editing and manipulation.³
6. Technologies that are designed for, or can be used for, the creation of deepfake sexual material are developing rapidly. For example, several digital applications can edit images to remove an individual's clothes and create fake nude images.⁴
7. Generative AI can also be used to create credible deepfakes through just [one image](#) or even [words alone](#). The United Nations Office of the High Commissioner for Human Rights (OHCHR) and Australia's eSafety Commissioner (amongst others) have already expressed concern about the potential use of generative AI to create non-consensual sexualised content.⁵

8. Importantly, these materials are most often created and distributed without the consent of the individual depicted.⁶

3 Harms

9. Deepfake sexual materials can be used to humiliate, extort, or silence an individual, or for sexual gratification.⁷
10. Women, girls, and gender diverse people are disproportionately targeted by such content.⁸ This includes politicians, celebrities and, increasingly, everyday people.⁹ A 2023 study found that women make up 99% of the individuals targeted in deepfake pornography.¹⁰
11. Persons with disability, First Nations peoples, the LGBTIQ+ community, and younger people aged between 16–29 are also heavily targeted by deepfake sexual material.¹¹
12. While the research shows that these groups are heavily targeted, it should be acknowledged that the harm caused by deepfake sexual material is not limited to these groups but will be experienced by any individual who is targeted.
13. Deepfake sexual material can impact numerous human rights,¹² including an individual's right to privacy – a cornerstone human right. The right to privacy is protected under numerous international instruments, including the *International Covenant on Civil and Political Rights* (ICCPR) art 17, which provides that

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Everyone has the right to the protection of the law against such interference or attacks.
14. Deepfake sexual material can utilise, without consent, an individual's personal data, such as their personal image, and can lead to reputational damage and stigma, as well as affect personal and family relationships.
15. Further, deepfake sexual material can impact upon the right to security of a person, protected under Article 9 of the ICCPR, as such content can

cause serious psychological and physical harm to individuals,¹³ and can lead to harassment, extortion, and threats to their life.¹⁴

16. Deepfake sexual material can also impact upon an individual's enjoyment of other rights, including the right to work, as such content can severely affect a person's professional life and employment opportunities.¹⁵

4 The Criminal Code Amendment (Deepfake Sexual Material Bill)

17. While existing civil and criminal laws at the state and territory level go some way to addressing the harms of deepfake sexual materials, the existing legal framework has critical shortcomings.

18. The *Online Safety Act 2021* (OS Act) for example provides civil penalties for the posting of non-consensual 'intimate' images, including images that have been altered.¹⁶ While an important avenue for redress for individuals affected by deepfake sexual content, the efficacy of civil penalties may be undercut by the costly nature of litigation, and in situations where perpetrators lack the resources to pay the penalties.¹⁷

19. The OS Act also provides the eSafety Commissioner the power to issue removal notices for non-consensual intimate images, requiring content to be taken down within 24 hours.¹⁸ This is crucial to minimising the harm of deepfake sexual material. Promisingly, the eSafety Commissioner reports a 90 per cent success rate with takedown requests.¹⁹ However, this approach is reactive in nature and does not have the same deterrent effect on the creation or distribution of deepfake sexual material as a more proactive approach may have.

20. Criminal provisions also exist in Australian states and territories, but these are inconsistent – creating a patchwork of protections against deepfake sexual materials. For example, the distribution of deepfake sexual material may be captured under the laws that prohibit the distribution of intimate images where provisions include 'altered' images,²⁰ but not all jurisdictions make this distinction.²¹

21. The proposed Bill fills important gaps in the existing legal framework and is a key step towards ensuring that the law catches up with the developments in technology.

22. The details of the legislation, however, need to be carefully assessed to ensure there are no unintended consequences.

4.1 Using a carriage service to transmit sexual material without consent

23. The scope of sexual material under the Bill, which includes material that ‘depicts, or appears to depict’ a person ‘engaging in a sexual pose or activity’ is less detailed than comparable provisions in the OS Act.²²

24. However, the Commission believes that the adoption of open terminology will allow the courts flexibility in their interpretation of what is considered ‘sexual’ – taking into account the context of an image, such as the cultural and religious background of the individual pictured.

25. The Commission supports the inclusion of section 474.17A(2) which clearly extends the scope of protection provided to material created or altered using technology, expressly identifies deepfakes as an example, and allows for the potential inclusion of other technologies such as Photoshop, and technologies that are yet to emerge.

4.2 Aggravated offence - transmission of sexual material following certain civil penalty orders

26. The Commission notes that the proposed section 474.17AA(1)(b) of the Bill requires, in addition to the commission of the underlying offence, ‘3 or more civil penalty orders’ for applicable contraventions of the OS Act.

27. This raises the concern that individuals impacted by, for example, the non-consensual sharing of deepfake pornography, would need to be subject to the repeated harmful impacts of more than three acts, before the conduct could be considered ‘aggravated’ and subject to a higher penalty.

28. Considering the serious harms that can arise from the sharing of sexual material without consent, the Commission recommends the lowering of this threshold to where a person has already violated sections 75(1) or 91 of the OS Act just once. This will enhance the deterrent effects of both the provisions in the OS Act and the *Criminal Code 1995* (Cth) (Criminal Code).

Recommendation 1: The Australian Government should amend the legislation to lower the threshold for an aggravated offence under

section 474.17A(1)(b) from requiring three or more previous civil penalty orders, to requiring one or more previous civil penalty orders.

4.3 Aggravated offences – creation or alteration of transmitted sexual material without consent

29. The Commission commends the inclusion of proposed section s474.17AA(5), which makes it an offence for a person create and/or alter sexual material and transmit it without consent. This provision reflects recognition of the inherent harm in the creation and/or alteration of content such as non-consensual deepfake sexual material.
30. Notwithstanding this, the Bill does not create a standalone offence for the creation or alteration of sexual material in and of itself. Instead, the Bill requires transmission of such material for an offence to be made out.
31. Establishing a standalone offence would recognise the violation and harms to women and other targeted persons, in the very creation of non-consensual sexual material – including for solely personal purposes. The law can also lay a strong ‘foundation for education and cultural change’ on non-consensual deepfake sexual material.²³
32. The Commission recommends the additional creation of a separate offence for the creation or alteration of non-consensual sexual material. An example of this can be seen in section 51 of the *Crimes Act 1958* (Vic) regarding the production of child sexual abuse material, which states:
- (1) A person (A) commits an offence if—
 - (a) A intentionally produces material; and
 - (b) the material is child abuse material; and
 - (c) A knows that the material is, or probably is, child abuse material.
 - ...
 - (3) For the purposes of subsection (1), the ways in which material is produced may include—
 - (a) filming, printing, photographing, recording, writing, drawing or otherwise generating material; or
 - (b) altering or manipulating material; or
 - (c) reproducing or copying material.

Recommendation 2: The Australian Government should enact a standalone offence for the creation and/or alteration of sexual material without consent.

33. In establishing a standalone offence, both the prohibition on retrospective criminal laws²⁴ and the practical difficulties in establishing the date of offending in respect of the creation of material will need consideration.

4.4 Penalties

34. The Commission supports the application of criminal penalties for offences under section 474.17A and 474.17AA of the Bill (maximum 6 and maximum 7 years imprisonment respectively).

35. These penalties are appropriately significant, reflecting the seriousness of offences, the severely detrimental impact they can have, and the deterrent effect against offending conduct.

36. The fact that these are maximum, not minimum, penalties also allows for judicial discretion in sentencing commensurate with the severity of the offence in question.

37. The Committee should give careful consideration to the potential application of these new offences to children, including those as young as 10, an issue which has been raised by Children's Rights Commissioner Anne Hollonds.²⁵ We note also the Attorney-General's comment on this issue:

...that's going to be a matter for courts but by and large children are not gaoled in Australia. The police will obviously exercise discretion in what they investigate and how they apply these newly created offences. But we've got here behaviour that affects women and girls who are the target of this kind of deeply offensive and harmful behaviour. We know that it can inflict deep and long-lasting harm on victims. The Albanese Government has no tolerance for this kind of criminal behaviour and that's why we are legislating in this clear way.²⁶

4.5 The need for education to accompany reform

38. To facilitate the effective application and enforcement of the amended Criminal Code, the Commission recommends practical education and

training to ensure that the public is aware of the availability of new protections. This will ensure that these protections are appropriately applied by law enforcement and the judiciary.

39. Additional education should also be provided to the public about the legal and social harms of utilising tools to create deepfake sexual materials.

Recommendation 3: The Australian Government should ensure that the passing of the Bill is accompanied by practical education and training for the public, law enforcement, and judiciary.

5 Recommendations

40. The Commission makes the following recommendations.

Recommendation 1: The Australian Government should amend the legislation to lower the threshold for an aggravated offence under section 474.17A(1)(b) from requiring three or more previous civil penalty orders, to requiring one or more previous civil penalty orders.

Recommendation 2: The Australian Government should enact a standalone offence for the creation and/or alteration of sexual material without consent.

Recommendation 3: The Australian Government should ensure that the passing of the Bill is accompanied by practical education and training for the public, law enforcement, and judiciary.

Endnotes

- ¹ eSafety Commissioner, 'Deepfake Trends and Challenges – Position Statement', *Australian Government eSafety Commissioner* (Webpage, 23 January 2022) <<https://www.esafety.gov.au/industry/tech-trends-and-challenges/deepfakes>>.
- ² eSafety Commissioner, 'Image-based Abuse', *Australian Government eSafety Commissioner* (Webpage, 20 October 2023) <<https://www.esafety.gov.au/key-topics/image-based-abuse>>.
- ³ Equality Now, Alliance for Universal Digital Rights, *Briefing Paper: Deepfake Image-based Sexual Abuse, Tech-facilitated Sexual Exploitation and the Law* (Report, 2024) <<https://equalitynow.storage.googleapis.com/wp-content/uploads/2024/01/17084238/EN-AUDRI-Briefing-paper-deepfake-06.pdf>>.
- ⁴ See e.g. Michael Safi, Alex Attack and Joshua Kelly, 'Revealed: the Names Linked to ClothOff, the Deepfake Pornography App', *The Guardian* (online, 1 March 2024) <<https://www.theguardian.com/technology/2024/feb/29/clothoff-deepfake-ai-pornography-app-names-linked-revealed>>; 'App That Can Remove Women's Clothes from Images Shut Down', *BBC News* (online, 28 June 2019) <<https://www.bbc.com/news/technology-48799045>>; Simon Parkin, 'The Rise of the Deepfake and the Threat to Democracy', *The Guardian* (online, 22 June 2019) <<https://www.theguardian.com/technology/ng-interactive/2019/jun/22/the-rise-of-the-deepfake-and-the-threat-to-democracy>>.
- ⁵ United Nations Office of the High Commissioner for Human Rights, *Taxonomy of Human Rights Connected to Generative AI* (Paper, 30 November 2023) <<https://www.ohchr.org/sites/default/files/documents/issues/business/b-tech/taxonomy-GenAI-Human-Rights-Harms.pdf>>; eSafety Commissioner, 'Generative AI – Position Statement', *Australian Government eSafety Commissioner* (Webpage, 15 August 2023) <<https://www.esafety.gov.au/industry/tech-trends-and-challenges/generative-ai>>.
- ⁶ Clare McGlynn, 'Deepfake Porn: Why We Need to Make it a Crime to Create It, Not Just Share It', *The Conversation* (online, 9 April 2024) <<https://theconversation.com/deepfake-porn-why-we-need-to-make-it-a-crime-to-create-it-not-just-share-it-227177>>.
- ⁷ Stephanie Tong, "'You Won't Believe What She Does": An Examination into the Use of Pornographic Deepfakes as a Method of Sexual Abuse and the Legal Protections Available to its Victims' (2022) 22-25 *UNSW Law Journal Student Series*, <<https://www5.austlii.edu.au/au/journals/UNSWLawJlStuS/2022/25.html>>; Danielle K. Citron and Robert Chesney, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' (2019) 107 *California Law Review* 1753, 1772.
- ⁸ Gabrielle Hunt and Daryl Higgins, 'Deepfake AI Pornography is Becoming More Common – Can Parents and Schools Do Anything to Prevent It?', *The Conversation* (online, 12 June 2024) <<https://theconversation.com/deepfake-ai-pornography-is-becoming-more-common-what-can-parents-and-schools-do-to-prevent-it-232248>>.
- ⁹ Jeannie Marie Paterson, 'Picture to Burn: The Law Probably Won't Protect Taylor (or Other Women) from Deepfakes', *University of Melbourne Pursuit* (Article, 8 February 2024) <<https://pursuit.unimelb.edu.au/articles/picture-to-burn-the-law-probably-won-t-protect-taylor-or-other-women-from-deepfakes>>; Anastasia Powell, Adrian J. Scott et al, 'Whether of Politicians, Pop Stars or Teenage Girls, Sexualised Deepfakes are on the Rise. They Hold a Mirror to Our Sexist world', *The Conversation* (8 February 2024) <<https://theconversation.com/whether-of>>

[politicians-pop-stars-or-teenage-girls-sexualised-deepfakes-are-on-the-rise-they-hold-a-mirror-to-our-sexist-world-222491](#)>.

- ¹⁰ Cat Woods, 'The Spotlight Cast by Taylor Swift's Deepfake Experience', *LSJ Online* (22 February 2024) <<https://lsj.com.au/articles/the-spotlight-cast-by-taylor-swifts-deepfake-experience/>>; Home Security Heroes, '2023 State of Deepfakes' (Report, 2023) <<https://www.homesecurityheroes.com/state-of-deepfakes/#key-findings>>.
- ¹¹ Asher Flynn et al, 'Legal Loopholes Don't Help Victims of Sexualised Deepfake Abuse', *360 Voices* (online, 3 April 2024) < <https://360info.org/legal-loopholes-dont-help-victims-of-sexualised-deepfake-abuse/>>.
- ¹² United Nations Office of the High Commissioner for Human Rights, *Taxonomy of Human Rights Connected to Generative AI* (Paper, 30 November 2023) <<https://www.ohchr.org/sites/default/files/documents/issues/business/b-tech/taxonomy-GenAI-Human-Rights-Harms.pdf>>.
- ¹³ Equality Now and Alliance for Universal Digital Rights, 'Briefing Paper: Deepfake Image-based Abuse, Tech-facilitated Sexual exploitation and the Law' (Report, 2024) 4 <<https://equalitynow.storage.googleapis.com/wp-content/uploads/2024/01/17084238/EN-AUDRI-Briefing-paper-deepfake-06.pdf>>; Danielle K. Citron and Robert Chesney, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' (2019) 107 *California Law Review* 1753, 1773-1774.
- ¹⁴ See example in Jennifer Laffier and Aalyia Rehman, 'Deepfakes and Harm to Women' (2023) 3(1) *Journal of Digital Life and Learning* 1, 9.
- ¹⁵ Equality Now and Alliance for Universal Digital Rights, *Briefing Paper: Deepfake Image-based Abuse, Tech-facilitated Sexual exploitation and the Law* (Report, 2024) 4 <<https://equalitynow.storage.googleapis.com/wp-content/uploads/2024/01/17084238/EN-AUDRI-Briefing-paper-deepfake-06.pdf>>; Danielle K. Citron and Robert Chesney, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' (2019) 107 *California Law Review* 1753, 1773-1774; Stephanie Tong, "'You Won't Believe What She Does': An Examination into the Use of Pornographic Deepfakes as a Method of Sexual Abuse and the Legal Protections Available to its Victims' (2022) 22-25 *UNSW Law Journal Student Series*, <<https://www5.austlii.edu.au/au/journals/UNSWLawJlStuS/2022/25.html>>.
- ¹⁶ *Online Safety Act 2021* (Cth) ss 15, 75.
- ¹⁷ Stephanie Tong, "'You Won't Believe What She Does': An Examination into the Use of Pornographic Deepfakes as a Method of Sexual Abuse and the Legal Protections Available to its Victims' (2022) 22-25 *UNSW Law Journal Student Series*, <<https://www5.austlii.edu.au/au/journals/UNSWLawJlStuS/2022/25.html>>.
- ¹⁸ Or within a longer time specified by the eSafety Commissioner. Note that removal notices can be issued to providers and end users. See: *Online Safety Act 2021* (Cth) pt 6 div 3.
- ¹⁹ Cat Woods, 'The Spotlight Cast by Taylor Swift's Deepfake Experience', *LSJ Online* (22 February 2024) <<https://lsj.com.au/articles/the-spotlight-cast-by-taylor-swifts-deepfake-experience/>>;
- ²⁰ *Crimes Act 1900* (ACT) ss 72A, 72C; *Crimes Act 1900* (NSW) ss 91N, 91Q; *Summary Offences Act* (SA) ss 26A, 26C; *Criminal Code Act Compilation Act 1913* (WA) ss 221BA, 221BD; *Criminal Code Act 1983* (NT) ss 208AA, 208AB; *Criminal Code Act 1899* (Qld) ss 207A, 223.
- ²¹ See e.g. *Summary Offences Act 1966* (Vic) s 40.
- ²² See e.g. *Online Safety Act 2021* (Cth) ss 15(3), 15(4).

²³ Clare McGlynn, 'Deepfake Porn: Why We Need to Make It a Crime to Create It, Not Just Share It', *The Conversation* (online, 9 April 2024) <<https://theconversation.com/deepfake-porn-why-we-need-to-make-it-a-crime-to-create-it-not-just-share-it-227177>>.

²⁴ See, for example, Article 15 of the *International Covenant on Civil and Political Rights* and the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024), [2.1.3].

²⁵ Department of Parliamentary Services (Cth) *Bills Digest* (Digest No 81, 2023-24, 24 June 2024) 6.

²⁶ 'Introduction of Legislation to Ban Deepfakes Material, eSafety Commissioner v X Corp, Regulation of Social Media, Gaza Conflict', *ABC Melbourne Mornings*, 6 June 2024 <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/9782010/upload_binary/9782010.PDF;fileType=application%2Fpdf#search=%22media/pressrel/9782010%22>.