



CDPP

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Senator Nita Green
Chair, Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Chair

Inquiry into the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024

1. The Office of the Director of Public Prosecutions (Cth) (**CDPP**) welcomes the opportunity to provide a submission to assist the Senate Legal and Constitutional Affairs Committee's consideration of the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 (**the Bill**).
2. The CDPP notes that in December 2023, it provided the Parliamentary Joint Committee on Law Enforcement with a submission in relation to its inquiry into the capability of law enforcement to respond to cybercrime. In that submission, the CDPP noted that it has received referrals from investigative agencies in relation to the creation and dissemination of 'deepfakes' and considered the ability of the offence under s 474.17A(1) of the *Criminal Code* (Cth) (**Criminal Code**) to capture potential offending relating to deepfake material.
3. A 'deepfake' refers to media which depicts a person in certain poses or saying or doing things, where that person has not in fact said or done those things. For example, a deepfake image or video may superimpose a person's face on another person's body so as to depict that person engaging in a sexual act, in circumstances where they were never in fact involved in that sexual act.
4. Section 474.17A(1) of the *Criminal Code* is an aggravated form of the offence in s 474.17(1).
5. Section 474.17(1) of the *Criminal Code* makes it an offence for an individual to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing, or offensive. The maximum penalty for that offence is five years' imprisonment.
6. Section 474.17A(1) of the *Criminal Code* provides that where the offence in s 474.17(1) is committed in a way that involves the transmission, making available, publication, distribution, advertisement or promotion of private sexual material, the offender will be liable for the offence in s 474.17A(1) which is punishable by a maximum of six years' imprisonment.
7. While an individual's transmitting of deepfakes using a carriage service may constitute an offence contrary to s 474.17(1), the CDPP considers that, depending on the circumstances of the

transmission, such conduct is unlikely to constitute an offence contrary to s 474.17A(1). This is because of the way that “private sexual material” is defined in s 473.1 of the *Criminal Code*.

8. The definition of “private sexual material” in s 473.1 can be satisfied in two ways – first where the material depicts the victim engaging in a sexual pose or sexual activity in circumstances that reasonable persons would regard as giving rise to an expectation of privacy; and/or second where the material depicts the victim’s sexual organ, anal region, or breast region, in circumstances that reasonable persons would regard as giving rise to an expectation of privacy.
9. The issue that arises here is that, with certain deepfakes, it cannot be said that any expectation of privacy attaches to the depiction of a victim. For example, if an accused were to transpose an image of a victim’s face onto a publicly available pornographic video, this would generally speaking, not be “private sexual material”. This is because the creator of the deepfake uses, as source material, a depiction of a part of the victim (for example, their face) with respect to which it cannot be said there would be an expectation of privacy.
10. On the other hand, a circumstance in which the definition of “private sexual material” may be satisfied in the context of deepfakes is where the source material used by an accused was itself “private sexual material”. For example, if the source material used by a defendant is a sexual image of a victim taken without the victim’s knowledge or shared by the victim on a private basis, and the defendant then transposed into that image depictions of other sexual activities, this would constitute “private sexual material”. This is because even though the activity ultimately depicted did not in fact take place, the underlying material was “private sexual material”, and so the use of that underlying material will fall within the ambit of the offence in s 474.17A(1).
11. The Explanatory Memorandum to the Bill deals with this at [13]:

The issue that arises when dealing with such material under the current framework is that because the victim is not involved in the creation of the fictional ‘deepfake’ version of themselves, an expectation of privacy may not attach to the depiction of the victim. This issue does not arise with the new offences, which do not rely on this definition and instead turn on whether the person depicted in the material consents to its transmission.
12. The consequence of the above is that where an individual engages in conduct relating to deepfakes using a carriage service, the most likely available Commonwealth offence will be that available under s 474.17(1) of the *Criminal Code*.
13. The CDPP will be available to assist the Committee with any questions at the public hearing on 23 July 2024.

Yours faithfully

Eliza Amparo
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