



July 16, 2024

To Whom It May Concern: *Submission: Criminal Code Amendment (Deepfake Sexual Material) Bill 2024*

Bionote

I am a researcher based at the Queensland University of Technology. I conducted the first Australian research on the extent of children's and young people's exposure to pornography, in 2003 (Flood & Hamilton, 2003). I have had a longstanding involvement in research on gender, sexuality, and violence, including in recent publications on pornography (Crabbe & Flood, 2021; Crabbe, Flood, & Adams, 2024).

Summary

Just as it is an offence for someone to spy on someone else who is undressing, toileting, or having sex without their knowledge, it should be an offence to create deepfake pornography. In both cases, a harm is perpetrated.

Comment on the proposed legislation

I am pleased to see the development of legislation that will address deepfake pornography.

Deepfake pornography, comprising fake sexual videos and images where women's (and sometimes men's) faces are artificially edited into porn, is proliferating rapidly. The targets of deepfake pornography overwhelmingly are women, and the created images and videos are used to attack them, tarnish women's reputations, silence them, or extort them. Deepfake pornography thus reinforces and worsens patterns of gender-based violence and inequality. Recent Australian cases in which schoolboys have created deepfake pornographic materials using images of their female classmates and female teachers bring home both the immediacy and urgency of this issue.

However, I wish to express my concern at the limitations of the draft Criminal Code Amendment (Deepfake Sexual Material) Bill. The bill focuses on the sharing of deepfake pornographic materials and it does far less to criminalise the production of these materials in the first place.

Under the proposed Code, the creation of deepfake pornography is not an offence. Instead, it only becomes an offence if the deepfake pornography is shared or distributed. Thus, individuals may freely create fake pornographic images, whether of their ex-partners, classmates and teachers, female celebrities, or female politicians (to name some common targets of deepfake pornography), without penalty.

Under the Code, individuals who share deepfake pornography will have committed an offence, and will face greater penalties if they also created the material they share, but there is no penalty for creation alone. This is a strange and problematic omission.

The creation of deepfake pornography alone should be an offence, whether or not the materials subsequently are shared. Above all, this is because the creation of deepfake pornography itself involves the *perpetration of a harm*: the harm of individuals having pictures or images of themselves turned into pornography without their consent. This harm occurs *whether or not* individuals are aware of this perpetration.

This situation is analogous to the crime in which an individual spies upon another person while they are undressing, toileting, or having sex. It would be strange and troubling to argue that a harm has only been committed, a crime has only been perpetrated, if the person spied upon is *aware* of this taking place.

Instead, the person spied upon has suffered a harm, the violation of their bodily dignity and their right to privacy, whether or not they are aware of the offender's actions.

In the same way, the creation of deepfake pornography should be a crime in and of itself. Like the act of spying on someone undressing or toileting without their knowledge, this creation is a violation of the subject's bodily dignity and their right to privacy. That is, the creation of deepfake pornography is intrinsically harmful.

The fact that the creation of deepfake pornography involves the perpetration of a harm is further evident in victims' reactions to the discovery of such material. Whether or not this material has been circulated, victims report experiencing significant distress. They are traumatised by its creation, the fact of its existence, and its potential distribution, and not only by its actual distribution.

At this point, individuals can make deepfake pornography of a classmate, work colleague, or intimate partner or ex-partner, and even inform the affected individuals of this, without penalty. Under the proposed Code, as long as the creators of such material do not distribute it, they have committed no crime. This would be unjust, and would fail to address the intrinsic harms involved in this creation.

Criminalising not only the distribution of deepfake pornography but its production would:

- Recognise the intrinsic harms of creation;
- Provide clear messages to the community about the unacceptability of this behaviour; and
- Deter individuals who might otherwise create and/or distribute deepfake pornographic materials.

Recommendation

The proposed Code should include the offence of creating a sexually explicit and altered depiction ('deepfake') of a person or persons where the offender knows or should have known that the depicted individual(s) did not consent to this creation.

Please do not hesitate to contact me if you require further information.

Sincerely,

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References mentioned

Crabbe, M., & Flood, M. (2021). School-Based Education to Address Pornography's Influence on Young People: A Proposed Practice Framework. *American Journal of Sexuality Education*, 16(1), 1-37.

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