

QUESTIONS ON NOTICE

Senate Standing Committee on Legal and Constitutional Affairs on the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 [Provisions]

Noelle Martin*

Noelle Martin* is a multi-award-winning global activist, lawyer, and researcher at the University of Western Australia Law School. She researches the use and abuse of technologies of human replication, from deepfakes to generative artificial intelligence ('AI') to immersive augmented reality/virtual reality technologies, drawing on over a decade of lived experience as a survivor of image-based sexual abuse and deepfake abuse.

Noelle Martin's work on deepfakes have been featured in news media around the world and she is often invited to deliver speeches or consult on this issue. Her work has reached the US, UK, Canada, Ireland, India, Singapore, South Africa, Hong Kong, the Netherlands, Germany, Japan, New Zealand, and France, to name a few. She was invited to speak with and was quoted by the FBI and Homeland Security in an official report on deepfakes.

Two Questions on Notice

Question 1: Comments on Victoria's definition of consent in its intimate image offences

Question 2: Comments on Google's submission to this Senate Committee

Answer to Question 1: Comments on Victoria's definition of consent in its intimate image offences

<i>Crimes Act 1958 (Vic)</i>	<i>My Comments</i>
<p>53P Meaning of consent</p> <p>(1) Consent, in relation to the production or distribution of an intimate image, means free and voluntary agreement.</p> <p>(2) A person does not consent to the production of an intimate image just because they consented to the production of a different intimate image (including an intimate image produced on a different occasion or in a different way).</p> <p>(3) A person does not consent to the distribution of an intimate image just because they—</p> <p style="padding-left: 20px;">(a) consented to the distribution of that intimate image—</p> <p style="padding-left: 40px;">(i) on a different occasion; or</p> <p style="padding-left: 40px;">(ii) in a different way; or</p>	<p>Victoria's intimate image offences provide that consent be free and voluntary and prescribe circumstances in which a person does not consent to the production or distribution of intimate images.</p> <p>In the context of intimate image abuse, it is vital that consent be expressly revokable. Someone may have provided consent to the creation or distribution of an intimate image at one point in time but decide later they want to withdraw their consent. A person ought to be permitted to revoke or withdraw their consent in these circumstances. While there may be practical difficulties with respect to the withdrawal of consent with respect to intimate images originally produced or distributed with consent, to the extent that removal, deletion, or destruction of such material is practicable, this ought to be permissible.</p>

<p>Example Consenting to a photograph being emailed to another person but not uploaded to a social media website.</p> <p>(b) consented to the distribution of a different intimate image; or</p> <p>(c) consented to the production of that intimate image or a different intimate image; or</p> <p>(d) distributed that intimate image or a different intimate image; or</p> <p>(e) in the case of distribution of an intimate image to a particular person, consented to the distribution of that intimate image to a different person.</p> <p>53Q Circumstances in which a person does not consent</p> <p>...</p>	<p>A point for the Committee: intimate images can be ‘created’ or ‘produced’ using generative artificial intelligence technologies that have scraped non-intimate images and/or intimate images of people from the internet, including social media and pornographic sites. For example, a non-intimate image of person A could be scraped without consent from person A’s social media and used (as training data) to potentially produce or create a composite non-consensual intimate image of another person or a person who does not exist. One may not be able to identify person A in the composite image, but person A’s image has still been used in the facilitation of abuse – in the creation or production of intimate image abuse. I would urge this Committee to seek express clarification on the applicability of these proposed laws to these circumstances.</p>
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Answer to Question 2: Comments on Google’s submission to this Senate Committee

Google's parent company, Alphabet Inc., is worth trillions of dollars.¹ Google is, among other things, a public relations machine. Its submission can regurgitate and spruik its policies all it wants, but the fact remains that Google directs traffic to non-consensual deepfake sites, which are easily available, accessible, and/or discoverable through Google Search. To this day, when one searches for ‘deepfake porn’ on Google, ‘MrDeepfakes’ – the world’s biggest deepfake intimate abuse site – is the first link on Google Search, followed by a suite of non-consensual deepfake abuse sites.² Google has undoubtedly profited from, and continues to profit from, the mass-scale abuse of women by facilitating the availability, accessibility, and/or discoverability of these sites. Google is arguably the most significant actor in the deepfake abuse pipeline.

The Attorney-General’s Department clarified that it is their intention that these proposed laws apply to bodies corporates, pursuant to s 12.1 of the *Criminal Code Act 1995* (Cth) (Criminal Code).³ This is a significant step in the right direction to stem the tide of this abuse. It would be useful for this Committee to propose that these proposed laws be drafted again in such a way that expressly and clearly sets out the criminal liability for the categories of actors in the online industry who transmit and/or create deepfake abuse (for example, a hosting or content service), similar to the Criminal Code’s offences for those who fail to remove abhorrent violent material.

¹ <https://www.forbesindia.com/article/explainers/top-10-largest-companies-world-market-cap/86341/1>

² I was, in small part, involved in a Change.org campaign that has fought to remove these sites. See: <https://www.change.org/p/shut-down-mrdeepfakes-and-websites-dedicated-to-image-based-sexual-abuse>

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Deepfake/Additional_Documents

I would also urge this Committee to consider that any fines for bodies corporates that may result from the application of these proposed laws are directed into a specific compensation fund for victim-survivors. The very people who have to suffer this abuse deserve the financial support, especially since this abuse has the capacity to potentially impact a victim-survivor's employability, future earning capacity, and education, among other things.