

## Senate Legal and Constitutional Affairs Legislation Committee

### Attorney-General's Department

**Hearing date:** 23 July 2024

**Hansard page:** 46-47

#### **Paul Scarr asked the following question:**

Senator SCARR: Thank you, Chair. Thank you to all the witnesses for appearing today. I note from the respective submissions that you all work together in relation to this law. So congratulations on your efforts in that regard. This issue of creation—I will go to that first. I understand the constitutional law perspective. Are there any discussions in train with other state and territory jurisdictions with respect to what they may introduce as legislation to make sure that we don't have gaps in that regard? I note that Victoria appears to have very strong legislation, which I've referred to during the course of the day. What's the process nationwide in terms of addressing this issue?

Mr Reeve: As I'm sure you'll be familiar with, the Standing Council of Attorneys-General has an ongoing and standing discussion around issues of family, domestic and sexual violence, including ongoing work under the national strategy to end violence against women and children. In terms of discussions around this particular issue, might I ask if Mr Whiteman has any further details? As I mentioned, I've only recently come into the role, so I haven't been party to it. Otherwise we'll take it on notice.

Senator SCARR: Feel free to take it on notice. From my perspective—I understand the constitutional law issue—it then begs the question as to what's happening at a national level to make sure the gap is covered, if there is a gap in terms of other states and territories. Can you provide any further information now, or would you like to take it on notice?

Mr Whiteman: I would say that we would have to take that on notice. I'm not aware of any issues being raised recently in terms of the creation of this material. This is conduct which is generally criminalised, not the creation but the transmission of this material, across the states. It may just be that it hasn't necessarily been raised in a context that involves all the states and territories in the Commonwealth. But we may have to take that on notice just to double-check.

#### **The response to the question is as follows:**

The Commonwealth has engaged with states and territories on measures to ban deepfake non-consensual sexually explicit images at National Cabinet and in the Standing Council of Attorneys-General. The Commonwealth is continuing to work with states and territories on responses to improve online safety and prevent family, domestic and sexual violence and abuse.

The new Commonwealth offences in the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 will ensure that any non-consensual sharing of sexually explicit images, including deepfake images, is criminalised nationally.

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### Attorney-General's Department

**Hearing date:** 23 July 2024

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#### **Larissa Waters asked the following question:**

Senator WATERS: Thanks very much, Chair. I appreciate that. Hello, folks. I appreciate your time in the room. Apologies that I'm not in the room with you. I've got a vast number of questions and I do have to go at four, so I will just read them all out and then, in whatever time is left, could you please start to address the ones that you can. Otherwise I'd appreciate some responses on notice, please. The deputy chair asked about whether harmonisation of or any discussion at all about an offence for the creation of this sort of material is on the SCAG agenda, and I think your answer was that you're not aware of it. So my question is, can it please be put on the SCAG meeting agenda? I don't know whether you've got special access powers to somehow do that, but this is obviously an issue that needs addressing. And if the Commonwealth has constitutional barriers, someone's got to be doing it.

#### **The response to the question is as follows:**

The Attorney-General briefed the Standing Council of Attorneys-General (SCAG) on the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 and facilitated a discussion on online harms at the SCAG meeting on 5 July 2024. The Commonwealth is continuing to work with states and territories through SCAG and the Police Ministers Council, and the joint Family, Domestic and Sexual Violence Working Group, on options to improve responses including to technology-facilitated abuse and deepfakes.

## **Senate Legal and Constitutional Affairs Legislation Committee**

### **Attorney-General's Department**

**Hearing date:** 23 July 2024

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#### **Larissa Waters asked the following question:**

Senator WATERS:...I'm also interested in whether there's been consideration, or might be in future, of an offence about the threat to do the thing, whether it's the threat to disseminate or the threat to create the material. A few witnesses have mentioned that today.

#### **The response to the question is as follows:**

The making of a threat to create or disseminate sexually explicit material concerning a person over a carriage service may constitute an offence against section 474.17 of the Criminal Code, which makes it an offence to use a carriage service to menace, harass or cause offence.

State and territories have extortion and blackmail related offences that may also cover this type of conduct.

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### Attorney-General's Department

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#### **Larissa Waters asked the following question:**

Senator WATERS: .... I'd also like to know whether the existence of this new criminal offence, should the laws pass, be included in the respectful relationships national curriculum—things that you've got to mention when you teach that subject in schools—because I'm interested in the pipeline of how people learn about this new offence.

#### **The response to the question is as follows:**

The Australian Curriculum, Assessment and Reporting Authority (ACARA) is responsible for developing and updating the Australian Curriculum for agreement by the ACARA Board and all Education Ministers. Further information on this process is available at: [www.australiancurriculum.edu.au/about-the-australian-curriculum/#](http://www.australiancurriculum.edu.au/about-the-australian-curriculum/#).

If the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 passes, the Department of Education will further consider the potential need and benefits of including age-appropriate information on the legislation as part of the Respectful Relationships Education content in the Australian Curriculum, noting that any updates would be subject to agreement through the above process.

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### Attorney-General's Department

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#### **Larissa Waters asked the following question:**

Senator WATERS:...Another witness—Professor Clough, I think it was—talked about criminalising the promotion of the offence as a way of trying to get at the tech giants' responsibility for making the means of doing these offences so readily available. He's going to take on notice to give us a bit more of his thought process around that. I'd like to know whether the departments, and I guess it's A-G's in particular, have considered the scope to broaden out the effectiveness of this new offence.

#### **The response to the question is as follows:**

Pursuant to section 12.1 of the *Criminal Code Act 1995* (Cth), a body corporate may be found guilty of any offence, including one punishable by imprisonment.

It is intended that the offences in the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 will apply to bodies corporates (such as social media platform and technology companies) in the same way as it applies to individuals. The Bill provides that 'transmit' includes the making available, publishing, distributing, advertising and promotion of material.

The Online Content Scheme, established by the *Online Safety Act 2021*, also empowers the eSafety Commissioner to issue written notices to app distribution services for the removal of an app in specific circumstances.

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### **Larissa Waters asked the following question:**

Senator WATERS:... And likewise, can advertising of those apps be regulated? Is it regulated? Could it be? Can we ban the advertising of those sorts of dodgy apps on social media, on search engines, on the internet more broadly?

### **The response to the question is as follows:**

The regulation of advertising is a matter for the Department of Infrastructure, Transport, Regional Development, Communication and the Arts.

Advertising in Australia is subject to regulatory, co-regulatory and self-regulatory frameworks, intending to strike a balance between legitimate commercial interests and appropriate community safeguards.

The content of all advertising in Australia, including advertising of apps, is required to comply with the self-regulatory codes of practice, such as the Code of Ethics, developed by the Australian Association of National Advertisers. These codes are platform neutral, and are applicable to broadcast platforms, outdoor media and social media.

The Government is committed to modernising media regulations to ensure they are fit for the digital age and fulfil the legitimate expectations of consumers and industry for consistency, transparency and equity in the regulatory environment.

### **Online Content Scheme**

The Online Content Scheme also empowers the eSafety Commissioner to issue a link deletion notice to a search engine in specific circumstances, requiring the search engine to stop providing a link that gives Australian users access to Class 1 material<sup>1</sup> (Section 124 of the Online Safety Act). Failure to comply may result in a civil penalty of up to 500 penalty units. However, this power is targeted at restricting access to Class 1 material (rather than at apps

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<sup>1</sup> Class 1 material is material that is or would likely be refused classification under the National Classification Scheme. It includes material that:

- depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified
- describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not), or
- promotes, incites or instructs in matters of crime or violence.

used to generate deepfakes).

Under Section 124 of the Online Safety Act, the eSafety Commissioner may issue a link deletion notice if:

- users in Australia can access class 1 material using a link provided by the internet search engine service;
- there were two or more times in the past 12 months when users in Australia could access class 1 material using a link provided by the service, and
- during the past 12 months, eSafety gave one or more removal notices in relation to class 1 material that could be accessed using a link provided by the service, which were not complied with.

### **Online Safety Act Review**

On 22 November 2023, the Minister for Communications, the Hon Michelle Rowland MP, announced the commencement of a statutory review into the operation of the Online Safety Act 2021 (the Act). Ms Delia Rickard PSM was appointed to conduct the review and provide a report to the Minister by 31 October 2024.

The Review is a broad-ranging examination of the effectiveness of the Act, and will consider whether additional protections are needed for harmful online material such as online hate and image-based abuse.

It will consider the need for further protections to address online harms stemming from new and emerging technologies like generative artificial intelligence (including deepfakes) and algorithms, and whether the existing penalty regime works as an effective deterrent to industry non-compliance.