



1 October 2015

Mr Tim Watts MP
Federal Member for Gellibrand
Australian Labor Party

By email: Tim.Watts.MP@aph.gov.au

Dear Mr Tim Watts and Ms Terri Butler,

Exposure Draft of Criminal Code Amendment (Private Sexual Material) Bill 2015

Introduction

1. Women's Legal Services NSW (WLS NSW) thanks the Australian Labor Party for the opportunity to comment on the Exposure Draft of the *Criminal Code Amendment (Private Sexual Material) Bill 2015*.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. WLS NSW is currently engaged in the Recharge Project in partnership with the Women's Services Network (WESNET), Domestic Violence Resource Centre Victoria and the Australian Communications Consumer Action Network. It has involved a national survey on technology-facilitated stalking and abuse as well as the development of legal guides for each State and Territory and training materials for women escaping such abuse and those assisting them. The national survey found 98% of the 546 domestic violence workers surveyed reported they had clients who had experienced technology-facilitated stalking and abuse.¹ This project will extend the SmartSafe project (www.smartsafe.org.au) Australia-wide.

¹DVRCV/Delanie, *SmartSafe Survey for Australian Support Workers*, 2015.

4. Over the past few years we have seen a significant increase in technology-facilitated sexual violence. We agree with the Discussion Paper that current civil and criminal laws dealing with this use of technology are unclear and inadequate.
5. Laws must be developed to adequately respond to the misuse and abuse of new and emerging forms of technology. Adequate and ongoing training must be provided for Police so the laws are enforced, and to social workers and caseworkers to assist women with responding to these situations.
6. We note that some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission we use the term 'victim' which is intended to be inclusive of both victims and survivors.

Overview

7. In summary we recommend:

- 7.1 The creation of a specific criminal offence where intimate sexual images are actually or threatened to be shared without consent.
- 7.2 It should be irrelevant for any offence where threats are made to share private sexual material, whether the material actually exists. This should be explicitly stated in any legislation.
- 7.3 Consistent and uniform legislation should be enacted in each Australian State and Territory to mirror any enacted Commonwealth offence, so as to capture when these behaviours occur without the use of a carriage service.
- 7.4 It should be an offence to threaten to share private sexual images of a third party without consent.
- 7.5 There should be greater consideration of the impact of non-sexual material being shared or threatened to be shared when it occurs within a context of domestic violence.
- 7.6 Sections 474.24D(2) and 474.24D(3) should be amended so they begin: *'The material must depict, or be stated or implied to depict:...'*
- 7.7 The exceptions in section 474.24D(4) should be considered further and amended.
- 7.8 The definition in section 474.24D(3)(c) ought to be extended to state 'for a female or a transgender or intersex person who identifies as a female—the breasts' to acknowledge gender and sex diversity.
- 7.9 The offence be based on harm and distress caused (or at risk of being caused) rather than the defendant's intention.
- 7.10 Section 474.24E(1)(e) be clarified so that subsections (i) and (ii) both be available whether the private sexual material was actually or threatened to be shared.
- 7.11 'Risk of harm' should be an objective test based on whether a reasonable

person would consider there to be a risk, with a subjective element so it is considered within the circumstances of the case.

7.12 Any offence explicitly states that the court may order a take down, deliver up order or similar order.

7.13 Further consideration be made to the necessity of a media defence as outlined in section 474.24H.

7.14 It be explicitly stated that for the purpose of consent, upon ending a relationship, any prior consent relating to private sexual material is impliedly withdrawn.

7.15 Consideration be given to the potential impact of this offence on minors.

Threats to share private sexual material

Do you support the creation of a specific criminal offence in relation to “revenge porn” threats?

8. WLS NSW supports the creation of a specific criminal offence where private sexual images are actually shared without consent or threatened to be shared without consent.

9. It should be irrelevant for any offence where threats are made to share private sexual material, whether the material actually exists. For example, we have had clients where the other party has threatened to share intimate still or moving images that were allegedly filmed without knowledge or consent. Therefore, the client has not known whether the intimate still or moving images actually exist, however, their fear of distress and harm is real. It should be immaterial if the material does not actually exist or if the threats were empty. We recommend this should be explicitly stated in the Bill.

10. We also suggest consistent and uniform legislation be enacted in each Australian State and Territory to mirror any enacted Commonwealth offence, so as to capture when this behaviour occurs without the use of a carriage service. The behaviour should be criminalised irrespective of whether it is technology-facilitated or in-person behaviour.

Should the offence apply to a situation where a person (Person A) makes threats to a person (Person B) that they will share a private sexual image or recording of another person (Person C)?

11. WLS NSW supports the offence extending to situations where threats are made to share intimate images of a third party.

The meaning of “private sexual material”

What should be the meaning of “private sexual material”?

12. We note that the definition of ‘private sexual material’ in section 474.24D of the Bill is limited. It does not capture intimate material of a non-sexual nature used to shame, humiliate or control a woman within the context of domestic violence. For

example an image of a woman without her religious headscarf can cause harm to a victim if such an image is shared or threatened to be shared without consent.

13. We recommend greater consideration of the impact of non-sexual material being shared or threatened to be shared when it occurs within a context of domestic violence, and in particular, the potential impact on culturally diverse women. We recommend there should be some recognition of the serious impact sharing or threatening to share such images could have on the victim.
14. The meaning of 'private sexual material' is also limited by the need for the material to depict at least one of the factors listed in section 474.24D(3). Our concern is a practical consideration that commonly arises in scenarios where a person is threatening to share private sexual material. For many of our clients who have received such threats, it may be that the threatened image does not in fact exist or they have not seen the image to know what it in fact depicts. For example, where a person threatens to share private sexual material of the victim they say they covertly recorded without the victim's consent, the harm caused is just as real, even where that person is lying about the existence of this private sexual material. In such cases, if you only capture scenarios where you can prove the material *actually* depicts something listed in section 474.24D(4), you would significantly impede the application of this offence. We therefore recommend amending sections 474.24D(2) and 474.24D(3) so they begin:

'The material must depict, or be stated or implied to depict:...'

15. By extending the definition to situations where the material is stated or implied to depict private sexual material, this will assist police to overcome resource intensive and onerous evidentiary limitations. If threats are made over a carriage service that private sexual material will be non-consensually shared, the police should be able to lay charges without needing to obtain a copy of that material. To have the section otherwise worded would suggest that to prosecute, the police would need to show what was depicted, and therefore, may need to obtain warrants to seize electronic devices of the offender and utilise computer forensics to find the alleged material. This is likely to be too resource intensive to be practical and a deterrent to investigating and prosecuting matters.
16. We note the limitations on material being 'private sexual material' in section 474.24D(4) where the material has been altered or combines material in certain circumstances. It appears the intention of this exemption envisages situations where, for example, a woman's head is doctored onto a photo of another woman's naked body. We question why it is necessary to have such a limitation.
17. We now live in a digital age where electronic devices have built in editing functionality as well as the wide availability of Apps, software and programs for images to be altered and edited with incredible ease. A layperson now has at their fingertips the capabilities to edit an image and make it look convincing and real as if professionally done. If a victim's head is convincingly photo-shopped onto an image of a naked woman in a sexual act so a reasonable person would think the person depicted is the victim, and this were distributed using a carriage service, how is the harm caused less real? We therefore recommend reconsidering the exceptions in section 474.24D(4), in particular

474.24D(4)(b)(iii).

How can we ensure that the offence is inclusive of all persons regardless of gender or gender identity?

18. We believe that any legislation should be inclusive of sex and gender diversity.
19. To avoid any doubt that the section 474.24D(3)(c) definition of 'private sexual material' to include 'the breasts of a female person' includes transgender and intersex people who identify as a female, we recommend adopting wording similar to the approach in section 61B(5) of the *Crimes Act 1900* (ACT). This provision prohibits using a device to observe or capture visual data in certain circumstances including:

For a female or a transgender or intersex person who identifies as a female—the breasts.

Intention of perpetrators

How can we ensure that the offence applies to the range of intentions, motivations or reasons for sharing private sexual images and recordings without consent?

20. Section 474.24E does not depend upon the defendant's intention, but rather, focuses on the actual or potential harm or distress caused to the victim. The benefit of this approach is that it is not necessary to prove why a defendant shared or threatened to share private sexual material, which can be for varied reasons such as to cause harm, to humiliate, to gain social status, for sexual gratification or to receive monetary reward.² We generally agree with this approach of focusing on harm or distress to constitute an offence.
21. However, It is not entirely clear how section 474.24E(1)(e) will operate where it states:

Either:

 - (i) *the conduct mentioned in paragraph (a) causes distress or harm to a subject of the material; or*
 - (ii) *there is a risk that the conduct mentioned in paragraph (a) will cause distress or harm to a subject of the material;*
22. It is not clear if these subsections are an either/or approach in any situation or if subsection (i) is intended to only apply where the private sexual material is actually shared and subsection (ii) is intended for threatened publication.
23. We recommend that subsections (i) and (ii) above should be available in any situation whether the private sexual material was actually shared or threatened to be shared. For example, where a woman is in a domestic violence relationship and due to fear, coercion or control, states distress or harm was not caused, the

² See Nicola Henry and Anastasia Powell, 'Sexual Violence and Harassment in the Digital Age', Presentation to Women's Legal Services NSW, 24 April 2015 www.wlsnsw.org.au/wp-content/uploads/NSW-Womens-Legal-Services-Presentation-24_April_2015.pdf

prosecution could instead rely upon the risk that the conduct would cause distress or harm which is a lower threshold test.

24. We recommend 'risk of harm' should be an objective test based on whether a reasonable person would consider there to be a risk, but also with a subjective element so it is considered within the circumstances of the case.

25. Further, it is difficult to imagine how the prosecution will be able to successfully prove that there was a *risk* the conduct would cause distress or harm when section 474.24E(4)(b) states '*a person's conduct does not cause distress merely because that is a natural and probable consequence of the conduct.*' This may need further consideration.

How can we ensure that the offence is responsive to the range of effects of this behaviour on victims?

26. We recommend that any offence explicitly state that the court may order a take down, deliver up order or similar order be made. This would be similar to section 26E(3) of the *Summary Offences Act 1953 (SA)*, which allows for the court to order the forfeiture of records of still or moving images in filming offences. This would provide a practical form of redress for victims where, for example, the image remains online and it is within the defendant's control to remove the content.

Protections for the media

How can we strike the right balance between ensuring protections for the media whilst also protecting victims?

27. We question the need for a defence to excuse the media posting private sexual material of a victim without consent, and cannot envisage circumstances where this would be justified. We recommend further consideration be made to the necessity of the defence as outlined in section 474.24H(4) of the Bill.

The meaning of "consent"

How should consent be defined in the context of the sharing of private sexual material?

28. We support the inclusion of 'reckless as to the subject's lack of consent' as outlined in s474.24E(1)(d). Further to the explanation of consent in section 474.24E(3) of the Bill we recommend it be explicitly stated that for the purpose of determining consent, upon ending a relationship, any prior consent relating to private sexual material is impliedly withdrawn.

29. Disability, age, domestic violence context, duress and deception are other relevant factors to consider when looking at consent.

Other relevant consideration

Minors

30. Technology-facilitated sexual violence is a growing issue for young women under 18 years of age. This raises a number of issues where either the victim or the perpetrator are minors.

31. We recommend greater consideration should be given to the potential impact of this offence on minors.

If you would like to discuss any aspect of this submission, please contact Alex Davis, Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
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