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By email only to: shounok.chatterjee@lawcouncil.au

Dear James,

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

I refer to the above matter.

The Law Institute of Victoria (**LIV**) welcomes the opportunity to provide the Law Council of Australia (**LCA**) with its views on the Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 (the **Bill**), to inform a submission to the Senate Legal and Constitutional Affairs Legislation Committee's review of the Criminal Code Amendment (**Deepfake Sexual Material**) Bill 2024.

The letter that follows is informed by the views of members of the LIV's Criminal Law Section and Technology and Innovation Section.

Executive summary

The LIV acknowledges the gravity of technologically-facilitated image based sexual abuse (**IBSA**) and is concerned by its growing prevalence. The LIV notes that Victoria is the only jurisdiction in Australia with IBSA offences capable of applying to technology-facilitated conduct.

In response to the six discussion points in the LCA's Memorandum on the Bill (the **Memorandum**), the LIV submits that:

1. It is prudent to evaluate the adequacy of Australia's IBSA criminal law frameworks to ensure that the law is capable of applying to emerging manifestations of IBSA conduct. Contemplated changes to Commonwealth IBSA offences would benefit from being informed by the operation of similar existing offences in other Australian jurisdictions and overseas, and by best practice principles from relevant research and expert opinions (where available).
2. There is likely no gap in current Commonwealth criminal law as it applies to technology-facilitated IBSA due to the existence of section 474.17, though the existing aggravated offences probably do not apply. The LIV is not opposed to this state of affairs continuing, and would prefer it over the implementation of proposed amendments contained in the Bill.

3. New section 474.17A offence likely would not be interpreted as applying to a range of innocuous conduct, like the sharing of adult pornography, on a common-sense interpretation of the offence considered in light of the purpose of the Bill.
4. While offence-specific modification of the definition of 'recklessness' is unusual and perhaps inadvisable, the LIV does not agree that recklessness is an insufficient mental requirement for the offence, noting that it is the mens rea of many similar criminal offences, notably sexual offences.
5. The approach to drafting the new aggravated offences is complex, but it is unlikely that the section 474.17A offence would apply to historical figures and obvious fakes like cartoons.
6. The maximum penalty associated with the proposed new offences are potentially disproportionate. It would prefer that the range fall somewhere between 3 and 5 years, and that funding be allocated to designing and disseminating education, especially targeted toward young people, about IBSA and its harms, and on addressing the (particularly online) proliferation of misogynistic content targeted at young children, especially boys.

The LIV further submits that the Bill should be amended to introduce safeguards to mitigate the risk that minor offences perpetrated by young people are treated disproportionately. Specifically, prosecutions of those aged under 18 years, or at a minimum aged 16 or under, must require approval from the Director of Public Prosecutions to proceed, as is the case in Victoria and New South Wales. Further, the Australian Federal Police should be required to implement procedures allowing cautions or other similar diversionary mechanisms to be issued for offences committed by children and young people.

Context

Technologically-facilitated image based sexual abuse (**IBSA**), or the 'non-consensual creation and sharing of intimate and sexual images and recordings, and threats to create and share such images and recordings',¹ is an increasingly notorious phenomenon both in Australia and internationally.

The LIV acknowledges the gravity of IBSA and is concerned by its growing prevalence,² particularly as facilitating technology becomes ever-more readily accessible and simultaneously capable of generating increasingly higher quality 'deepfake' material.³ The LIV is especially troubled by the gendered nature of offending, with men comprising 90 percent of sentenced offenders, and its link to family violence -

¹ Sentencing Advisory Council, 'Sentencing Image-Based Sexual Abuse Offences in Victoria (Report, October 2020); Sentencing Advisory Council, 'Sentencing Image-Based Sexual Abuse in Victoria Factsheet' (Factsheet, October 2020) 1; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, 12 November 2021) 309.

² Sentencing Advisory Council, 'Sentencing Image-Based Sexual Abuse Offences in Victoria (Report, October 2020).

³ Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, 12 November 2021) 309.

over 60 percent of all IBSA cases in Victoria involve the distribution of intimate images having a family violence connection, while over 70 percent of all cases involve threats to distribute linked to it.⁴

The LIV notes that IBSA criminal provisions exist in State and Territory laws, and Commonwealth laws. To contextualise the LIV's views on the Bill, the following paragraphs describe the Victorian IBSA framework and the existing Commonwealth framework.

Victorian IBSA framework

Victoria is the only Australian jurisdiction with IBSA laws specifically applicable to technologically facilitated IBSA. This has been the case since 2023 with the passage into law of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022* (Vic). Relevant offences are located in subdivision 8FAAB, Division 1, Part I of the *Crimes Act 1958* (Vic) (**Crimes Act**) and specifically apply to images captured via 'live streaming', and to producing, altering, or manipulating deepfake or false digital images, alongside photographs and recordings. Key elements of the framework include:

- **Definitions:** Key terms in the IBSA offences are defined in section 53O, notably including:

intimate image means an image depicting—

- (a) a person engaged in a sexual activity; or
- (b) a person in a manner or context that is sexual; or
- (c) the genital or anal region of a person (whether bare or covered by underwear);
- (d) if a person is female, or [] transgender or intersex ... identifying as female, the[ir] breasts ...

produce, in relation to an image, means –

- (a) filming, recording, taking or otherwise capturing the image; or
- (b) digitally creating the image.

... an **image** may be—

- (a) still, moving, recorded or unrecorded; and
- (b) created by ... (i) generating the image; or (ii) altering or manipulating another image.

- **Consent:** the definition and meaning of **consent** in the context of IBSA is set out in section 53P, alongside a non-exhaustive list of circumstances in which consent does not exist in section 53Q.
- The meaning of '**community standards of acceptable behaviour**', an element of the offences, is set out in section 53U.
- **IBSA offences:** the IBSA offences are set out in sections 53R – 53T, as follows:
 - Producing intimate image, section 53R;
 - Distributing intimate image, section 53S;
 - Threat to distribute intimate image, section 53T.

⁴ Sentencing Advisory Council, 'Sentencing Image-Based Sexual Abuse in Victoria Factsheet' (Factsheet, October 2020) 1-2.

All three carry a maximum penalty of 3 years imprisonment.

- **Consent of Director of Public Prosecutions (DPP):** Section 53W provides that DPP consent is needed to proceed with an IBSA prosecution if an accused is under 16.

Current Commonwealth laws

Current Commonwealth laws relevant to IBSA are contained in Division 474 of Part 10.6 of the *Criminal Code 1995* (Cth) (**Criminal Code**), specifically subsections 474.17 – 474.17B. Broadly speaking, the regime comprises the following:

- **Basic offence:** Section 474.17 contains the offence of '[u]sing a carriage service to menace, harass, or cause offence', which applies to any use of a carriage service in a way that a reasonable person would consider to be menacing, harassing, or offensive. It carries 5 years imprisonment.
- **Aggravated offences:** section 474.17A contains two aggravated offences involving the use of 'private sexual material' in the commission of the basic offence:
 - **Standard aggravated offence:** Applies where the commission of the basic offence involves the transmission, making available, publication, distribution, advertisement, or promotion, of private sexual material. It carries 6 years imprisonment.
 - **Special aggravated offence:** Involves the commission of the standard aggravated offence in circumstances where 3 or more civil penalty orders have been made against the offender under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) regarding subsection 75(1) or section 91 of the *Online Safety Act 2021* (Cth), and carries 7 years imprisonment.
- **Double jeopardy provisions:** Sections 474.17A(8) – (12) limit how the above-mentioned offences may be used. Specifically, they provide that a person convicted or acquitted of:
 - the basic offence - may not be convicted of the standard aggravated offence or the special aggravated offence in relation to the conduct that constituted the underlying offence;
 - the standard aggravated offence - may not be convicted of the basic offence or the special aggravated offence in relation to the conduct that constituted the standard aggravated offence;
 - the special aggravated offence - may not be convicted of the basic offence or the standard aggravated offence in relation to the conduct that constituted the standard aggravated offence
- **Set Aside provisions:** Sections 474.17A(13) – (14) outline when a conviction for the special aggravated offence must be set aside (upon application).
- **Alternate verdicts:** Section 474.17B details when a trier of fact may reach an alternative verdict on a trial for either of the aggravated offences.

The Bill

Need for amendments

The LIV acknowledges concerns that the current Commonwealth IBSA regime may not be applicable to IBSA involving technology owing to the definition of ‘private sexual material’, which requires that the material involve depictions in circumstances that reasonable people would regard as giving rise to an expectation of privacy. This view was articulated by the Office of the Commonwealth Director of Public Prosecutions (**CDPP**) in its submission to the Inquiry into the capability of law enforcement to respond to cybercrime:⁵

the federal offences under ss 474.17 and 474.17A of the Criminal Code may not capture [deepfake] ... conduct ... 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 such conduct is unlikely to constitute an offence contrary to s 474.17A(1) ... because deepfakes ... will not constitute “private sexual material” as defined in s 473.1. 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. The issue that arises is that, as the victim was not involved in the creation of the fictional ‘deepfake’ version of themselves, it cannot be said that any expectation of privacy attaches to the depiction of the victim. The consequence ... 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. The CDPP observes that the maximum penalty for an offence against s 474.17(1) is five years’ imprisonment.

In that context, the Bill proposes to:

- Substitute section 474.17A with a new provision making it an offence to transmit sexual material relating to persons who are, or appear to be, over 18 without their consent (Clause 5);
- Insert new section 474.17AA containing two aggravated offences (Clause 5);
- Insert new section s 474.17AB containing double jeopardy and set aside provisions (Clause 6); and
- Make necessary related amendments, namely, deleting the definitions of ‘private sexual material’ and ‘subject’ in section 473.1 of the Criminal Code (Clauses 1 - 4); and
- Amend section 473.4 by repealing subsections 473.4(2), (3), and (4), so it will read (Clause 3, 4):

473.4 Determining whether material is offensive

The matters to be taken into account in deciding ... whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:

⁵ Commonwealth Director of Public Prosecutions, *Submission to the Parliamentary Joint Committee on Law Enforcement, Inquiry into the capability of law enforcement to respond to cybercrime* (December 2023) [23]-[29].

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; []
- (b) the literary, artistic or educational merit (if any) of the material; and
- (c) the general character of the material (including whether it is of a medical, legal or scientific character).

New Transmission Offence – new section 474.17A

New section 474.17A, 'Using a carriage service to transmit sexual material without consent', makes it an offence for a person to use a carriage service to transmit material depicting another person aged 18 or older either engaging in a sexual pose or sexual activity, or depicting their sexual organ, anal region, or breasts (if female), in circumstances where the person either knows that the other person does not consent to the transmission, or is reckless as to whether they consent⁶ (**New Transmission Offence**).

It is expressly provided that it is irrelevant whether the material transmitted in unaltered format, or whether it has been created, or altered in any way, using technology (i.e., 'deepfakes').⁷ The penalty associated with the offence is imprisonment for 6 years, which is harsher than the Basic Offence but the same penalty associated with the existing standard aggravated offence in section 474.17A.

Subsection (3) sets out defences to the offence, in relation to which the defendant bears the evidential burden of proving. Defences include instances in which transmission is necessary for enforcing a law of or monitoring compliance with the same, and/or where necessary for the purposes of proceedings in a court or tribunal, or for a genuine medical or scientific purpose, or where ' [a] reasonable person would consider transmitting the material to be acceptable, having regard to the nature and content of the material, the circumstances in which it was transmitted, the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted, among other things'.

Aggravated offences - new subsection 474.17AA

New subsection 474.17AA, 'Aggravated offences involving transmission of sexual material without consent', contains two aggravated offences.

The first, 'transmission of sexual material without consent after certain civil penalty orders were made', corresponds with the existing special aggravated offence and is contained in subsections (1) – (4). It provides that an aggravated offence, hereafter referred to as the **New Aggravated Civil Penalty Offence**, is committed where:

- an offence against subsection 474.17A(1) is committed; and
- prior to the commission of the offence, 3 or more civil penalty orders were made against the defendant under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) in relation to

⁶ Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, s 474.17A(1).

⁷ Ibid, s 474.17A(2).

contraventions of subsection 75(1), and/or contraventions of section 91 of the *Online Safety Act 2021* (Cth) that relate to removal notices given under section 89 of that Act.

The second, the 'creation or alteration of sexual material transmitted without consent', does not correspond to an existing offence. Set out in subsections (5) – (7), it provides that an aggravated offence, hereafter referred to as the **New Aggravated Creation or Alteration Offence**, is committed where:

- a person commits an offence against subsection 474.17A(1); and
- they are responsible for the creation or alteration of the material.

Both of the new aggravated offences carry a penalty of imprisonment for 7 years, which corresponds with the existing penalty for the special aggravated offence.

Double jeopardy and set aside provisions - new subsection 474.17AB

New subsection 474.17AB, 'Double jeopardy etc. provisions—offences involving transmission of sexual material without consent' limits how the offences can be used in prosecuting a person for conduct captured by the relevant provisions (**New Double Jeopardy Provisions**), and outlines when convictions must be set aside (**New Set Aside Provisions**).

The New Double Jeopardy Provisions are set out in 474.17AB(1) - (3), and provide that a person convicted or acquitted of the:

- New Transmission Offence - may not be convicted of the New Aggravated Civil Penalty Offence or the New Aggravated Creation or Alteration Offence in relation to the conduct constituting the offence;
- New Aggravated Civil Penalty Offence - may not be convicted of the New Transmission Offence or the New Aggravated Creation or Alteration Offence in relation to the conduct constituting the offence;
- New Aggravated Creation or Alteration Offence - may not be convicted of the New Transmission Offence or the New Aggravated Civil Penalty Offence in relation to the relevant conduct.

These do not prevent an alternate verdict being reached under section 474.17B, Alternate Verdicts.⁸

The New Set Aside Provisions provide that a conviction for the New Aggravated Civil Penalty Offence must be set aside (upon application) if one or more of the relevant civil penalty orders are set aside or reversed on appeal, and the person could not have been convicted if the civil penalty orders had not been made. If set aside, proceedings may still be instituted against the person for the New Transmission Offence or the New Creation or Alteration Offence in relation to the relevant conduct.

Alternate verdicts – new section 474.1B

Clause 6 substitutes existing section 474.17B 'Alternative verdict if aggravated offence not proven', with a new section 474.17B which provides that:

⁸ Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, s 474.17AB (2).

- If, during a trial for the New Aggravated Civil Penalty Offence, the trier of fact is not satisfied the person is guilty of the offence, but they are satisfied beyond reasonable doubt that they are guilty of an offence against either the New Transmission Offence or the New Aggravated Creation or Alteration Offence, it may find the person not guilty of the former but guilty of either of the latter;
- If, during a trial for the New Aggravated Creation or Alteration Offence, the trier of fact is not satisfied the person is guilty of the offence, but they are satisfied beyond reasonable doubt that they are guilty of an offence against either the New Transmission Offence or the New Aggravated Civil Penalty Offence, it may find the person not guilty of the former but guilty of either of the latter.

Importantly, an alternative verdict can only be made if the person has been accorded procedural fairness in relation to the finding of guilt for the relevant alternative offence.⁹

Responses to LCA Points

1. The need to reevaluate the adequacy of Australia’s criminal frameworks to ensure that the specific harms caused by non-consensual sharing of intimate images ... are subject to denunciation and deterrence ... [and that c]hanges to Commonwealth criminal offences should be informed by best practice principles drawn from the operation of similar offences ... in states and territories.

The LIV agrees that, as manifestations of IBSA change with alongside developments in technology, it is prudent to evaluate the adequacy of Australia’s IBSA criminal law frameworks to ensure that the law is capable of applying to emerging manifestations of IBSA conduct.

The LIV considers that contemplated changes to Commonwealth IBSA offences would benefit from being informed by the operation of similar existing offences in other Australian jurisdictions and overseas, and by best practice principles from relevant research and expert opinions (where available), to ensure that any new offences are appropriately drafted and fit-for-purpose.

2. Necessity of the proposed changes

The second point in the Memorandum states ‘[i]nsufficient evidence has been advanced to establish the necessity of these changes and a gap in current Commonwealth criminal law. We welcome views on whether there are issues with the framing of ...section 474.17 ... and the related aggravated offences ...section 474.17A(1) and section 474.17A(4)’.

As to whether sufficient evidence has been advanced to establish the necessity of these changes, the LIV expresses no view.

⁹ Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, s 474.1B(2).

However, as to whether there is a gap in current Commonwealth criminal law as it relates to technology-facilitated IBSA, the LIV refers again to the submission of the CDPP cited above which states that:¹⁰

the federal offences under ss 474.17 and 474.17A of the Criminal Code may not capture [deepfake] ... conduct ... 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 such conduct is unlikely to constitute an offence contrary to s 474.17A(1) ... because deepfakes ... will not constitute "private sexual material" as defined in s 473.1. ... The consequence ... 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...

The LIV agrees with this interpretation of the provisions, and with the conclusion that there is probably no gap in current Commonwealth criminal law as it applies to technology-facilitated IBSA due to the existence of section 474.17. However, the LIV acknowledges that the existing aggravated offences probably do not apply to it owing to the definition of 'private sexual material'.

The LIV considers this state of affairs to be acceptable for several reasons.

Firstly, the maximum penalty associated with the Basic Offence is greater than the maximum penalty associated with equivalent Victorian offences – and so the LIV is satisfied that it is within an appropriate range.

Secondly, the drafting of the provision is broad and technology neutral, meaning it should be able to be flexibly deployed to novel manifestations of IBSA that may emerge in future as technology changes and as new means of communicating and sharing material emerge. It is critical that legislation regulating conduct involving technology is broad and flexible so it does not become quickly obsolete, necessitating frequent (costly) reevaluations and redrafting. In this regard, the LIV refers to the Australian Human Rights Commission's submission to the Joint Committee on Law Enforcement's Inquiry into of the capability of law enforcement to respond to cybercrime:¹¹

To ensure that law enforcement is able to best respond to technologies, which often change, foundational legislation must be updated and new legislation should be drafted in technology-neutral terms. Technology-neutral drafting ensures that new technological developments cannot avoid regulation simply because they are innovative. It also reduces the need for constant updates to laws to accommodate technological advancements.

While section 474.17 satisfies these criteria, the LIV is concerned the Bill's proposed new offences are so prescriptive that they risk being incapable of applying to changing manifestations of IBSA.

¹⁰ Commonwealth Director of Public Prosecutions, *Submission to the Inquiry of the capability of law enforcement to respond to cybercrime* (December 2023, amended February 2024) [23]-[29].

¹¹ Australian Human Rights Commission, *Submission to the Inquiry of the capability of law enforcement to respond to cybercrime: Human Rights Responses to Cybercrime* (15 December 2023) [15], [16].

Finally, the LIV considers it acceptable to rely on the Basic Offence to deal with technology-facilitated IBSA because doing so would eliminate the need for the complicated, convoluted, highly specific aggravated offences which carry, in the LIV's view, disproportionate maximum penalties. The LIV submits that judicial officers are very capable of considering the particular circumstances of a matter and reaching an appropriate sentence within the 5 year maximum penalty range that would be commensurate to the aggravated offences.

3. Overly broad

Point three in the Memorandum notes that 'the of absence of a requirement that the relevant material is offensive means that new section 474.17A could apply to a wide range of innocuous conduct (including sharing of adult pornography where the transmitter is reckless as to whether the person represented consents to the transmission of the material) ...'.

The LIV does not agree that the new offence would be interpreted as applying to a range of innocuous conduct, like the sharing of adult pornography (assuming that said pornography has been legally acquired and is not material like 'revenge porn'). This view derives from a common-sense interpretation of the offence considered in light of the purpose of the Bill, explained in the Explanatory Memorandum as follows:¹²

This Bill amends the Criminal Code Act 1995 to strengthen offences targeting the creation and non-consensual sharing of sexually explicit material online, including material that has been created or altered using technology such as deepfakes.

Deepfakes refer to images, videos or sound files, generated using AI, of a real person that has been edited to create an extremely realistic but false depiction of them doing or saying something that they did not actually do or say.

As technology advances ... the sophistication of deepfake techniques increases, making it almost impossible to detect deepfake material. The use of technology, such as AI, to create fake sexual material poses significant risks to the Australian community, and the non-consensual sharing of this material can have long-lasting harmful impacts on victims.

With respect to the scope of application of the offence, the Explanatory Memorandum further provides:¹³

The offence is not intended to capture private communications between consenting adults or interfere with private sexual relationships involving adults. For example, a willing participant in a sexual relationship sending photos of themselves in a sexual pose to their partner, would not be an offence in this section. In that context, the person depicted in the image would have consented to its transmission

... the serious nature of the offending behaviour [being the creation and sharing of] ... sexually explicit deepfakes, created and shared without consent, are used to degrade and dehumanise others, particularly

¹² Explanatory Memorandum, Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, [1]-[3].

¹³ Explanatory Memorandum, Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, [73]-[75].

target women and can perpetuate harmful gender stereotypes and drive gender based violence. When they are shared with others or posted online without the consent of the person depicted, it is a serious breach of a person's privacy and can have long lasting harmful impacts on victims.

Further, with respect to the meaning of 'consent' in the context of the provision, it is explained that 'a person would be taken to have consented to the transmission if the person freely and voluntarily agrees to the transmission'.¹⁴ In the context of consensually produced pornography that was intended for public dissemination, it seems clear that consent would be established in relation to transmissions of the material.

Considering all the above, the LIV is satisfied that the scope of the offence would not be construed as applying to the sharing of consensually produced commercial pornography between adults.

4. Drafting of section 474.17A

Point four of the Memorandum refers to 'the unusual approach in proposed section 474.17A(5), which includes an offence-specific modification of the meaning of recklessness to include not giving any thought to whether or not the person is consenting. The standard fault element of recklessness is already defined in Chapter 2 of the Criminal Code. Given the onerous penalty, described below, recklessness may be an insufficient mental requirement'.

This modification is acknowledged in the Bill's Explanatory Memorandum, which provides that:

Subsection 474.17A(5) provides that, for the purpose of this offence, being reckless in relation to consent includes not giving any thought to whether or not the person is consenting. This ensures that an offender is not able to avoid criminal liability by never turning their mind to whether consent exists, and therefore not meeting the knowledge or reckless fault elements required to prove ... 474.17A(1)(d) of the offence.¹⁵

The LIV agrees that the offence-specific modification contained in proposed section 474.17A(5) is unusual and perhaps inadvisable given that it may give rise to uncertainty in the application of the law, though the proposed modification does accord with the Victorian definition of recklessness in the context of sexual offences involving consent. In any case, the LIV does not agree that recklessness is an insufficient mental requirement for the offence, noting it is the mens rea of many similar criminal offences, notably sexual offence provisions.

5. New section 474.17A - unnecessary complexity and unintended consequences

The fifth point in the Memorandum provides that '[t]he approach to drafting the proposed offence in new section 474.17A may give rise to unnecessary complexity and unintended consequences. It appears

¹⁴ Ibid [71].

¹⁵ Ibid [85].

that, except for the operation of the offence-specific exception in new section 474.17A(3)(d), the offence would apply to representations of historical figures and obvious fakes such as cartoons’.

The LIV agrees that the approach to drafting the new aggravated offences is complex, perhaps unnecessarily so. However, as to whether the section 474.17A offence would apply to historical figures and obvious fakes like cartoons, the LIV submits that it likely would not.

In support of this view, the LIV refers to the Explanatory Memorandum, which explains that:

- ‘the first element of the offence requires the person to transmit material of ‘another person’ [which] ... will require a real person to be depicted in the material and the offence will not apply to, for example, artistic or AI depictions of fictional characters’;¹⁶ and
- ‘the use of the phrase ‘appears to depict’ is intended to cover material where the depiction reasonably or closely resembles an individual to the point that it could be mistaken for them. It ensures that the offence applies where an image is obviously a representation of a real person, but for minor alterations to, for example, use AI or other technology to smooth the appearance of the person’s skin or edit out a mole’.¹⁷

Further, the LIV submits that the ‘consent’ element of the offence implicitly requires that an image depict, or appears to depict, a person who possesses a mind that is capable of consenting (or not). An image depicting an imaginary cartoon creation would thus surely not suffice, nor would an image depicting a (presumably deceased) historical figure.

The above would inform a common-sense interpretation of the offence, as would the purpose of the Bill, referred to above. In such circumstances, the LIV considers it extremely unlikely that such an expansive interpretation of the offences could be supported.

The same logic applies if the point being made is that the offence could be applied to crude depictions of an actual living person such as a cartoon; in such circumstances, the LIV is firmly of the view that the offences would not be construed as applicable by a court.

6. Maximum penalties

The LIV notes the sixth point in the Memorandum, that ‘[t]he maximum penalties envisaged under the Bill ... appear to be disproportionate when considered in light of maximum penalties under comparable state and territory offences’.

The LIV agrees that the maximum penalties associated with the proposed new offences are significant and potentially disproportionate when considered against the maximum penalties available under comparable Victorian offences – which, as noted above, are of 3 years imprisonment.

¹⁶ Explanatory Memorandum, Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, [60].

¹⁷ Ibid [64].

The LIV recognises the devastating, traumatising consequences IBSA can have, and it agrees that imprisonment is an appropriate, legitimate tool by which to serve the objectives of protecting the community, denunciation, deterrence, and punishment (among other things) in response to it. However, the LIV cautions against pursuing a strategy that primarily relies on criminalisation as a panacea. IBSA is a complex, gendered phenomenon that is increasingly perpetrated by children and young people – some of whom may often be utterly ignorant of the gravity of their actions and the fact that they are criminal offences. Consequently, imposing lengthy terms of imprisonment will be unlikely to deter offending (and thereby, promote the protection of the community) because it does nothing to address the root causes of the conduct - despite being extremely expensive. Instead, it risks trapping people, especially children and young people, in a criminogenic cycle from which it is extremely difficult to extricate oneself from. Further, the LIV is concerned about the effect prolonged detention schemes may have on people with mental impairments or disabilities, who comprise up to 40 per cent of the Victorian prison population.⁷

The LIV's preferred approach would be to reduce the maximum penalty associated with the offence to somewhere between 3 and 5 years, and to allocate funds to designing and disseminating education, especially targeted toward young people, about IBSA and its harms, and on addressing the (particularly online) proliferation of misogynistic content targeted at young children, especially boys.

Related to the issue of whether the penalties associated with the proposed new offences are disproportionate, the LIV wishes to raise serious concern with the absence of safeguards regarding the prosecution of children. In particular, the LIV is perturbed that prosecutions of children will not require approval from the Director of Public Prosecutions, as is required in Victoria and New South Wales. Further, there is no indication that the Australian Federal Police will be required to implement procedures allowing cautions or other similar diversionary mechanisms to be issued for offences committed by children and young people. The LIV submits that both of these features are critical and must feature in the Bill and/or its accompanying explanatory material to mitigate the risk that minor offences perpetrated by young people ignorant of the gravity of their actions are treated disproportionately, which may undermine prospects of rehabilitation.

Should you wish to discuss any of the points discussed above, please feel free to contact Sinéad O'Brien Butler, Manager – Policy and Research, by email to [REDACTED].

Sincerely yours,

[REDACTED]

Adam Awty
Chief Executive