

Submission: Exposure Draft *Criminal Code Amendment (Private Sexual Material) Bill 2015*

Introduction

safe steps welcomes the opportunity to provide a response to the draft *Criminal Code Amendment (Private Sexual Material) Bill 2015* (the draft Bill). The Bill represents a new area of law that we hope will provide further protection to our clients against abuse.

About safe steps

safe steps Family Violence Response Centre is Victoria's 24 hour, 7 day per week service for women and children experiencing family violence. **safe steps** provides a critical service intervention, including support, accommodation, advocacy and referral throughout Victoria and nationally. **safe steps** ensures that women and children experiencing family violence, including those at the highest risk of harm, receive an immediate response to keep them safe.

Our clients report experiencing frequent abuse through information and communications technology (ICT), of which non-consensual distribution of private images is but one type. Legal options to pursue justice for this type of abuse will contribute to greater safety for women. As the case studies of **safe steps** clients below demonstrate, the harm caused by non-consensual pornography has many implications for women subjected to this abuse. The shame and stigma related to non-consensual sharing of intimate images contributes to women feeling reluctant to access support, and affects their families and children.

Case study 1

A woman was drugged, and while unconscious was filmed "participating" in sexual acts. This film was uploaded to YouTube and other porn sharing websites without her consent. While this woman did engage **safe steps** briefly, she did not come into our accommodation and wanted to remain anonymous. Shame around image sharing and identification may have contributed to her reluctance to come into service.

Case study 2

Photographs of a Muslim woman in her bra and without her hijab were shared without her consent on the perpetrator's Facebook account. The photos were accessible by her children and other family members. This caused the woman and her members of her family to experience feelings of shame. Upon contact with **safe steps**, the woman was highly distressed and staff spent a lot of time trying to alleviate her distress.

Meaning of “*private sexual material*”

Through the review process **safe steps** noted that the definition of “private sexual material” in the draft Bill may be ambiguous and may have some unintended consequences.

safe steps considers the issue of consent to be central to the type of abuse being targeted by this Bill. Without making consent central, the definition of “*private sexual material*” appears to be overly dependent on the content of the material in question. This leaves the definition open to a number of potential ambiguities that may create gaps and barriers for women seeking redress for abuses perpetrated against them:

- Within the proposed definition it is unclear as to whether the Bill applies to photographic images only, or whether it would also include private written communication, artwork or voice recordings.
- It is unclear how the term “sexual pose” will be interpreted, and by whom.
- The definition relies on exposure of particular body parts to constitute *private sexual material*.

One example of an unintended consequence is the criminalisation of photographs of women breastfeeding. There is considerable social stigma regarding breastfeeding, and contention regarding sharing images of breastfeeding on social networking websites. **safe steps** would be concerned if this Bill inadvertently contributed to this stigma.

The specification that the material depicts the breasts “of a female person” may exclude transgender and gender diverse persons, who may not be legally considered female or may have breasts but not identify as female. There may be a risk that transgender and gender diverse persons are not protected under this provision. This would be particularly risky for this group as transgender, and sex and gender diverse persons, are at risk of having their transgender status exposed as a specific form of abuse (known as “outing”).

Furthermore, the definition may exclude acts that violate a person’s privacy although the particular material does not depict particular organs or the person engaging in sexual acts, as with case study 2 above. Some provisions in the Victorian law provide greater protection in this regard, as they also specify an offence of creating a private intimate image of a person without their consent.

safe steps is also unclear as to the purpose of subsection 4 within section @474.24D. **safe steps** is concerned that this subsection may inadvertently provide protection if an offender makes alterations to an image, e.g. cropping, collating multiple images into a continuous clip, using software to place an image of the face of the subject onto the body of another person.

safe steps would suggest that the definition of “*private sexual material*” is revised, and that subsection 4 is reconsidered.

Offence of transmission of private sexual material

safe steps supports the centrality of the consent of the subject of any material to the offence. With this requirement, subsection (1)(e) is unnecessary and may be detrimental to victims of non-consensual pornography. **safe steps** considers it sufficient to demonstrate that the material was distributed without the subject's consent in order to give effect to the intent of the Bill.

Subsection (1) (e) would place the onus on the victim to demonstrate that they have experienced distress or harm. This requirement often works against women subjected to abuse. There may also be costs associated with obtaining independent evidence or expert testimony verifying the distress and/or harm caused. Requiring distress or harm to have been caused in order for the act to be considered an offence would therefore potentially re-victimise victims.

Conversely, this subsection may provide a defence for a perpetrator who may be able to claim that they have committed no offence by distributing private images of someone because the subject has not been able to prove that they have suffered distress or harm.

Requiring testimony as to the harmful nature of the offence should therefore not be a requirement for the offence to have taken place.

Definition of consent

safe steps considers consent to be critical to the nature of the offence being specified in the draft Bill. We therefore recommend that it is placed at the beginning of the Bill, to emphasise its centrality to the proposed offences.

The distributor of the material should bear the onus to demonstrate that informed consent has been obtained. There should be no assumption of consent.

To that end, **safe steps** would support a definition specifying that consent obtained under duress would not satisfy the conditions within the draft Bill. This would provide greater protection for women who subjected to this type of abuse.

safe steps also suggests including a provision specifying that a person must have the capacity to give informed consent for the consent to be valid for the purposes of the Bill.

Use of a carriage service

safe steps queries the specification of use of a carriage service (within the meaning set out in section 7 of the *Telecommunications Act 1997 (Cth)*) for an act to be an offence. This would exclude threats or transmission via printed material, postal services and in person. **safe steps** would suggest that further protection should be available to victims of distribution of private intimate images via other means.

Media activities

safe steps strongly supports the freedom of the press to publish information which is believed to be in the public interest, and would consider reporting on non-consensual image sharing to be within the public interest. However, **safe steps** can see no reason to publish the material itself in doing so. **safe steps** is concerned that section @474.24H, subsection (4) may place the victim at risk, re-victimise them, and cause actual harm whether or not it is intended by the publisher.

safe steps recommends that distribution of *private sexual material* for news, current affairs or documentary purposes is not defensible or in the public interest, unless the subject of the material gives their consent for its use towards those purposes.

For further information

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