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Tim Watts MP
Parliament House
Canberra ACT 2600

Via email to: tim.watts.mp@aph.gov.au

6th October 2015

Dear Mr Watts,

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

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to this exposure draft. EFA's submission is contained in the following pages. EFA is happy to provide further information, if required.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Jon Lawrence - Executive Officer

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1. Introduction

Electronic Frontiers Australia (EFA) welcomes the opportunity to comment on the **Criminal Code Amendment (Private Sexual Material) Bill 2015 Exposure Draft** ('**the Bill**').

EFA is committed to protect the right of unfettered freedom of expression. EFA is also committed to the right to individual privacy. These rights often intersect and the sharing of private sexual material without consent is one such circumstance.

While EFA is wary of and strongly reluctant to endorse limitations on the freedom of expression, the sharing of private sexual material without consent can involve very significant harm and distress to the persons depicted in that material, with no public benefit. As such, it is one context in which EFA is prepared to endorse some limitations on freedom of expression.

The potential harm and distress involved in the malicious or reckless sharing of private sexual material, or involved in a threat to do so, can be very significant and can result in loss of reputation, employment, social standing, and in extreme circumstances, can be seen a factor involved in suicide.

As such, EFA is prepared to endorse criminal sanctions relating to the sharing of private sexual material without consent, subject to clear definitions and with appropriate exceptions and defences.

While EFA accepts that this particular issue does arguably warrant separate attention, EFA also strongly supports, in principle, the establishment of a statutory cause of action for serious invasions of privacy, such as that outlined in the Australian Law Reform Commission's report[i] tabled in parliament on 3rd September 2014.

Ideally, any legislation to address the sharing of private sexual material without consent should be considered by the parliament at the same time as the proposal to introduce a statutory cause of action for serious invasions of privacy.

2. Response to questions raised in Discussion Paper

2.1. Threats to share private sexual material

Question: Do you support the creation of a specific criminal offence in relation to "revenge porn" threats?

A threat to make private sexual material publicly available can, in some circumstances, be very powerful and has the potential for the person receiving the threat to be 'blackmailed'. As such, EFA is prepared to endorse the creation of a criminal offence in relation to 'revenge porn' threats.

EFA is however concerned that s474.24F (2), as currently worded, may be too low a standard for this offence. If the person receiving the threat does not fear that the threat will be carried out, then the threat itself will have no effect.

EFA therefore believes that, in such a circumstance, the threat should not be considered an offence.

Recommendation: delete s474.24F (2) such that it is necessary in a prosecution for an offence against subsection (1) to prove that the person receiving the threat actually feared that the threat would be carried out. It may be appropriate to adopt an existing standard in this regard such as that defined for common assault.

Question: 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)?

A threat to make private sexual material available can, in some circumstances, pose potential harm and distress not just to persons depicted in that material, but also other persons depicted in the material and to people close to them. Such a threat can therefore potentially be used to 'blackmail' a range of individuals.

As such, a threat made to persons other than those depicted in the material to make available private sexual material should, in certain circumstances, and subject to the concerns noted above, also attract a criminal sanction.

2.2. The meaning of "private sexual material"

Question: What should be the meaning of "private sexual material"?

EFA has two concerns with the definition of 'private sexual material' in the proposed s474.24D of the Exposure Draft

Firstly, the term 'sexual pose', is a broad, inherently subjective concept that will be open to very different interpretations depending on a number of factors, including:

- the age (or apparent age) of the individual depicted in the image;
- the context in which the image was captured; and,
- the cultural and religious background of the individual.

A 'sexual pose' that does not expose any sexual activity or the body parts specified in (3) (b) & (c) may therefore not meet what EFA believes would be an appropriate standard for 'private sexual material' in the context of this bill. In its current wording, the term 'sexual pose' may cover innuendo and sex-related 'poses' that may be intended to be made for innocent reasons like humour.

Recommendation: delete 'a sexual pose' from (3) (a).

Secondly, 474.24D(3)(c) uses gender-specific terminology, ie 'the breasts of a female person.' This therefore excludes transgender and other gender identities and should be revised.

Recommendation: delete 'female' in (3) (c) and add 'of a non-male gender identity' (or similar).

Including an exclusion for material 'altered in any way', as specified in (4) (a), may create a loophole that will potentially exclude material that has been altered in a very minor fashion, such as by applying minimal blacking-out/pixellation of sexual organs or breasts, where that alteration does not significantly reduce the potential harm associated with release of the image.

A higher standard for this exclusion may therefore be warranted, such as 'substantially altered in any way'.

Recommendation: add 'substantially' before 'altered in any way in (4) (a).

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

Gender-neutrality should be achievable by ensuring that all references to persons in the bill use gender-neutral language, where possible – see comments relating to the definition of 'private sexual material' above. The bill should also explicitly state that the offence(s) are relevant to all genders and gender identities and to all combinations thereof.

2.3. Intention of perpetrators

Question: 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?

The question of intent is only relevant in relation to threats to share private sexual material. Once the material has been shared or published without consent, particularly if that involves the material being made available on the Internet, then the intentions become, arguably, irrelevant.

The Exposure Draft, as currently worded, deals with the intention of causing harm or distress or where there is a risk of causing harm or distress and with recklessness relating to consent.

As such, EFA believes it is sufficient.

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

EFA believes that the offence as defined in the Exposure Draft, subject to the recommended changes contained herein, is largely sufficient to cater for the range of effects of this behaviour on victims.

That said, EFA believes that this proposed legislation should ideally be considered alongside the proposal from the Australian Law Reform Commission for the introduction of a statutory cause of action for serious invasions of privacy as outline in their report[ii] tabled in parliament on 3rd September 2014.

2.4. Operating a "revenge porn" website

Question: How can we ensure that the offence captures a range of scenarios that involve people who are encouraging or deliberately facilitating the large-scale sharing of private sexual images?

EFA believes that the offence as defined in the Exposure Draft, subject to the recommended changes contained herein, is largely sufficient to cater for people who are encouraging or deliberately facilitating the sharing of private sexual material on any scale, however, it may be appropriate to include an exception to the defence specified in 474.24H (1) (a), to exclude from that specific defence, actions involved in republishing private sexual material from multiple sources involving multiple images.

The introduction of a statutory cause of action for serious invasions of privacy is likely to be a significant additional disincentive to persons considering producing websites that collate private sexual images shared without consent.

2.5. Protections for the media

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

In principle, EFA is opposed to legislated controls on what the media is able to publish. In the context of 'private sexual material', however, it is clear that providing a blanket exception for the media to publish such material may magnify and prolong the harm involved.

It is difficult to image a scenario in which publication of private sexual material in the media would be in the public interest.

That said, the media should of course be free to publish anything that discusses or refers to private sexual material, and to the fact of the publishing of such material by another party, without actually publishing the material itself.

EFA expects that reputable media outlets would, at worst, modify such material sufficiently to ensure at least that what they publish would not invoke 474.24D (3), however EFA does not support any sanction on the media in this regard.

As mentioned above, this proposed legislation should ideally be considered alongside the proposal from the Australian Law Reform Commission for the introduction of a statutory cause of action for serious invasions of privacy as outline in their report[iii] tabled in parliament on 3rd September 2014.

2.6. The meaning of "consent"

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

EFA believes that, in the majority of circumstances involving the sharing of private sexual material, consent should be explicit. There are a limited number of scenarios where consent can potentially be

implied legitimately and EFA believes that a decision whether consent can be implied in an individual circumstance is best determined in court.

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[i] Serious Invasions of Privacy in the Digital Era (ALRC Report 123), at: http://www.alrc.gov.au//publications/serious-invasions-privacy-digital-era-alrc-report-123
[ii] *Ibid*
[iii] *Ibid*