

DC VOLUNTEER LAWYERS PROJECT

A voice for victims and children in the DC metro area since 2008

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**Testimony of Masooma Hussain, Supervising Attorney
DC Volunteer Lawyers Project
Before the Committee on Judiciary and Public Safety
Council of the District of Columbia**

B25-0345: Accountability and Victim Protection Amendment Act of 2023

Good [morning/afternoon]. Thank you to the Committee for the opportunity to provide testimony today in support of amending the Criminalization of the Non-Consensual Pornography Act of 2014. The proposed amendments are found in Title 14 of the Accountability and Victim Protection Amendment Act of 2023.

My name is Masooma Hussain, and I am a Supervising Attorney at the DC Volunteer Lawyers Project. DCVLP is a non-profit organization that was established in 2008 to provide direct legal and advocacy assistance to low-income survivors of domestic violence. In 2022, we provided legal representation to 454 survivors of domestic violence in protection order cases. DCVLP attorneys also provide free legal advice and brief services to survivors through our various legal clinics throughout the District of Columbia.

Non-consensual pornography includes the distribution of a private sexual image to cause harm to the person depicted. As this Committee well knows, non-consensual pornography is a form of domestic and gender-based violence that is used by abusers as a weapon to shame, embarrass, degrade, control, and punish. The impact on survivors can be devastating.

This Committee passed the Criminalization of Nonconsensual Pornography Act of 2014 because legal remedies at the time were inadequate to protect survivors of non-consensual pornography or to deter perpetrators. As codified in D.C. Code § 22-3502, the Act provides that it is unlawful for a person to knowingly disclose one or more sexual images of another person when 1) the person depicted did not consent to the disclosure, 2) there was an agreement or understanding between the person depicted and the person disclosing that the image would not be disclosed, and 3) the person disclosed the image with the intent to harm the person depicted or receive financial gain.

The amendment being considered by the Council today relates to the “agreement or understanding” requirement. The “agreement or understanding” requirement is unnecessarily restrictive and has led to survivors being denied access to civil protection orders where a current or former intimate partner has disclosed sexually explicit images for the purpose of harassing them. This is because it is often difficult to prove that an agreement or understanding between the parties existed, especially if that agreement was verbal. In fact, some survivors may not even be aware that an abuser has access to compromising or sexually explicit images until after the abuser discloses those images, causing survivors extreme emotional distress and trauma. Essentially, the current statute provides abusers a “loophole” and excludes many survivors who otherwise would have been entitled to relief.

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DCVLP worked with one such survivor. Ms. Doe came to DCVLP seeking representation for a civil protection order case. The opposing party in the CPO matter was concurrently charged with Unlawful Disclosure for posting flyers on buildings and bus stops that included sexually explicit pictures of Ms. Doe with accompanying language stating that Ms. Doe had herpes and people should get tested. Understandably, when Ms. Doe encountered these flyers in person, she was distressed and humiliated. However, critically, at the time, Ms. Doe did not know how or when her abuser obtained the sexually explicit pictures since she had not shared those pictures with him. Therefore, no agreement or understanding between the parties ever existed. The Judge presiding over the criminal matter raised this very point, and indicated that she would have found Ms. Doe's abuser liable for unlawful disclosure if the statute had been written differently, but could not.

The proposed amendment the Council is considering today would require that "the person disclosing the sexual image knew or consciously disregarded a substantial risk that the person did not consent to the disclosure." This change will close a loophole that has hampered prosecution of these cases, and put the focus on the defendant's mental state and the lack of consent in the distribution of the image.

According to a 2022 Congressional Research Service analysis, the majority of states make dissemination of nonconsensual pornography a criminal offense if the defendant acted with some level of knowledge, either actual or imputed through recklessness or negligence, that the depicted person had not consented to the disclosure.

This includes Maryland and Virginia. Maryland's Revenge Porn statute (MD Code § 3-809), requires that the person disclosing the sexual or intimate images of the survivor "knew that the other person did not consent to the distribution" – the other person being the survivor – or the person disclosing the sexual or intimate images of the survivor did so "with reckless disregard as to whether the person consents" to the distribution. Similarly, in Virginia, the statute on the Unlawful Dissemination or Sale of Images of Another (VA Code § 18.2-386.2) prohibits the malicious dissemination or sale of sexual or intimate images of another "...where such person knows or has reason to know that his not licensed or authorized to disseminate or sell such [images]."

The proposed amendment is also aligned with the standard endorsed and published by the Uniform Law Commission in 2018. Section 3 of the Uniform Civil Remedies for the Unauthorized Disclosure of Intimate Images Act outlines the basic elements of the disclosure of intimate images. Notably, one of the elements is that the person disclosing the image *knew or acted with reckless disregard* for whether the depicted person consented to the disclosure.

Even more recently, a newly-enacted federal private right of action for victims of nonconsensual pornography requires that the person disclosing the image did so "knowing" that the person whose image was disclosed did not consent to the disclosure or with "reckless disregard" as to whether there was consent.

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DCVLP supports the proposed amendment to the Unlawful Disclosure Statute, which will replace the “agreement or understanding” requirement with a less restrictive “knew or consciously disregarded a substantial risk that the person did not consent to the disclosure.” This standard will bring the statute into alignment with the majority of states, including Maryland and Virginia, and will ensure that victims of unlawful disclosure in DC will not be deprived of relief based on a technicality. DCVLP is grateful for the opportunity to provide testimony and we welcome further questions.