

Combating Child Sexual Exploitation Legislation Amendment Bill 2019

Legal Aid NSW submission to the
Senate Legal and Constitutional Affairs
Committee

26 August 2019

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short

matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

The Commonwealth Crimes Unit (CCU) is a specialist Unit within the Criminal Law Division providing representation to people charged with Commonwealth offences. CCU solicitors provide representation in Local Court summary matters and matters proceeding on Indictment for sentence or trial in the District Court. The Unit provides advice, representation and advocacy for Federal Offenders who are refused parole or have their parole revoked.

The Children's Legal Service advises and represents children and young people 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

The Family Law Division provides services in Commonwealth family law and state child protection law.

Legal Aid NSW welcomes the opportunity to make a submission to the Inquiry into the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019. Should you require any further information, please contact:

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1 Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the Bill).

Our submission outlines a number of issues with the current drafting of the Bill. We suggest refinements to a number of provisions, and oppose the new offence of possession or control of child abuse material obtained or accessed using a carriage service.

In general, we consider that the proposals should be more narrowly framed and should more closely resemble the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

2 Offences relating to a failure to protect and report

2.1 Definition of child sexual abuse offence

Item 3, Schedule 1 of the Bill would insert new offences into the *Criminal Code Act 1995* (Cth) (Criminal Code) in relation to failure to protect a child at risk of a sexual abuse offence (cl 273B.4), and failure to report a child sexual abuse offence (cl 273B.5), which applies to Commonwealth officers who exercise care or supervision over children.

Clause 273B.1 of the Bill sets out the following proposed definition of 'child sexual abuse offence', which would apply in relation to the above offences:

- a) a Commonwealth child sex offence within the meaning of the *Crimes Act 1914*; or
- b) a State or Territory registrable child sex offence.

A 'State or Territory registrable child sex offence' is defined as an offence:

- a) that a person becomes, or may at any time have become, a person whose name is entered on a child protection offender register (however described) of a State or Territory for committing; and
- b) in respect of which:
 - i) a person under 18 was a victim or an intended victim; or
 - ii) the offending involved child abuse material.

We are concerned that the proposed offence provisions require Commonwealth officers to maintain awareness of all relevant offences across Australia. This may be overly onerous in cases where offences vary significantly across jurisdictions and their classification as registrable offences may not always be obvious. For example, in NSW

there are a number of non-sexual offences against children that may result in a person's name being entered on a child protection offender register,¹ including kidnapping,² child abduction,³ and wounding.⁴

It may not be immediately apparent to officers that such offences are registrable offences. This is particularly the case if the conduct occurs in a different jurisdiction to the fail to report/protect offence, such that the officer is unfamiliar with the applicable registration regime.

As such, we suggest that the definition of child sexual abuse offence should be refined to capture only conduct that might reasonably be expected to be relevant and within the officer's contemplation. One way of achieving this may be to revise the definition of State or Territory registrable child sex offence, so that it is limited to offences of a sexual nature.

2.2 Failing to protect child at risk of child sexual abuse

The drafting of the proposed offence of failing to protect a child at risk of a child sexual abuse offence is not consistent with Recommendation 36 of the Royal Commission's Criminal Justice Report and differs significantly from existing State provisions.

The Royal Commission's Criminal Justice Report specifically recommended that the failure to protect offence should:

- apply to adults
- apply to protect children from sexual offences by adults, rather than sexual offences by children
- protect against abuse by an adult associated with the relevant institution, and
- relate to all children under 16 years old, but only relate to children who are 16 or 17 years old where the potential offender is in a position of authority in relation to the child.⁵

Some states have already adopted a failure to protect offence.⁶ There are some substantial differences between the proposed Commonwealth provision and the State provisions. For example:

- 1) the NSW and Victorian offences only apply to *adult* offenders,

¹ *Child Protection (Offender Registration) Act 2000* (NSW), s 3.

² *Crimes Act 1900* (NSW), s 86.

³ *Crimes Act 1900* (NSW), s 87.

⁴ *Crimes Act 1900* (NSW), s 33.

⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, page 249.

⁶ For example, see *Crimes Act 1900* (ACT) s 66A, *Crimes Act 1958* (Vic) s 490 and *Crimes Act 1900* (NSW) s 43B.

- 2) the NSW offence relates to a serious risk that an *adult* will commit a child abuse offence against a child, and
- 3) the NSW, Victorian and ACT provisions relate to a risk of child sexual abuse by a person who is associated with the organisation in which the defendant is a worker/holds a position.

The limitations recommended by the Royal Commission are important. They ensure that children are not unfairly captured by the provisions, and that organisations and officers do not become risk averse as a result of unduly onerous obligations. As the Bill currently stands, children who are Commonwealth officers can be prosecuted for this offence. Further, there is currently no required nexus between the potential offender and the officer. This creates a very broad obligation that is inconsistent with the Royal Commission's recommendation, which was targeted towards changing cultures *within* organisations by ensuring that action is taken to protect children from potential offenders who are associated with the organisation. As currently drafted, a child who is an Australian Defence Force cadet would commit an offence if they failed to protect another cadet under their supervision from a risk of child sexual abuse by that cadet's parent. The offence would also be committed if the cadet failed to address the risk of other child cadets engaging in similar aged underage consensual sexual activity (which constitute child sexual abuse offences).

In order to achieve consistency with the Royal Commission's recommendations, and with existing offences, we suggest that the offence should be redrafted to ensure that it:

- applies only to adults and not to children in leadership positions
- applies only when the potential offender is an adult
- applies when the potential offender is associated with the organisation in which the officer works
- applies in relation to children aged 16 or 17 only if the potential offender is in a position of authority in relation to the child.

2.2.1 Absolute liability

Clause 273B.4(2) of the Bill provides for absolute liability in relation to the element of the offence which requires that the conduct of the potential offender, if engaged in, would constitute a child sexual abuse offence. We are concerned that this provision makes it irrelevant whether the defendant knew that the conduct in question would constitute a child sexual abuse offence. The offence provision is based around the potential commission of defined sexual and registrable offences. As we have highlighted above, there is potential that the broad definition of 'child sexual abuse offence' will enliven the offence in circumstances where it may not be obvious to the defendant. As currently drafted, a defendant in another State would have no defence even though they are not aware that conduct might constitute a registrable offence within NSW.

As we suggest above, the definition of child sexual abuse offence should be refined to capture only conduct that might reasonably be expected to be relevant and within the officer's contemplation, that is, offences within their jurisdiction and of a sexual nature.

2.2.2 Certain matters not required to be proved

In our view, cl 273B.4(3) of the Bill is drafted too broadly. The clause provides that the offence applies:

- a) whether or not the child can be identified as a specific person; and
- b) whether or not the potential offender can be identified as a specific person; and
- c) whether or not a child sexual abuse offence is or was actually committed in relation to the child.

We recognise that this provision is intended to ensure that children can be protected even where specific details about a potential risk are unknown. However, in our view, the drafting is too broad. Currently, for example, it is arguable that an offence would be committed where a Commonwealth officer fails to provide protection to children generally from known risks of child abuse, such as through failing to provide child protection training to staff, even where there is no knowledge of any potential offender, any child at risk, or any incident of abuse. The broad scope of the offence may lead to confusing and inconsistent application of the provision.

To ensure that the offence targets specific risks, we suggest that it should require either that a specific child has been identified or that a specific potential offender has been identified.

2.3 Failure to report offence

Again, we are concerned that the offence has been drafted too broadly. Clause 273B.5 of the Bill is inconsistent with the Royal Commission's recommendations in relation to a failure to report offence.⁷ As with the failure to protect offence above, the Royal Commission recommended that the failure to report offence should:

- apply only to adults
- apply to protect children from sexual offences by adults, rather than sexual offences by children
- protect against abuse by an adult associated with the relevant institution.⁸

⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, Recommendation 33.

⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, pp 213-214.

We suggest that the Bill should adopt these aspects of the Royal Commission's recommendation. In addition, for reasons already outlined above, Legal Aid NSW is concerned with the following clauses of the Bill:

- cl 273B.5(3), which provides for absolute liability in relation to cl 274B.5(1)(d) and (2)(d), and
- cl 273B.5(6), which provides that a specific child and a specific potential offender need not be identified.

2.4 Consent to commence proceedings

Clause 273B.6(1) of the Bill provides that proceedings must not be commenced without the consent of the Attorney-General. The explanatory memorandum to the Bill notes that:

The intention of this section is to ensure that a proposed prosecution is scrutinised and a judgement made about its appropriateness before it proceeds. This extra level of scrutiny is important to avoid unintended consequences, in particular, in light of the fact that the offences criminalise omissions to act.⁹

Legal Aid NSW supports this provision. However, we note that cl 273B.6(2) of the Bill provides that a person may be arrested for, charged with, or remanded in custody or on bail in connection with, such an offence before the necessary consent has been given. Generally, detention should be used as a last resort. Given that these offences involve criminalising omissions rather than acts, we suggest that detention would be inappropriate prior to obtaining the Attorney-General's consent for prosecution.

3 Possession of child-like sex dolls

Clauses 273A.1 and 473.1 of the Bill (which amend the Criminal Code) and cl 233BAB(4) of the Bill (which amends the *Customs Act 1901* (Cth)) refer to a doll or other object which resembles:

- a person who is, or appears to be, under 18 years of age, or
- a part of the body of such a person.

Given that the provisions require that the doll 'resembles' a child, we consider that it is duplicative and potentially confusing to include the phrase 'or appears to be'.

⁹ At para 68.

4 Possession or control of child abuse material obtained or accessed using a carriage service

Clause 474.22A of the Bill would insert a new offence into the Criminal Code of possessing or controlling child abuse material obtained or accessed using a carriage service.

We oppose the new offence for the reasons set out below.

4.1.1 The offence is unnecessary and duplicative.

The Criminal Code already contains offences in relation to:

- 1) obtaining/accessing/disseminating etc. child abuse material using a carriage service (s 474.22), and
- 2) possession of child abuse material with intent to commit an offence under s 474.22 (s 472.23).

Both of these offences already cover the criminality envisaged by the proposed offence. In particular, we note that a person who has committed the proposed offence would have committed an offence under the existing s 474.22 of the Criminal Code.

The creation of the proposed offence (cl 474.22A of the Bill) may lead to duplication in charges. For example, a person could be charged under s 474.22 of the Criminal Code for obtaining the child abuse material using a carriage service and could also be charged with possession of the same material under cl 474.22A of the Bill.

4.1.2 The penalty is not proportionate

Like s 474.23 of the Criminal Code, the proposed offence involves possession and control of child abuse material. However, the criminality envisaged by s 474.23 is greater because that offence can cover the production and supply of child abuse material and also involves an intention to commit a further offence under s 474.22. Despite this, the proposed offence carries a maximum penalty of imprisonment for 15 years, equivalent to the maximum penalty for an offence under s 474.23 of the Criminal Code. This is a disproportionate outcome. The lesser criminality involved in proposed cl 474.22A of the Bill should attract a lesser maximum penalty than an offence under s 474.23 of the Criminal Code.

4.1.3 The fault element of the offence is unclear

There needs to be greater clarity about the fault element for the proposed offence, such as that provided in s 474.22 of the Criminal Code, which lists what elements require proof of intention or recklessness. We suggest that a person should only be guilty of the proposed offence if they were intentionally in possession or control of the child abuse

material. For example, a person should not be guilty of the offence if the child abuse material is on their computer without their knowledge.

We are also concerned that absolute liability applies to cl 474.22A(1)(c) of the Bill, that is, there is no fault element attaching to proof that the person used a carriage service to obtain or access the material. It would appear that a person who accidentally accesses child abuse material, or who obtains unsolicited child abuse material which is sent to them, would be guilty of the offence.

The effect of the absolute liability provision is particularly concerning when combined with the presumption in cl 474.22A(3) of the Bill.

4.1.4 The presumption may operate unfairly

Clause 474.22A(3) of the Bill provides that if the prosecution proves that

- the person has possession or control of material,
- the material is in the form of data held in a computer or contained in a data storage device, and
- the material is child abuse material

it is presumed, unless the person proves to the contrary, that the person

- a) obtained or accessed the material, and
- b) used a carriage service to obtain or access the material.

As noted above, there are many circumstances in which a person may come into possession of material where they may not have obtained or accessed the material. Similarly, in many instances data held in a computer or data storage device (such as a USB stick) may not have been obtained or accessed using a carriage service. For example, a person may unwittingly obtain a computer or storage device that already had the material saved on it (without the use of a carriage service) and the person may not access that material.

We are concerned that the proposed presumption may operate unfairly in reversing the onus of proof.

5 Forced marriage

Schedule 5, cl 270.7A(1) of the Bill would amend the Criminal Code to expand the existing definition of forced marriage to include any marriage where either party was under 16 when the marriage was entered into. We are broadly supportive of the proposed amendment, which will assist in protecting child victims of forced marriage. However, we are concerned that, contrary to the intention of protecting vulnerable children, the provision envisages prosecution of a child for a forced marriage offence

under s 270.7B of the Criminal Code. While the Bill requires that the Attorney-General consent to prosecution of a child, in our view it is preferable to exempt all children from prosecution for a forced marriage offence. In the alternative, children under 16 years of age should at least be exempted.

We also strongly oppose cl 270.2B(6) of the Bill, which allows for a child to be arrested, charged and remanded in custody before the consent of the Attorney-General is obtained to commence proceedings. Detention of children should be a last resort and should not be used in circumstances where children may be considered as victims rather than offenders, and where it is unclear whether any prosecution will be pursued. We recommend the deletion of the cl 270.2B(6) of the Bill.