

CrimTrac submission to the Legal and Constitutional Affairs Committee Inquiry into the *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010*

Thank you for the opportunity to provide a submission to the inquiry on the *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010* (the Bill). CrimTrac has not had the opportunity to review this Bill prior to the request by the Legal and Constitutional Affairs Legislation Committee.

The CrimTrac Agency

The CrimTrac Agency (CrimTrac) was established as an Executive Agency under the *Public Service Act 1999* on 1 July 2000. CrimTrac's operation is underpinned by an Inter-governmental Agreement (IGA) signed on 13 July 2000. CrimTrac's primary role is to provide national information sharing solutions to support the effective operation of police services and law enforcement agencies across borders.

CrimTrac's main functions are to:

- provide leadership in generating national approaches to information sharing solutions for law enforcement agencies;
- ensure the secure, accurate and timely exchange of a broad range of information between law enforcement agencies in accordance with Australian law;
- provide national criminal record checking services for law enforcement and other accredited agencies;
- identify, investigate and develop emerging information technologies, opportunities and information sharing solutions that would provide benefits to law enforcement agencies; and
- develop information sharing solutions that leverage off CrimTrac's core capabilities.

This submission contains the views of CrimTrac as custodian of the Australian National Child Offender Register (ANCOR) and as the agency responsible for development of the Child Exploitation Tracking System (CETS)/Australian National Victim Image Library (ANVIL) business case. This submission does not necessarily represent the views of the Commonwealth, State or Territory governments, or the CrimTrac Board of Management, comprised of Commissioners of Police and a representative of the Commonwealth Attorney-General's Department.

Australian National Child Protection Offender Register

CrimTrac's IGA required the agency to deliver a National Child Sex Offender System. This system is known as the Australian National Child Offender Register (ANCOR). CrimTrac is the custodian of ANCOR and is responsible for the operation, maintenance and further development of the system.

Each State and Territory has enacted legislation (ANCOR legislation) that requires a person sentenced in respect of a registrable offence and subject to a court order to report periodically to Police, advise Police of interstate and international travel plans and submit to periodic risk assessments. This information is held on the ANCOR system enabling police to effectively monitor the movements of those who offend against children. A registrable offence is defined in ANCOR legislation and essentially includes murder, kidnapping, assault, sexual assault, other sexual offences and child neglect. In order to be a registrable person the victim of the offence must have been a child.

The existing child sex offences contained in the Crimes Act 1914 and the Criminal Code Act 1995 (the criminal code) are specifically referenced in the definition of Class 1 and Class 2 registrable offences in the ANCOR legislation of the States and Territories. This is because the States and Territory Police Service Child Protection Units enter information about registrable offenders onto the ANCOR for all relevant offences that are prosecuted in their jurisdictions.

CrimTrac understands that existing offences under the Crimes Act 1914 that are being moved to the criminal code and the proposed new sexual offences against children created under the Bill will not be registrable offences for the purposes of ANCOR until corresponding amendments are made to ANCOR legislation at the state and territory level.

Child Exploitation Tracking System/Australian National Victim Image Library

The Ministerial Council for Police and Emergency Management – Police (MCPEMP) Senior Officer's Group (SOG) has requested that CrimTrac develop a business case for the introduction of an Australian National Victim Image Library (ANVIL) to effectively manage child exploitation material for the purposes of enhancing inter-jurisdictional collaborative efforts in child exploitation investigations. This will improve law enforcement opportunities to identify and rescue child victims of sexual exploitation; more effectively identify offenders; and support Australian commitments to prevent crimes against children by contributing to overseas investigations.

The ANVIL will be delivered as part of the introduction of the Child Exploitation Tracking System (CETS). Subject to approval of the proposed business case CETS will be hosted by CrimTrac. The CETS business case will be delivered by CrimTrac, the Australian Federal Police and Queensland Police Service to MCPEMP-SOG in April 2010, and MCPEMP in June 2010.

During the development of the business case CrimTrac has identified an issue of concern to the agency as the likely host of child exploitation material (CEM) under the existing Division 474, of the criminal code.

The criminal code (proposed Subdivision D of the Bill) provides for offences relating to use of carriage services for child pornography material or child abuse material. Specifically CrimTrac has concerns that employees of the agency may fall within the offence provisions of:

- s474.19 (using a carriage service for child pornography);
- s474.20 (possessing, controlling, producing, supplying or obtaining child pornography for use through a carriage service);
- s474.22 (using a carriage service for child abuse material); and
- s474.23 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service).

Child exploitation material to be held in CETS/ANVIL will include child abuse material and child pornography images as defined in s473.1. Therefore CrimTrac as host of the CETS/ANVIL will potentially commit offences against the code as the agency will:

- access material (in accordance with the definition in s473.1), transmit, make available, publish, and distributes child abuse material and child pornography using a carriage service to police services; and
- be in possession and control (in accordance with the definition in s473.2) and will produce, supply or obtain (in accordance with the definition in s473.3) child abuse material and child pornography using a carriage service to police services.

The proposed s473.5 which provides the circumstances in which a person is taken not to have used a carriage service does not assist CrimTrac as the agency does not fit within the definitions of a carrier, a carriage service provider, an internet service provider or an internet content host. Therefore CrimTrac would be taken to use a carriage service in engaging in the prohibited conduct.

Nor does CrimTrac appear to be able to avail itself of the defences under s474.21 and s474.24 or under s10.5 (lawful authority). The defence provisions under s474.21 and s474.24 provide that a person is not criminally responsible if the conduct engaged in is for the public benefit, which is defined under s474.21(2) and s474.24(2) as:

- enforcing a law of the Commonwealth, a State or a Territory; or
- monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory...

Whilst CrimTrac supports police services in enforcement of or investigation of contraventions of the law through the provision of information services, the agency has no general enforcement or investigative function under legislation or the IGA. In particular instances the agency has been defined as a law enforcement agency such as under Part VIIC of the Crimes Act 1914 in order for the agency to receive information about spent convictions and subsequently disclose that information for the purposes of providing national police checking services.

CrimTrac employees are not able to avail themselves of a defence under s474.21(3) or s474.24(3) as they are not law enforcement officers within the definitions provided under the code.

It is not clear that a defence of lawful authority under s10.5 would necessarily be available to CrimTrac in the present circumstances.

It is CrimTrac's submission that any amendment to the legislation should include a provision that contemplates the existence of a database of such images and information for the use of law enforcement agencies. Such a provision would need to contemplate that child abuse and child pornography information may be hosted by a government agency whose functions do not fit strictly within the current public benefit definitions, and that public servants who are not law enforcement officials may cause these images to be transmitted for law enforcement purposes.