



**Australian Government**  
**Attorney-General's Department**

4 October 2017

# **Senate Legal and Constitutional Affairs Legislation Committee**

## **Inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017**

**Attorney-General's Department Submission**

## Summary

The Government is committed to protecting the community from the risks posed by child sex offenders, and ensuring that penalties for Commonwealth child sex offences appropriately reflect the severity of these crimes. To deliver on this commitment, on 13 September 2017 the Government introduced the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (the Bill).

The reforms target all aspects of the child sex offender cycle—from the commission of the offence through to bail, sentencing and rehabilitation. This comprehensive approach will ensure that the child sex offences reflect the severity of these crimes.

The measures proposed in the Bill will:

- increase the length of sentences for Commonwealth child sex offenders to reflect the gravity of these offences and strengthen sentencing and parole outcomes for all Commonwealth offenders, including those convicted of a Commonwealth child sex offence
- ensure all Commonwealth child sex offenders are supervised and placed under appropriate conditions once released
- criminalise emerging forms of child sexual abuse, including through the use of the internet
- update the terminology used in Commonwealth legislation to better reflect the seriousness of child sexual abuse, and
- improve protections for vulnerable witnesses.

The Bill complements a broader package of reforms aimed at criminalising child sexual abuse and strengthening protections for the community—including the tough new measures to stop child sex offenders from travelling overseas to commit criminal acts against children introduced under the *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* and the recent introduction of Carly's Law, which targets online predators preparing or planning to cause harm to, procure, or engage in sexual activity with a child (*Criminal Code Amendment (Protecting Minors Online) Act 2017*).

The Bill is consistent with recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and complements the work of Commonwealth, state and territory governments through the Ministerial Council for Police and Emergency Management child sex offender reform working group.

The Bill was developed in consultation with the Australian Federal Police, the Commonwealth Director of Public Prosecutions and the Department of Immigration and Border Protection. A summary of the Bill is **Annexure A**.

## Policy rationale

Advances in technology, and increasing access to those technologies, is facilitating a progressive increase in the number of charges and prosecutions for online sexual abuse of children. Offenders are using more technologically sophisticated networks to distribute child sexual abuse material, using the dark web,

encryption and online ‘cloud’ storage. For example, in 2016 the *Internet Watch Foundation* reported that 1,572 commercial child sexual abuse websites were found to be using sophisticated anonymity technologies to hide their presence, an increase of 112% from the 743 disguised websites identified in 2015.<sup>1</sup>

Australia’s laws should reflect the changing landscape of offending, and appropriately reflect the impact that online sexual abuse can have on child victims. Penalties should adequately reflect the severity of the offences.

Statistics on current Commonwealth child sex offences demonstrate the low rate of convictions resulting in a custodial sentence—meaning the majority of convicted offenders are released into the community. For example:

- Only **59%** of charges relating to child sex offences resulted in a custodial sentence.
- **27%** of charges resulted in a period of imprisonment which was fully suspended.
- Since 2010, the use of a community service order (or similar sentencing alternative) has increased dramatically as a sentencing option from 0.69% in 2010/11 to 12% in 2016/17.

The Government believes that current approach to sentencing results in outcomes that are manifestly inadequate for Commonwealth child sex offences, and do not appropriately reflect the gravity of the offences or provide sufficient protection for the community. The current average maximum sentence for all Commonwealth child sex offences is 18 months. Of the 59% identified above that result in a custodial sentence (taking into account non-custodial sentencing options and release on parole), the average period of time each convicted child sex offender spends in custody is approximately 6 months.

Inadequate sentences do not sufficiently recognise the harm suffered by victims of child sex abuse. For example, the Bill addresses the myth that child sexual abuse material offences are a ‘*victimless*’ crime by criminalising emerging uses of technology to facilitate dealings in child abuse material and ensuring that the terminology and sentences for these offences reflects the gravity of the offending. Behaviour such as accessing and transmitting child sexual abuse material encourages the market demand for, and commercialisation of, child abuse material and leads to further physical and sexual abuse of children, in addition to the harm suffered in the production of that material.

A more detailed analysis of sentencing statistics, undertaken by the Department, is at **Annexure B**.

## Prosecution of the sexual abuse of children

### New offences

The Bill introduces new offences including the offences for third party postal and online grooming and the provision of electronic services to facilitate child abuse material.

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<sup>1</sup> *Annual Report 2016*, Internet Watch Foundation (published 3 April 2017) <https://www.iwf.org.uk/report/2016-annual-report>.

### **Grooming of a third party through a carriage service or postal service**

‘Grooming’ in its more general context refers to behaviours deliberately undertaken with the aim of facilitating sexual contact with a child. This may occur online, by phone or in person.

The Bill will amend the Criminal Code to make it an offence to groom a third party with the intention of facilitating sexual contact with a child where it occurs over a carriage service or postal service. For example, this may include using the internet to groom a parent or guardian or a person who has care, supervision or authority over a child.

### **Electronic service offence**

The Bill will amend the Criminal Code to make it an offence for a person to provide an electronic service (for example, a website, peer to peer network or dark web service) with the intention that the service be used for accessing child abuse material. Providing an electronic service includes: creating, developing, altering, maintaining, controlling, moderating, making available, advertising or promoting an electronic service, or assisting to do any of these actions.

### **Amendments to current Commonwealth child sex offences**

#### **‘Live streamed’ child sexual abuse**

The Criminal Code will be amended to clarify that live streamed child sexual abuse is captured under existing Commonwealth child sexual abuse offences.

#### **Subjecting a child victim to cruel, inhuman or degrading treatment or death as a result of physical harm in connection with the sexual activity**

The Bill will introduce a new aggravated offence where an offender, while committing an offence relating to sexual activity with a child, subjects the child to cruel, inhuman or degrading treatment, or where the child dies as a result of physical harm suffered in connection with the sexual activity. This new offence will complement existing aggravated offences under the Criminal Code, which apply when a child has a mental impairment or when a child is under the care, supervision or authority of the perpetrator.

#### **Amalgamating definitions relating to child abuse material**

The *Criminal Code* and other Commonwealth legislation currently distinguish between ‘child abuse material’ and ‘child pornography material’. Including the term ‘pornography’ in this description diminishes the seriousness of the offence and the harm inflicted on the children depicted in that material. Pornography generally refers to images of sexual activity between consenting adults.

Accordingly, the Bill repeals existing references to ‘child pornography material’ and combines the current definitions of ‘child abuse material’ and ‘child pornography material’ into a single definition of ‘child abuse material’.

## **Presumption against bail**

The presumption against bail is designed to protect the community from child sex offenders while they await trial or sentencing. The presumption will apply in two instances—where a person is charged with a ‘first strike’ offence (under section 16AAA of Schedule 6), and where a person is a repeat offender and subject to the ‘second or subsequent’ mandatory minimum penalties (under section 16AAB).

The presumption is reasonable and proportionate as it applies only to the most serious child sex offences and in circumstances where an offender would be facing a mandatory minimum penalty if convicted on a second or subsequent offence. The presumption is rebuttable and allows for judicial discretion in determining whether the risk to the community of a person being released on bail can be mitigated through appropriate bail conditions.

The Bill sets out a non-exhaustive range of factors that the court may consider in determining bail for child sex offences. For example, whether the bail authority considers that the person would be likely to commit further offences, intimidate witnesses or destroy evidence.

## **Vulnerable witnesses**

The Bill removes the requirement for vulnerable witnesses to be available to be cross-examined at committal proceedings. There is currently no restriction on whether a vulnerable witness can be cross-examined at committal proceedings (or proceedings of a similar kind) and few restrictions on the scope of questioning permitted in committal proceedings.

By prohibiting cross-examination at committal proceedings or proceedings of a similar kind, vulnerable witnesses will be spared an additional risk of re-traumatisation. Under the current legislation, vulnerable witnesses may be required to give evidence twice and often in distressing, combative environments. The measures will contribute to streamlining criminal justice processes by ensuring cross-examination is reserved for trials only, and not committal proceedings or proceedings of a similar kind.

The Bill also removes the requirement for the court to grant leave before admitting a video recording of an interview of a vulnerable witness as evidence in chief. These measures will bring the Commonwealth broadly into line with the practice in other Australian states and territories.

## **Reforms to remedy insufficient sentencing outcomes of child sex offenders**

### **Introduction of new minimum and increased maximum penalties**

The Bill introduces mandatory minimum sentences for the most serious child sex offences under the *Crimes Act 1914* that attract the highest penalties—including offences relating to the use of a carriage service or postal service, and offences relating to the sexual abuse of children overseas.

Mandatory minimum penalties will also apply to child sex offenders previously convicted of a separate child sex offence (including state and territory offences) (repeat offenders). This measure is designed to reflect the risk that repeat offenders pose to community safety.

For all offences that attract a mandatory minimum penalty, that mandatory minimum penalty has been calculated in the Bill at 25% of the maximum penalty for the offence. This means that the head sentence (defined as the overall period of imprisonment, not just the period of time spent in custody) must be no less than the prescribed mandatory minimum penalty. Where a person is charged with more than one offence, the highest applicable mandatory minimum penalty will apply as the absolute minimum head sentence.

Courts will retain appropriate discretion in determining sentences while still observing relevant statutory requirements and sentencing principles. Courts will be able to exercise discretion to:

- reduce the mandatory minimum penalty on the basis of a guilty plea
- reduce the mandatory minimum penalty on the basis of an offender's cooperation with law enforcement, and
- determine the appropriate non-parole period for an offender.

The mandatory minimum penalties will not apply to people under the age of 18 when the relevant offence was committed while they were under the age of 18.

The Bill increases the maximum penalties for offences under the *Criminal Code* relating to the sexual abuse of children outside Australia and offences committed through the use of online and postal services. The penalties for sections 272.9(1), 272.9(2), 474.25A (1) and 474.25(2) (sexual activity other than sexual intercourse) will now attract a maximum penalty of 18 years. The proposed maximum penalty for these offences reflects the relative seriousness of conduct. The penalties differentiate between conduct that is preparatory to sexual activity (such as procuring and grooming), conduct where an offender engages in *sexual activity* with a child (including activity of a sexual or indecent nature, activity that does not require physical contact between people, and online sexual activity) and conduct which requires the offender to have *sexual intercourse* through physical contact with a child (including penetration and oral intercourse). Offences preparatory to engaging in sexual activity with a child (such as grooming and procuring) attracts a maximum penalty of 15 years' imprisonment for; sexual activity that does not involve sexual intercourse attracts a maximum of 18 years imprisonment; and engaging in sexual intercourse with a child (section 272.8) attracts a maximum penalty of 20 years' imprisonment.

The Bill also increases the maximum penalty for offences committed by internet service providers that fail to report child abuse material to the Australian Federal Police when the service provider becomes aware that the service provided can be used to access child abuse material. This offence allows for prosecution where service providers do not cooperate with police to identify child abuse material.

The proposed introduction of mandatory minimum sentences and increased penalties for child sex offences reflect the significant threat that the offenders pose to community safety and the significant, long term harm to children.

To assist the Committee, the department provides the below scenarios to assist in the understanding of the operation of the mandatory minimum penalty scheme.

#### **Example 1 – ‘First strike’ offence**

Person A is being sentenced for two offences under section 474.25A of the *Criminal Code* (using a carriage service for sexual activity with person under 16 years of age – maximum penalty of 18 years’ imprisonment). The mandatory minimum penalty for a single offence under this section is 5 years. Accordingly, the minimum head sentence is 5 years.

#### **Example 2 – Second or subsequent offence**

Person B is being sentenced for one offence contrary to section 474.27A(1) (using a carriage service to transmit indecent communication to persons under 16 – maximum penalty of 10 years’ imprisonment) and two other offences under section 474.22 of the *Criminal Code* (using a carriage service for child abuse material – maximum penalty of 15 years’ imprisonment). The offender has previously been convicted for a state possession of child sexual abuse material offence.

The minimum mandatory penalty for a single offence under section 474.27A is 3 years and the minimum mandatory penalty for a single offence under section 474.22 is 4 years. In determining the head sentence, the highest minimum penalty will be the lowest head sentence the person can be sentenced to. Accordingly, it will be a minimum of 4 years.

### **Sentencing factors for Commonwealth offenders**

#### **Sentencing factors applying to all Commonwealth offenders**

The Bill will amend the current sentencing factors applying to all Commonwealth offenders under the Crimes Act to ensure that the benefit to the community, or any victim of, or witness to, the offence, and the timing of a guilty plea, can be taken into account for Commonwealth offenders. Additionally, if a person has used good community standing in the commission of the offence then this will be regarded as an aggravating factor on sentencing.

#### **Sentencing factors applying specifically to Commonwealth child sex offenders**

The Bill sets out factors the Courts must have regard to when sentencing a person for Commonwealth child sexual abuse offences relating to the use of a carriage service or postal service for the purpose of engaging in sexual activity with a person under 16 years of age, and offences relating to the sexual abuse of children overseas. As aggravating factors this includes whether the victim is under the age of 10 years, the number of people involved in the criminal act, and the age and maturity of the victim or intended victim.

### **Presumption in favour of cumulative sentencing**

The presumption in favour of cumulative sentencing will require that, when sentencing an offender for a Commonwealth child sex offence, a court must not make an order that has the effect that a term of

imprisonment for that offence would be served partly cumulatively, or concurrently, with an uncompleted term of imprisonment.

The presumption in favour of cumulative sentences operates where a person is being sentenced for multiple Commonwealth child sex offences or Commonwealth child sex offences in addition to a state or territory registrable child sex offence.

The objective of the presumption is to act as a yardstick against which to examine a proposed sentence of an offender for multiple child sex offences, to ensure that the effective sentence represents a tougher response to the objective seriousness of the sexual abuse of children.

Discretion is still retained for a court to consider the outcome for all the offences in totality and, if appropriately satisfied, order the sentence in a different manner, provided that the sentence overall is still of an appropriate severity. In these circumstances, the new measures will require the court to provide reasons for deviating from the presumption in favour of cumulative sentencing.

## **Balancing justice outcomes and reducing the impact on victims of child sexual abuse**

### **Ensuring Commonwealth offenders are more accountable for breaches of parole or license**

#### **Revocation of parole without notice on community safety grounds**

Currently, unless certain circumstances apply, before the Attorney-General can revoke a person's parole order or licence, he or she must be notified of the specific conditions the person is alleged to have breached and given 14 days to respond. This time lag between when a person is notified of the intention to revoke and the actual revocation and subsequent imprisonment of the person is problematic if it is believed the person poses a danger to the community. In particular, it gives the person an opportunity to commit further offences or even to abscond.

To address this, the Bill introduces into the list of exceptions an ability to revoke parole where the Attorney-General is of the opinion that revocation without notice is necessary in the interests of ensuring the safety and protection of the community or of another person. Importantly, after parole has been revoked and the offender remanded in custody, that offender retains the opportunity to make a written submission to the Attorney-General as to why the parole order or licence should not be revoked. If the Attorney-General is satisfied of those reasons the offender would be immediately released from custody.

#### **Clean street time amendments**

Currently, offenders released into the community on parole or licence who reoffend have their parole order or licence revoked automatically on sentencing for the new offence. In such cases, the person is liable to serve that part of the sentence that was outstanding at the time of their release, but are given credit for 'clean street time'. Clean street time includes the time between reoffending and sentencing for the new offence (often a period of many years).

The Bill introduces a federal 'clean street time' policy which links revocation of a parole order or licence to the time the new offence was committed. This will ensure that a person is only rewarded for good behaviour and that the consequences of breaching parole or licence are adequately reflected in sentencing.

### **Restriction of information in certain circumstances when deciding to grant parole**

The Bill restricts the information to be provided to a parolee as part of the parole decision making process where release of that information would be likely to prejudice national security. It is in the public interest to restrict certain information used as part of a parolee's decision to release an offender from custody. For example, information may be provided to the department which relates to ongoing intelligence matters or investigations. The release of that information to the parolee could jeopardise not only ongoing matters but put the community at risk where that information relates to the capabilities or methodology of law enforcement or intelligence agencies.

### **Engagement with human rights**

The Bill is designed to protect the rights of children, in particular the right to be protected from sexual abuse. Many of the measures in the Bill promote the principles underpinning, and the fundamental rights and freedoms protected by, the Convention on the Rights of the Child and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. This is particularly true of those measures that criminalise emerging forms of child sexual abuse as well as those that introduce aggravated offences relating to cruel, inhuman or degrading treatment in connection with sexual abuse, introduce and enhance vulnerable persons provisions, increase the maximum penalties for certain child sex offences and introduce mandatory minimum penalties for serious child sex offences.

## Annexure A: Summary of the Bill

In meeting the challenges above, the Bill amends the *Crimes Act 1914* by:

- Amending the vulnerable witness protection measures to remove the requirement to seek leave for the use of pre-recorded interviews and to prevent children and other vulnerable witnesses from being cross-examined at a committal proceeding.
- Introducing a presumption against bail for certain Commonwealth child sexual offences.
- Including additional factors which must be taken into account when sentencing federal offenders to ensure they are appropriate given the nature of the offending.
- Creating a presumption in favour of an actual term of imprisonment.
- Requiring that a court, when making a recognizance release order for a child sexual offender, must set supervision conditions, and must set rehabilitation treatment conditions unless inappropriate.
- Including a presumption in favour of cumulative sentences.
- Adding 'residential treatment orders' as an additional sentencing alternative.
- Reducing the amount of 'clean street time' that can be credited by a court as time served against the outstanding sentence following commission of a further offence by a person on parole or licence.
- Listing community safety as a factor that can be taken into account to revoke a federal offender's parole without notice.
- Requiring a period of time to be served in custody if their parole order is revoked.
- Restricting the need to provide offenders with information that has been taken into account when determining whether an offender should be released on parole if provision of the information is likely to prejudice national security.
- Introducing mandatory sentencing for certain Commonwealth child sex offences (includes increases in penalty for certain offences to ensure that it fits within the mandatory penalties, or if not, receives an increase to balance its exclusion) and repeat offenders.

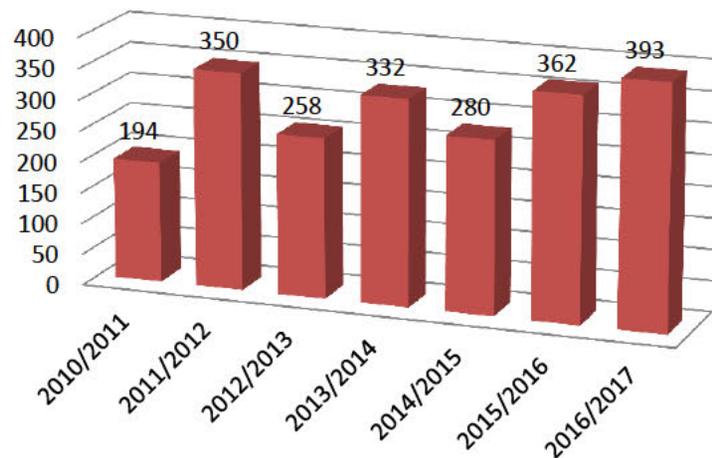
The *Criminal Code 1995* will be amended by:

- Increasing penalties for certain offences.
- Adding an offence of providing electronic services to facilitate dealings with child abuse material.
- Adding an offence of 'grooming' third parties using the post or a carriage service to procure children for sexual activity.
- Clarifying that live-streamed child abuse is captured in existing Criminal Code offences.
- Including additional 'aggravating factors' for engaging in sexual activity with a child for divisions 272 and 474.
- Including additional aggravating sentencing factors that apply to relevant offences when the child victim is under the age of 10, or when multiple persons are present, at the time of offending.

The Bill will also amend Commonwealth legislation to remove references to '*child pornography material*' and replace these with '*child abuse material*'. This will amend the above two Acts in addition to minor consequential changes to the *Customs Act 1914* and the *Telecommunications (Interception and Access) Act 1979*

## Annexure B - Commonwealth child sex offending statistics 1 July 2010—1 July 2017

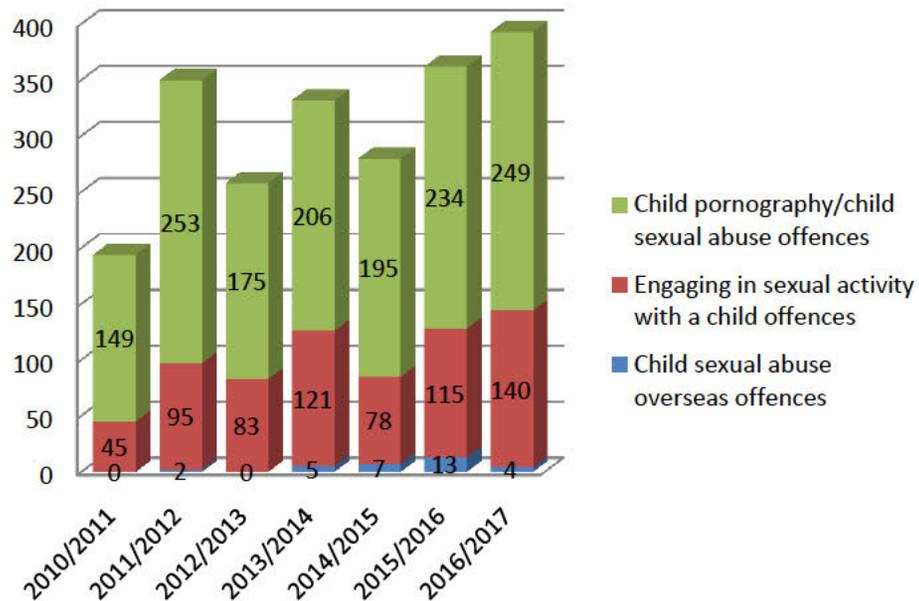
### Total charges laid per year



### Key observations

- A considerable portion of Commonwealth child sexual abuse offences charged since 2010 are child pornography or child abuse material offences (**67%**) (conduct of engaging in sexual activity offences forms approximately 31%; child sexual abuse overseas approximately 1%).
- **39%** of the total convictions for child pornography and child abuse material resulted in a custodial sentence.
- **63%** of the total convictions for conduct of engaging in sexual activity with a child resulted in a custodial sentence.
- **72%** of the total convictions for child sexual abuse overseas resulted in a custodial sentence.

### Total charges per offence type per year



### Conviction and plea rates

- **90% conviction rate** (charges proven) for Commonwealth child sexual abuse offence charges.
- The conviction rate has on average increased yearly for all types of Commonwealth child sexual abuse offences, from July in 2010 to July in 2017.
- In **87%** of cases a defendant enters a plea of guilty.
- Total of persons convicted since 1 July 2010 is **1589** by the CDPP (does not include persons convicted by State DPPs for Cth charges).

### Highest applicable penalty

- **59%** of charges resulted in a custodial sentence.
- **27%** of charges resulted in a period of imprisonment which was fully suspended.
- The use of a community service order (or similar sentencing alternative) has on average increased since 2010 (2010/11: 0.69%, 2014/15: 12%, 2016/17: 12%).
- **1.8 years** is the average custodial sentence length for Commonwealth child sex offences.