



Australian Government

Department of Home Affairs



Australian Government

Attorney-General's Department

Submission to the Inquiry into the Combating Child Sexual Exploitation Legislation Amendment Bill 2019

Senate Standing Committee on Legal Constitutional Affairs

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Introduction

This is a joint submission from the Department of Home Affairs and the Attorney-General's Department.

Both departments thank the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the opportunity to make a submission on the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the Bill).

The Bill increases the protection of children by responding to key recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), and addressing operational difficulties the Australian Federal Police, the Australian Border Force and the Commonwealth Director of Public Prosecutions are facing in investigating and prosecuting new trends in child exploitation.

This submission provides responses to issues raised in the public submissions published on the Committee's website by 5 March 2019. Both departments note the submissions expressed strong overall support for measures in this Bill.

Points raised on the Bill

Schedule 1 – Failing to protect children from, or report, child sexual abuse offences

Purpose

Schedule 1 of the Bill creates new offences of failure to report, and failure to protect children from, a child sexual abuse offence.

These offences have been introduced in response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse's *Criminal Justice Report*, which found these offences were required to incentivise the reporting and prevention of child sexual abuse. While these recommendations were directed at State and Territory governments, the introduction of offences directly applicable to Commonwealth officers is necessary and appropriate given the various capacities in which such officers engage with children. The Commonwealth also has a responsibility to ensure the safety and wellbeing of all children who are within the care, supervision or authority of its officers.

Definition of 'child sexual abuse'

In its submission to the Committee, the Australian Lawyers Alliance (ALA) expresses support for the new offences in Schedule 1. However, the ALA recommends that, in addition to sexual abuse, the Bill be expanded to protect against non-sexual abuse, such as physical abuse and psychological abuse.

Schedule 1 implements the Royal Commission's recommendations by introducing offences that are designed to protect children and bring to light sexual abuse that has occurred. Sexual abuse against a child is a particularly egregious crime that often leads to lifelong and intergenerational damage.

The Government recognises that physical abuse and psychological abuse can be incredibly traumatic and often precursors to, or associated with, sexual abuse. These other forms of abuse are required to be reported by people employed in certain professions under State and Territory mandatory reporting schemes.

Application to Commonwealth institutions

The ALA suggests that the failure to report offence should apply to Commonwealth institutions in addition to Commonwealth officers.

The failure to report and failure to protect offences are directed at Commonwealth officers as individuals who engage with children in various capacities. This is necessary and appropriate, as individuals are the ones most likely to witness or suspect child sexual abuse and need to act. The proposed definition of 'Commonwealth officer' in section 273B.1 would capture the most senior people within a Commonwealth institution, including the Minister and departmental Secretary. Further consideration would be needed to extend the failure to report and failure to protect offences to institutions.

As the Explanatory Memorandum to the Bill notes, the Royal Commission identified underreporting as a significant barrier to victims and survivors of child sexual abuse accessing justice. Children are likely to have fewer opportunities and less ability to report the abuse to police or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of persons charged with providing care, supervision or authority.

The National Office for Child Safety (the National Office) provides national leadership, working across governments and sectors, to deliver national policies and strategies to enhance children's safety and reduce future harm to children. The National Office leads the development and implementation of a number of national initiatives, one example of which is the Commonwealth Child Safe Framework (the Framework).

The Framework provides a consistent and transparent approach to child safety for Commonwealth entities. The Framework sets minimum standards for creating and embedding child safe practice and culture in Commonwealth entities, by requiring them to:

1. Undertake risk assessments annually in relation to their activities, to identify the level of responsibility for, and contact with, children and young people, evaluate the risk of harm or abuse, and put in place appropriate strategies to manage identified risks.
2. Establish and maintain a system of training and compliance to make staff aware of and compliant with, the Framework and relevant legislation, including Working with Children Checks and mandatory reporting requirements.
3. Adopt and implement the National Principles for Child Safe Organisations within 12 months of the Council of Australian Governments endorsement.

The Framework is also being rolled out to include requirements for third parties funded by the Commonwealth.

Schedule 2 – Possession of child-like sex dolls etc.

Purpose

Schedule 2 aims to ensure that Commonwealth legislation prohibiting dealings with child pornography material and child abuse material is comprehensive, technology-neutral and future-focused by combating the new trend of child-like sex dolls. These objects are used to simulate sexual intercourse with children, and can be extremely life-like in appearance. They may also have built-in functions such as voice and movement capabilities. The Bill explicitly criminalises dealings with child-like sex dolls including possessing, importing, posting and ordering these dolls.

The Australian Institute of Criminology (AIC) recently published a research report¹ on the implications of child-like sex dolls. While this emerging issue requires further research, the AIC notes:

It is possible that use of child sex dolls may lead to escalation in child sex offences, from viewing online child exploitation material to contact sexual offending. It may also desensitise the user from the potential harm that child sexual assault causes, given that such dolls give no emotional feedback. The sale of child sex dolls potentially results in the risk of children being objectified as sexual beings and of child sex becoming a commodity. Finally, there is a risk that child-like dolls could be used to groom children for sex, in the same way that adult sex dolls have already been used.

Under Schedule 2, a person commits an offence if the person possessed a doll or other object that resembles a child or the part of a body of a child, and a reasonable person would consider it likely that the doll or other object is intended to be used by a person to simulate sexual intercourse. The drafting of the offence aims to ensure that Commonwealth legislation for child-like sex dolls is technology-neutral. This will better enable legislation to remain in-step with technological advancements. Objects such as child-like sex silicone parts, child-like sex robots and potentially virtual, holographic and other three-dimensional representations of children that are used to simulate sexual intercourse must be criminalised.

In his submission to the Committee, Professor Jeremy Gans of Melbourne Law School raised concerns around the drafting of the offence for the criminalisation of the possession of child-like sex objects. Professor Gans is concerned with the potential for the offence to capture unintended objects.

¹ Brown R & Shelling J. 2019. Exploring the implications of child sex dolls. Trends & issues in crime and criminal justice No. 570. Canberra: Australian Institute of Criminology.

Only objects that resemble children or parts of children are intended to be captured by the offence. Possession of the object as described will only be criminalised if a reasonable person would consider it likely that that object is intended to be used by a person to simulate sexual intercourse. The words 'sexual intercourse' have been deliberately used, as opposed to the broader 'sexual activity' used elsewhere in the *Criminal Code Act 1995* (the Code). This is because the central focus of Schedule 2 is to capture dolls and other objects designed for sexual functionality and advertised and sold for this purpose. The inclusion of parts in the offence is to reflect that some dolls are sold and shipped from overseas in component parts, to be assembled by the buyer after they arrive in country. The Bill therefore captures a doll or other object that resembles 'a part of the body' of a child, as component parts may not be construed to be 'dolls' on their individual merits.

Definition of 'child pornography material'

Professor Gans has questioned why the amendments to the definition of 'child pornography material' in Schedule 2 do not replicate the existing language in section 473.1 of the Code. The intention of Schedule 2 is to ensure the definition of 'child pornography material' accurately reflects new and emerging kinds of child pornography, chiefly: child-like sex dolls.

The existing test in the Code that the material must depict a child who is engaged in a sexual pose or activity, or is in the presence of a person who is engaged in a sexual pose or sexual activity, and does this in a way that a reasonable person would regard as being offensive, is not suited to objects such as child-like sex dolls. Rather, it is aimed at material such as photographs, pictorial representations and digital images. The requirement that the material must be considered offensive by a reasonable person ensures that depictions can be assessed in their context, and takes into account the varying nature of such images, and the subjectivity inherently involved in assessing material as 'child pornography'.

In contrast, a child-like sex doll is inherently sexual. They contain functioning sexual parts, and are designed to allow the person to simulate sexual intercourse with a child. The Bill intends that it is the functionality of the object that attracts the criminality.

The Commonwealth framework of child pornography material offences covers a range of dealings with child pornography material, primarily in relation to a carriage service, postal service and overseas access. By amending the definition of 'child pornography material' to explicitly include child-like sex dolls, it is clear that dealing with these objects in any of these ways is criminal behaviour.

Fault elements

Professor Gans has inquired as to the fault elements in new section 273A.1 of the Code inserted by Schedule 2 of the Bill. Section 273A.1 must be read in conjunction with section 5.6 of the Code, as it does not specify the applicable fault elements. Paragraph 273A.1(a) attracts the fault element of intent, as possession is a physical element consisting of conduct. That is, to be liable for the offence, the person must have intended to possess the item. Paragraphs 273A.1(b) and (c) attract the fault element of recklessness, as they relate to the circumstances of the item resembling a child and of a reasonable person considering it likely that the item is intended to be used by a person to simulate sexual intercourse. The Government considers that the use of the word 'likely' is not problematic in this context.

Schedule 3 – Possession or control of child pornography material or child abuse material obtained or accessed using a carriage service

Purpose

Schedule 3 of the Bill introduces two new offences: one for the possession and control of child pornography material, and another for the possession and control of child abuse material. In both cases, the material must be in the form of data held in a computer storage device, and must have been obtained via a carriage service (e.g. the internet).

Existing Commonwealth offences criminalise other online dealings in child pornography and abuse material, including transmitting, accessing, distributing and soliciting material, and possessing child abuse material with the intention to deal with it online. The new offences will capture the act of possessing child abuse material, without the added requirement of an intention that the material will then be dealt with via a carriage service.

Definition of ‘material’

In its submission to the Committee, the International Justice Mission (IJM) welcomes the new offences in proposed sections 474.19A and 474.22 of the Criminal Code, as inserted by Schedule 3. However, the IJM suggests amendments to clarify whether these provisions cover situations where live-streamed child abuse material is recorded for later viewing or sharing.

No amendments are necessary to achieve this objective. First, in our view, these situations would be covered by the proposed new Schedule 3 offences as currently drafted – recordings of live-streamed material would clearly be electronic data that was obtained/accessed via a carriage service. Second, there are existing offences in the Code which capture engaging in sexual activity with a child, including through live-streaming. Third, possession of hardcopy, child abuse or child pornography material, including recordings or images, is also criminalised under state and territory laws.

Application to minors

In its submission to the Committee, Yourtown broadly welcomes the Bill to further strengthen the Australian Government’s legal response to the sexual exploitation of children and strongly supports many of the Bill’s elements. Yourtown encourages the Government to not unduly criminalise the conduct of minors under the proposed Schedule 3 offences.

Minors who possess child pornography material or child abuse material may be subject to prosecution for the proposed offences at sections 474.19A and 474.22A. This is consistent with the approach for all Commonwealth offences for child abuse material and child pornography material. Safeguards are in place to prevent the unnecessary prosecution of minors, including section 474.24C of the Code which requires the Attorney-General to consent to proceedings against a minor for offences against Subdivision D of Part 10.6 of the Code, which relate to the use of a carriage service for child pornography material or child abuse material, including the offences in new sections 474.19A and 474.22A.

Police and prosecutorial discretion also plays an important role. The *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process* details factors for prosecutors to take into account before prosecuting minors for criminal offences, including:

- the seriousness of the alleged offence and possible alternatives to prosecution
- the age and maturity and mental capacity of the minor, and
- any unduly harsh effect of prosecution on the minor.

These important safeguards prevent the unnecessary prosecution of defendants under the age of 18 years whilst providing for serious, malicious and exploitative conduct engaged in by a minor to be pursued through prosecution.