



THE UNIVERSITY OF
MELBOURNE

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Senate Legal and Constitutional Affairs Committee

Dear Committee Secretary,

Submission – Inquiry into the Combating Child Exploitation Legislation Amendment Bill 2019

I am a Professor at Melbourne Law School, specialising in all aspects of criminal justice. I am also the author of *Modern Criminal Law of Australia* (2nd ed, Cambridge, 2017), which focusses on statutory criminal law, including the federal *Criminal Code*. I am also the external legal advisor to the Victorian Parliament's Scrutiny of Acts and Regulations Committee, advising on the compatibility of new Victorian bills and regulations, including criminal law statutes, with human rights.

This submission only concerns *Schedule 2 – Possession of Child-like sex dolls etc.* It is mainly concerned with that *et cetera*. I argue that schedule 2 goes beyond its stated purpose, that a key term – 'child-like sex objects' – is inappropriately ambiguous and that the criminal offences in the schedule lack some important elements.

Schedule 2's scope goes beyond its stated purpose

Schedule 2's purpose is described by the Home Affairs Minister's second-reading speech:

The bill also strengthens the Commonwealth framework of offences to ensure a comprehensive, technology-neutral and future-focused response to all forms of child pornography material and child abuse material. In particular, the bill will clarify the law to ensure that the abhorrent new trend of childlike sex dolls, used to simulate sexual intercourse with children, is clearly and robustly stamped out in Australia.

The purpose is further described in the Explanatory Memorandum as follows:

This new form of child sexual abuse material must be clearly criminalised to prevent children from being abused, as the dolls normalise abusive behaviour towards children, encourage the sexualisation of children and increase the likelihood that a person will engage in sexual activity with or towards children. These amendments are intended to further implement Australia's obligations under Articles 19 and 34 of the Convention on the Rights of the Child.

It is additionally described in the Statement of Compatibility this way:

These measures give further effect to Australia's obligations under Articles 19 and 34, as prohibiting the possession, advertising, ordering, posting and importation of child-like sex dolls reduces the risk of child sexual abuse. This is reasonably appropriate and adapted to fulfilling the obligations under these Articles as there are links between the use of child-like sex dolls and actual offending against children. By allowing a person to simulate sexual intercourse with a child, child-like sex dolls normalise abusive behaviour, encourage the sexualisation of children and increase the likelihood that a person will engage in sexual activity towards actual children. Therefore prohibiting child-like sex dolls is necessary and will be effective in preventing and reducing the risk of child sexual abuse.

All of these purposes are limited to prohibiting 'child-like sex dolls'.

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However, all of Schedule 2's new rules apply to a broader category of 'dolls or other objects'. For example, proposed new section 273A.1 states:

A person commits an offence if:

- (a) the person possesses a doll or other object; and*
- (b) the doll or other object resembles:*
 - (i) a person who is, or appears to be, under 18 years of age;*
 - (ii) a part of the body of such a person; and*
- (c) 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.*

Penalty: Imprisonment for 15 years

So, while the stated purposes of schedule 2 are all exclusively about child-like sex 'dolls', schedule 2's actual text covers a broader range of child-like sex 'objects', of which 'dolls' are a subset.

No express justification has been given in the explanatory materials for this bill for its wider application, which includes the creation of a number of serious criminal offences. **I suggest that the Committee seek an explanation for criminalising the possession of child-like sex objects (rather than merely child-like sex dolls) and ask the Minister to include that explanation in the material accompanying the bill.**

The term 'child-like sex object' is ambiguous

Does it matter in practice that schedule 2 is not limited to dolls, but rather extends to all child-like sex 'objects'? I think it might.

The defining feature of a 'doll' is that it is shaped like a person. That matters, because it makes it straightforward to apply the other two defining aspects of a 'child-like sex doll'. First, if a doll is shaped like a person, then it makes sense to ask whether the doll is 'child-like', specifically whether or not it 'resembles' a child (in whole or in part.) You simply look to see if it has features (such as hair or clothing or proportions) that, in total, are child-like. As the explanatory memorandum explains:

Child-like sex dolls vary in facial appearance, proportions, height, size and functionality. A doll or other object may be captured by this paragraph despite possessing one or more adult features, for example developed breasts or make-up. Consideration should be given to the characteristics of the doll in its entirety, including its functionality, proportionality, physical features and anything else that provides context to the purpose and age resemblance of the doll.

Second, if a doll is shaped like a person, then it is fairly straightforward to understand whether or not it is 'intended to be used by a person to simulate sexual intercourse.' The *Criminal Code* defines 'sexual intercourse' to mean vaginal, anal or oral sex.¹ Accordingly, the obvious way to determine this issue will be to examine the doll to see whether it has orifices or an appendage that could be used to simulate a vagina, anus, mouth, penis or finger.

By contrast, it is much harder to assess whether or not a non-doll (i.e. non-person-shaped) 'object' falls within the scope of schedule 2. The first problem is that (depending on the precise meaning of 'resembles') it is possible that a non-person-shaped object could 'resemble' a child or a part of a child, simply because it contains an image of a child (or apparent child), or includes sort of child-like feature,

¹ *Criminal Code* (Cth) s. 272.4 (and see the Dictionary.)

such as images associated with children's clothing or a name associated with a child. The second problem is that (depending on the precise meaning of 'simulate') an object may be considered 'intended to be used by a person to simulate sexual intercourse' simply because it has a shape or surface that can be used for sexual purposes in a way that simulates some form of sexual intercourse. For example, the object could have a size and texture that is designed so that someone can masturbate on or with it in a way that mimics intercourse.

Is there a class of objects that may have an image of a child on it and be used to masturbate in a way that mimics intercourse? According to a number of news reports and academic papers, yes, there is, and such objects are reportedly fairly common in some (arguably innocuous) circles. According to a fairly recent article in *The Conversation* (which is a mainstream, non-prurient publication run by Australian universities that aims to publish accessible academic research), there is a category of objects popular in Japan known as 'sex pillows'.² The article states that there are many different types of these objects, ranging from unusually shaped pillows that are shaped like people in some way (and hence likely fall within the scope of 'dolls') to simple, typically-shaped pillows or cushions with an illustration of a person on them, which are used by consumers to 'make believe' that they are actually people, including to the extent of mimicking physical intimacies or masturbating. Consistently with aspects of Japanese culture (notably 'manga' culture), the pictures on these pillows sometimes (indeed, often) resemble minors.

The question that arises is whether or not schedule 2 is meant to cover the ordinary end of the 'sex pillow' spectrum, i.e. a pillow with an image of a person on it (or added to it via a pillow case) who appears to be a minor and that is intended to be used to masturbate on or with. To put this question another way, is the intention of schedule 2 to criminalise the possession of some pillows in same way as the possession of an anatomically correct 'doll' of a child, including a maximum penalty of fifteen years imprisonment and the possible application of mandatory minimum sentences and registration as a sex offender? The text of schedule 2 is ambiguous on this point. It shouldn't be. **I suggest that the Committee ask the Minister if schedule 2 is meant to make it a criminal offence to possess pillows with images of child-like people on them that are intended to be used to masturbate with.**

Perhaps the answer is yes. **If so, I suggest that the Committee inquire as to whether the Department will give this novel restriction and punishment appropriate publicity.** I note that clause 7 of schedule 2 provides that the new offence applies, not only to possession of objects obtained after the schedule commences, but also to the continuing possession of objects obtained before the schedule commences. That may catch unawares any person who does not recognise that a pillow they presently own falls within the new definition. I also note that clause 9 of the schedule provides that child-like sex objects are 'Tier 2' goods, alongside particular firearms, weapons, radioactive materials, etc. That may catch unawares a person (for example, a visitor from Japan or a returning tourist or someone simply shopping online³) who may bring such a pillow into Australia, unaware that its importation is punishable by up to ten years in prison.

Perhaps the answer is no. Although not definitive, that is the most likely reading of the explanatory memorandum for the new possession offence, which refers to 'robots' and 'similar objects' that clearly do not encompass pillows:

² A Giard, 'In Japan, pillows can be a sex partner', *The Conversation*, 5 July 2017, available at <<https://theconversation.com/in-japan-pillows-can-be-a-sex-partner-79985>>.

³ E.g. <https://www.etsy.com/ie/market/manga_pillow_case>

This offence will, in particular, target the possession of three-dimensional human-like dolls that resemble children and have imitation orifices that are intended to be used for the purpose of simulating sexual intercourse. This offence only applies to conduct in Australia. Paragraph 273A.1(a) requires the person to intentionally possess a doll or other object. This paragraph is not limited to complete dolls and is intended to capture parts of dolls as well as similar objects that are developed using emerging technology such as child-like sex robots.

If so, I suggest that the Committee inquire as to whether this can be made clear through appropriate amendment of the text of Schedule 2. I note that the text of Schedule 2 makes no reference to ‘similar objects’ or to specifics such as ‘imitation orifices’ or ‘child-like sex robots’ that are referenced in the explanatory memorandum. By contrast, the proposed United States offence (which passed the House of Representatives mid-last year and is currently before its Senate⁴) criminalises the possession of ‘an anatomically-correct doll, mannequin, or robot, with the features of, or with features that resemble those of, a minor, intended for use in sexual acts.’ That definition strikes me as a reasonable way of achieving the stated goal of capturing ‘emerging technology such as child-like sex robots’, without the ambiguities of the terms presently used in Schedule 2.

The new offences omit important elements

While my main submission is that the prohibition on ‘child-like sex objects’ has not been expressly justified and is inappropriately ambiguous, I wish to address a broader issue with the new criminal offences in schedule 2 that may exacerbate this problem: the new offences omit an important physical element and may omit important fault elements.

On the physical element side, schedule 2’s design is to treat ‘child-like sex dolls and other objects’ in the same way as child pornography and child abuse material. The second-reading speech generally says:

The bill also strengthens the Commonwealth framework of offences to ensure a comprehensive, technology-neutral and future-focused response to all forms of child pornography material and child abuse material

The explanatory memorandum explains (only with respect to ‘dolls’):

The Bill expands the definition of ‘child pornography material’ in the Criminal Code and the definition of ‘child pornography’ in the Customs Act to respond to an emerging form of child pornography: child-like sex dolls.... The Commonwealth framework of offences covers a range of dealings with child pornography material, primarily in relation to a carriage service, postal service and dealings with child pornography material committed overseas. It is important that these offences are amended to keep pace with the evolving threats posed by paedophiles. The amendments made by the Bill will ensure that these new forms of child pornography are clearly criminalised. By amending the definition of ‘child pornography material’ in the Criminal Code, it will be put beyond doubt that it is criminal to, for example, use a carriage service to advertise or solicit child-like sex dolls, or use a postal service to send child-like sex dolls. Similarly, the Customs Act is amended by the Bill to clarify that child-like sex dolls are a form of child pornography. This will provide certainty to officers at the border, who are responsible for detecting different forms of child pornography, that these objects are prohibited.

Treating child-like sex dolls as child pornography or child abuse material is a good approach. But the problem is that schedule 2 doesn’t do that. Rather, it treats child-like sex dolls (and other objects) differently to all other child pornography and child abuse material.

⁴ H.R.4655 - CREEPER [Curbing Realistic Exploitative Electronic Pedophilic Robots] Act of 2017. See < <https://www.congress.gov/bill/115th-congress/house-bill/4655/text>>.

The *Criminal Code* presently defines ‘child pornography material’ as follows:⁵

"child pornography material" means:

- (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:*
 - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or*
 - (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;**and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*
- (b) material the dominant characteristic of which is the depiction, for a sexual purpose, of:*
 - (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or*
 - (ii) a representation of such a sexual organ or anal region; or*
 - (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;**in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*
- (c) material that describes a person who is, or is implied to be, under 18 years of age and who:*
 - (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or*
 - (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;**and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or*
- (d) material that describes:*
 - (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or*
 - (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;**and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.*

As you can see, there is a common element to all of these current definitions: an offensiveness test. The same is true for each part of the definition of ‘child abuse material’. And it is also true in all Australian states and territories for their definitions of child pornography and the like. The purpose of the offensiveness test is to ensure that the definition doesn’t inadvertently cover material that reasonable people may regard as acceptable material, e.g. discussions of child rape, or about teenage sex, or indeed Japanese comics.

However, clause 8 (and equivalent language elsewhere in Schedule 2) has no offensiveness test. Instead, there is a test of whether the doll or object is likely to be used to simulate sexual intercourse.

⁵ *Criminal Code* (Cth), s. 473.1.

I suggest that the Committee ask the Minister why clause 8 lacks an equivalent to the offensiveness test in paras (a)-(d) of the current definition of child pornography material. It may be that the Minister considers that such a test is unnecessary in the case of child-like sex dolls. However, depending on the Minister's answers to other questions, a separate question may arise: is such a test nevertheless necessary in the case of other child-like sex objects, including potentially child-like sex pillows, in light of their apparent social acceptability in Japan and perhaps elsewhere.

On the fault element side, the new possession offence (and other offences added by Schedule 2) may lack subjective fault elements corresponding to the key elements of the offence. Section 273A.1 states:

A person commits an offence if:

- (a) the person possesses a doll or other object; and*
- (b) the doll or other object resembles:*
 - (i) a person who is, or appears to be, under 18 years of age;*
 - (ii) a part of the body of such a person; and*
- (c) 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.*

Penalty: Imprisonment for 15 years

Like all federal criminal offences, this must be read with s. 5.6 of the Code, which states:

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.*

The purpose of s. 5.6 is to ensure that all offences attract the usual subjective fault elements of intent or recklessness unless Parliament provides otherwise.

The explanatory memorandum for s273A.1 says (correctly, I think):

Paragraph 273A.1(a) requires the person to intentionally possess a doll or other object.

This follows from s. 5.6(1). However, this only requires proof that a person meant to possess a 'doll or object'. It does not require proof that the person was aware that the doll or object was a child-like sex object.

The remainder of the explanatory memorandum does not address whether or not s5.6(2) imposes a test of recklessness for the remaining physical elements of s.273A.1(b) (that the object is or appears 'child-like) or s273A.2(c) (that a reasonable person would likely see it as intended to simulate sexual intercourse.) **I suggest that the Committee ask the Minister whether or not s. 5.6(2) imposes a recklessness requirement for either or both of ss. 273A.1(b) or (c).**

I think it is quite possible that s. 5.6(2) does not apply to either or both of s.273A.1(b) or (c). That is because it is arguable that those provisions 'specify' their own (non-subjective) fault elements. The use of the word 'appears' in s. 273A.1(b) has been understood by some courts as rebutting the availability of either a subjective fault element or even a defence of honest and reasonable mistake of fact in the context of child sex offences.⁶ Likewise, it is reasonably arguable that the language of s.

⁶ E.g. *R v Clarke* [2008] SASC 100.

273A.1(c) (specifically the reasonable person test and the word ‘likely’) is meant to provide a wholly objective test of the question of whether or not a child-like doll or other object is a child-like sex doll or other object. I note that the federal *Guide to Framing Commonwealth Offences* states that the word ‘likely’ ‘should generally not be used’ as ‘[t]his word may interact with the fault elements of recklessness and negligence with unintended consequences.’⁷ **I suggest that the Committee ask the Minister why the word ‘likely’ has been used in s. 273A.1(c) despite the contrary guidance.**

If it is true that s5.6(2) does not apply to either or both of s. 273A.1(b) or (c), then the new offence may be inconsistent with the federal *Guide to Framing Commonwealth Offence*, which provides:⁸

Strict liability and absolute liability can only be applied by an express provision to this effect and can attach to either a single physical element of an offence or all physical elements of an offence.

Applying strict or absolute liability to a particular physical element of an offence may be justified where one of the following applies.

- *Requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking ‘fault’ in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.*
- *The element is a jurisdictional element rather than one going to the essence of the offence.*

Accordingly, if s. 5.6(2) does not apply to either of s.273A.1(b) or (c), then I suggest that the Committee ask the Minister:

- (1) **why there is no express provision that absolute liability applies to the relevant paragraph(s)?**
- (2) **what is the justification for applying absolute liability to the relevant paragraph(s)?**
- (3) **in particular, what is the justification for not making the defence of honest and reasonable mistake of fact (or an equivalent defence) available for the relevant paragraph(s)?**

Possible Committee questions for me

I acknowledge that the Committee has very little time to review this complex law and that my submission raises some surprising and difficult issues. Accordingly, I will conclude my submission by guessing some questions the Committee may have for me and providing some brief responses.

Why am I bringing up sex pillows? I’m not. Minister Dutton has brought them up by adding the ambiguous words ‘or other objects’ throughout Schedule 2, without suitable qualifying language such as ‘other similar objects’ or the US formulation.

Am I in favour of child-like sex pillows? I’m not. If there is a justification for criminalising their possession (and there may well be), then schedule 2 should do that, expressly and unambiguously.

Am I trivialising a serious issue of child abuse? I’m not. Schedule 2 is trivialising this issue by bundling an important and expressly justified ban on child-like sex dolls with an ambiguous ban on ‘other objects’.

⁷ Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, p. 31.

⁸ Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, pp. 22 & 23.

Can't the flaws in Schedule 2 be dealt with by police, prosecutorial and sentencing discretion?

Most likely not. These offences are enforced by a large range of customs officials, police, prosecutors and courts, not all of whom are lawyers and all of whom will rightly regard any breach of such serious offences as a very serious matter. They all rightly expect Parliament's language to be crystal clear on such an important topic.

Won't it be very difficult to draft something that's clearer? It won't. Straightforward options include changing 'other objects' to 'other similar objects' or 'other person-shaped objects', introducing an offensiveness test, or using the language in the US law.

Wouldn't clearer language make it harder to prosecute paedophiles? It won't. The word 'dolls' readily covers a variety of person-shaped child-like sex objects and (if necessary) the problem of child-like sex 'robots' could be expressly dealt with, as it has in the US. Other items that are not person-shaped can be regulated with as child pornography items (depending on the offensive test) or as obscene items or as evidence of past or future child sexual abuse.

I am of course, happy to answer any further questions the Committee has.

Yours Sincerely,

Jeremy Gans