

Combating Child Sexual Exploitation Legislation Amendment Bill 2019

Submission to Senate Standing Committee on Legal and Constitutional Affairs
March 2019

1. Introduction

Shine Lawyers are pleased to be invited to provide this submission in response to the Combating Child Sexual Exploitation Legislation Amendment Bill 2019 (Bill).

This submission addresses the portions of the Bill relating to the measures creating offences for failure to protect a child at risk of child sexual abuse, failure to report a child sexual abuse offence and the strengthening of overseas persistent child sexual abuse laws.

Shine Lawyers supports the creation of criminal offences for officers within Commonwealth institutions who, in the course of their role, fail to prevent or fail to disclose child sexual abuse. This gives effect to recommendations of the Royal Commission. We also agree with the strengthening of the Criminal Code regarding persistent child sexual abuse offences committed by Australians overseas.

2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors seeking redress in every institutional redress scheme in Australia. These include, but are not limited to, the Defence Abuse Response Taskforce, *Victims of Crime Act 2001* (SA), Queensland ex gratia scheme, Tasmanian Abuse in Care ex gratia scheme, the WA Redress, Defence Force Ombudsman reparation scheme, Melbourne Response and Towards Healing.

Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

Neerkol Group Litigation

The claim involved some 80 former orphans of the St Joseph's Orphanage Neerkol, operated by the Sisters of Mercy.

Nudgee Orphanage Group Litigation

This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the Sisters of Mercy.

Brisbane Grammar Sexual Abuse Litigation

This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse as children.

St Paul's Sexual Abuse Group Litigation

The claim involved some 25 former students of St Paul's School in Brisbane who were subjected to sexual abuse during their school years.

Scriven v Toowoomba Preparatory School

This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

Australian Defence Force

Shine Lawyers has represented close to 200 current and former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force. Shine Lawyers worked closely with the legal representatives of the Australian Defence Force to develop a collaborative, cost effective and empathetic process which provides compensation, as well as Direct Personal Responses (apologies and acknowledgement of the harm done). The psychological welfare of the abuse survivor is central to the process.

3. Children's rights are paramount

All children have the right to a safe and happy childhood. Any sexual abuse of children, including in institutional contexts, is a gross violation of a child's rights.

Article 3 of the Convention on the Rights of the Child [1991] ATS 4 (CRC) provides that in all actions concerning children, the best interests of the child shall be a primary consideration. In particular Article 3(2) requires that parties to the Convention ensure children have such protection and care as is necessary for their well-being, taking into account the rights and duties of individuals legally responsible for them.

Article 19(1) of the CRC requires parties to the convention to take appropriate legislative, administrative, social and educational measures to protect children from all forms of abuse and exploitation including sexual abuse and Article 34 requires steps be taken to protect them from all forms of sexual exploitation and sexual abuse.

Criminalising the failure to report abuse or failure to prevent abuse is a clear indication that a Commonwealth officer must put the needs of the child first, and certainly before considerations such as the reputation of the Commonwealth institution. We consider all measures taken in the Bill to be reasonable and necessary in advancing these obligations.

4. Royal Commission recommendations for criminal justice reform

Any person associated with an institution who knows or suspects that a child is being or has been sexually abused in an institutional context should report the abuse to police.¹

Offences requiring people to refrain from perpetrating child sexual abuse exist at Commonwealth, state and territory levels and are aimed at the individual perpetrators of abuse. The purpose of the offences is clearly to require individuals to refrain from conduct amounting to sexual abuse of children and to punish those who do commit child sexual abuse.

¹ Royal Commission into Institutional responses to Child Sexual Abuse, Criminal Justice Report

The Criminal Justice Report 2015 of the Royal Commission recommended that each state and territory introduce offences of failure to report and failure to protect children from a child sexual abuse offence (Recommendations 33 and 36).²

Failure to protect and failure to report child sexual abuse offences are not aimed at the perpetrator of abuse and are not framed in terms of requiring one to refrain from committing child sexual abuse. Instead these offences impose a positive obligation on third parties, that is, persons other than the perpetrator of abuse, to take steps to prevent and to report child sexual abuse.

5. Why are third party offences necessary?

Persons other than the perpetrator and victim of abuse are obliged to report abuse because the perpetrator will not and the child cannot. The Royal Commission described many reasons why children do not report child sexual abuse. Children have less opportunity to report abuse, may be ashamed and fearful, and may not have the language to describe their experience. It is also well known now that it takes many years, perhaps decades for survivors of abuse to report.

In the absence of a third party report, a perpetrator might go on to perpetrate further abuse against children. In this context it is essential to the detection and prevention of child sexual abuse that reports be made and as a society we must place this burden on adults with care, supervision or authority over children.

6. Failure to protect a child at risk of a sexual child abuse offence

The significance of the criminalisation of the failure to protect children from abuse and failure to report abuse cannot be understated. Our clients have told us that when child sexual abuse was reported, their reports were not taken seriously or acted upon. The perpetrator of abuse is not the sole wrongdoer in these circumstances, but also those who were aware these things were happening and failed to act to prevent further abuse.

We note with approval that the Bill introduces an offence in the Criminal Code for a Commonwealth officer who negligently fails to reduce or remove the risk of a child under their care, supervision or authority being sexually abused, if it is part of their actual or effective responsibilities as a Commonwealth officer to reduce or remove that risk.³

We are told by many of our clients that it is not the experience of sexual abuse as children alone which has impacted them. We are told that the refusal to believe a child who comes

² https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/factsheet_-_criminal_justice_report_-_failure_to_report_offence.pdf

³ Explanatory Memorandum, Combating Child Sexual Exploitation Legislation Amendment Bill 2019 (Cth); A person commits an offence if:

- The defendant is a Commonwealth officer (S273B.1a)
- There is another person aged under 18 under the defendant's care, supervision or authority, in the defendant's capacity as a commonwealth officer (S273B.1b)
- The defendant knows there is a substantial risk that a person will engage in conduct in relation to the child under their care, supervision or authority (S273B.1c)
- Such conduct, if engaged in, would constitute a child sexual abuse offence, (S273B.1d)
- The defendant, because of the defendant's position as a Commonwealth officer, as the actual or effective responsibility to reduce or remove that risk, and (S273B.1e)
- The defendant negligently fails to reduce or remove that risk. (S273B.1f).

forward to report abuse to an authority figure, someone responsible for their care and well-being, was just as psychologically damaging as the abuse itself. Failing to act when a child reports abuse is in and of itself something which exacerbates the trauma of the survivor. With these descriptions from our clients in mind, we strongly support the creation of offences at Commonwealth level for failure of Commonwealth officers to protect from abuse and to report abuse. We feel criminalising failures to report abuse goes some way to assuring survivors of abuse that steps are taken to ensure that children reporting abuse in future are believed and that reports of abuse made within an institutional context will be acted upon and reported to police for investigation.

We represent many former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force, including a large number of former child sailors who were abused at HMAS Leeuwin. Measures criminalising the failure to prevent and report child sexual abuse in decades past, may have prevented or reduced the extent of child sexual abuse many of our clients experienced.

As drafted, the duty to protect a child at risk of sexual child abuse does not necessarily require the Commonwealth officer to eliminate all possible risks or to take extraordinary measures. However were Commonwealth officers to have taken the steps a reasonable person would be expected to have taken in circumstances many of our clients were abused, for example at HMAS Leeuwin, the abuse might have been stopped and devastating lifelong impacts avoided.

We note with approval that absolute liability applies to the circumstance that 'such conduct, if engaged in, would constitute a child sexual abuse offence.' As the intention of the recommendations is to impose obligations on third parties to give effect to a child's right to safety, an individual's ignorance of the law of what would constitute a child sexual abuse offence should not excuse their culpability.

7. Failure to report a child sexual abuse offence

In the absence of the introduction of the offences in this Bill, a Commonwealth officer may still commit an offence if they fail to report child sexual abuse under state or territory legislation, mandatory reporting obligations; and/or reportable conduct schemes. The Bill introduces an offence if a Commonwealth officer, who exercises care or supervision over children, knows of information that would lead a reasonable person to believe or suspect that another person has or will engage in conduct in relation to a child that constitutes a child sexual abuse offence and they fail to disclose that information as soon as practicable.⁴

⁴ Explanatory Memorandum, Combating Child Sexual Exploitation Legislation Amendment Bill 2019 (Cth) https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F6291_ems_53785d94-467c-4074-b841-44c62cd75bd5%22;

The proposed subsection 273B5(1) provides that a person commits an offence if:

- The defendant is a Commonwealth officer
- There is another person aged under 18 years under the defendant's care or supervision, in the defendant's capacity as a Commonwealth officer
- The defendant knows of information that would lead a reasonable person to believe that a person has engaged in, or will engage in, conduct in relation to a child
- Such conduct, if engaged in, would constitute a child sexual abuse offence, and
- The defendant fails to disclose the information as soon as practicable after coming to know it, to the police.

There is a public interest in serious crimes including child sexual abuse being reported when they have occurred to allow police to investigate. Due to the nature of child sexual abuse offences, offences often occur in private so bringing incidents of abuse to the notice of police is essential.

Shine Lawyers considers that the creation of this offence appropriately incentivises Commonwealth officers to report child sexual abuse. These offences will contribute to ongoing cultural change within Commonwealth institutions regarding the way in which institutions deal with the risk of child sexual abuse of children under the institutions' care, supervision or authority.⁵

Reasonable belief and reasonable suspicion offences

The Royal Commission considered the appropriate test for failure to report offences. It considered alternative tests (in descending order of mental threshold) as follows:

- failing to report based on knowledge of abuse,
- failing to report based on a reasonable belief of abuse; and
- failing to report based on a reasonable suspicion of abuse.

Criminalising only a failure to report abuse where a person can be shown to have knowledge of abuse would limit the scope of the offence and make the offence difficult to make out. This would be counterproductive to the purpose of the Bill of encouraging and incentivising reporting with a view to preventing child sexual abuse.

Criminalising the failure in cases where there is a reasonable belief held of abuse occurring was thought to encourage reporting of child sexual abuse even in instances where the person making the report may not themselves know that child sexual abuse has or would take place. We note with approval that it requires a lower mental threshold than *knowledge* while still incorporating an objective test, that is, whether the defendant knew of information that would lead a *reasonable person to believe* that a person has or will engage in conduct in relation to a child.

The offence introduced by subsection 273B.5 (2) creates an additional offence based on a lesser mental threshold by the person required to make the report. That is an offence is committed if the person fails to report based on a *reasonable suspicion* that child abuse has or would take place. We note with approval the different maximum penalty applicable in light of the more serious nature of failing to report abuse when a person has a reasonable belief that abuse took place as opposed to merely a reasonable suspicion.⁶

8. Other considerations

The definition of Commonwealth officer for the purposes of the offences the Bill proposes to create is appropriately broad. We note the inclusion of all persons who work for or on behalf of the Commonwealth or a Commonwealth agency including contractors and subcontractors of the Commonwealth or a Commonwealth Authority.

⁵ knowmore, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation paper: Criminal justice, 2016, p 20

We have considered section 273B.9 which protects persons who make a report of child sexual abuse by way of protected conduct. Shine Lawyers agree that those Commonwealth officers who protect children from child sexual abuse and report child sexual abuse ought to be afforded protection where their conduct is genuine and proportionate. Protecting persons who might come forward to report an instance of child sexual abuse should encourage and facilitate Commonwealth officers coming forward, where their ethical and moral obligation has not otherwise caused them to do so.

9. Persistent child sexual abuse offences

Shine Lawyers supports the amendments to the *Criminal Code Act 1995* proposed in Schedule 4 of the Bill relating to persistent sexual abuse of a child outside Australia. We note the Criminal Code already criminalises behaviors including engaging in sexual intercourse or sexual activity with a child overseas and causing a child to engage in sexual intercourse or sexual activity overseas in the presence of the defendant. The Bill proposes to reduce the number of underlying offences which need to be proved to make out the offence of persistent child sexual abuse overseas from three occasions to two.

The Royal Commission outlined difficulties survivors of child sexual abuse experience distinguishing specific incidents of sexual abuse in the context of extensive exploitation or abuse over a long period of time. Reducing the number of occasions from three to two is likely to make the offences more effective without making the trial of an accused perpetrator of abuse unfair.

10. Conclusion

Child sexual abuse has a profound effect and lasting impact on a person's life.

The criminal justice system has a role in justice being done for survivors of abuse and in an ideal world, preventing such abuse. Criminalising the failure to protect children against abuse and the failure to report abuse by officers of Commonwealth institutions is a powerful public statement that Australian society condemns such behaviour.

There is a moral imperative to prevent and report child sexual abuse and that failure to do so ought to be a crime in any Commonwealth institution. It is thought that these offences will operate to prevent child sexual abuse and will assist to bring to light instances of child sexual abuses which have already occurred.

We are grateful for the opportunity to provide our views in this submission. In the event you have any questions regarding this submission, please contact Lisa Flynn, Head of Specialist Personal Injury at _____ or on 13 11 99.