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Submission to the Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth)

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Introduction

- The Australian Institute of Criminology (AIC) is Australia's national research and knowledge centre on crime and justice.
- The AIC seeks to promote justice and reduce crime by undertaking and communicating evidence-based research to inform policy and practice.
- The AIC is governed by the Criminology Research Act 1971 (Cth) and has been in operation since 1973.
- The AIC is pleased to have the opportunity to contribute to the Committee's Inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth).
- The AIC notes that child sex tourism is a serious problem in many less developed countries and Australians have played a significant part in this industry overseas, especially in the neighbouring Asian region (Attorney-General's Department 2009).
- The AIC has conducted and continues to conduct research to contribute towards the evidence base on sexual offences against children, including such offences committed overseas. The AIC is also at the forefront of research on the grooming of children for sexual purposes facilitated by online technologies, particularly social networking sites. In 2009, the AIC sponsored the 8th Asia-Pacific Regional Conference on Child Abuse and Neglect (APCCAN09) of the International Society for Prevention of Child Abuse and Neglect. The Director of the AIC chaired the Conference.

Key points from AIC research

- Australians were the first foreigners to be prosecuted for child sex offences in Thailand, the Philippines, Fiji, Samoa and East Timor (Flanagan 2004).
- It is not known whether child sex tourism legislation has any real deterrent effect on Australians determined to have sex with children overseas, but there have been several successful prosecutions for such offences that would previously have been beyond the reach of Australian law (David 2000).
- There is no clearly defined relationship between the possession and use of child pornography and the commission of sexual offences against children although the production of child pornography of course entails the commission of a range of crimes against children.
- There is no common international definition of child pornography (Krone 2009a).
- Most Australian jurisdictions have legislation in place that criminalises online child grooming for the purposes of sexual contact (Urbas & Choo 2008).
- Offenders use various types of technologies to facilitate their grooming activities, and often carry out their conduct over months before they arrange a physical meeting (Choo 2009a).
- While a legislative approach is useful to keep children safe in the online environment, it is unlikely that law enforcement alone can cause a noticeable reduction in the online child-grooming statistics, making non-legislative responses crucial in improving internet safety for children (Choo 2009b). Non-legislative responses include major social networking sites working proactively with law enforcement agencies to protect children against sexual offenders online, and the development of software to locate and identify perpetrators and the distributors of child abuse materials (e.g. the establishment of the Technology Group Against Child Pornography that seeks to evaluate specific and emerging technologies used by sexual offenders in their child exploitation activities in 2006).
- There is a need for research to assess risks of displacement arising from new legislation and to understand any unintended consequences of criminalisation of online child exploitation (AIC 2009).

Comments on the Bill

- Overall, the AIC welcomes provisions which strengthen the international protection of children from sexual abuse and seek to ensure that such conduct is not merely displaced from Australian borders. We would like to make the following specific comments on the Bill, bearing in mind the Explanatory Memorandum and Second Reading Speech:

  The maximum penalty of 25 years set out for the offence of sexual exploitation of children and young people with a mental disability (cl 272.10) is significantly higher than several other comparable Commonwealth countries (see Canada: 5 years (Criminal Code 1985, s 153.1); New Zealand: 10 years (Crimes Act 1961, s 138); Singapore: 10 years (Penal Code, s 376F); and United Kingdom: 14 years (Sexual Offences Act 2003, ss 30-34)).

- Clause 272.11(2) could be more clearly expressed, viz:

  > (2) There is no fault element for any of the physical elements described in subsection (1) other than the fault elements (however described), if any, for the underlying offence.

  We suggest that it would be simpler if cl 272.11(2) were amended to read 'there is no additional fault element for any of the offences described in subsection (1)(a)-(d)'.

- It may be appropriate to include in clauses 272.16(1) and (2) a requirement for the defendant to take reasonable steps to ascertain the other person's age, viz:

  > It is a defence to a prosecution for an offence against this section if the defendant proves that, at the time of the sexual intercourse or sexual activity, he or she believed on reasonable grounds that the child was at least 16 years of age *and took reasonable steps to ascertain the age of the child* (emphasis added).

  Such a requirement would be consistent with Canada's Bill C-15A, section 172.1(4):

  > It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

- Clause 474.25B relates to mental impairment but there is no scope for aggravation of an offence where the young person is physically impaired (but not under the care of the alleged offender) and may therefore also be particularly vulnerable to abuse. The Committee may therefore wish to consider the desirability of extending the scope of the Bill in such circumstances.

- The Bill introduces 'a comprehensive new scheme to allow for the forfeiture of child pornography or child abuse material, or articles containing such material, such as computers, derived from or used in the commission of a Commonwealth child sex offence' (see Part IE). The Second Reading Speech notes:

  > Presently the only way that such material can be forfeited is through a post-conviction application under the Proceeds of Crime Act 2002. This is a lengthy and complex process. Unless a conviction is obtained, child pornography and child abuse material must be returned to the owner, an outcome which is undesirable (2RS: 4).

  Although it is inappropriate to return pornographic material to a suspect or offender, whether or not they are ultimately convicted of the offences charged, the same cannot be said for computers. The principal difficulty lies in disaggregating the illegal material from other digital content on a computer's hard drive. Consideration should be given to creating regulations that specify how and the extent to which computers confiscated under this legislation should be examined and illegal material destroyed or removed prior to return to the owner.

  Difficulties also arise because of the impact which destruction of computers might have on third persons who also make use of the suspect's computer. The suggestion that a person who has not been convicted of the offences charged should be deprived of their lawfully obtained property goes against the presumption of innocence and may impact adversely on others (e.g.

other members of the suspect's family who rely upon the computer for legitimate work or study purposes). Although it is conceded that such persons would probably be covered by cl 23ZB(3)(e), we would suggest that there may be ways of strengthening the provision, especially in respect of minors (rather than placing the onus upon them to object, as in cl 23ZB(3)(c).

In addition, cl 23ZC does not distinguish between computers and other forfeitable material but should perhaps do so, in recognition of the variety of purposes (legitimate and non-legitimate) for which they may be used (cf pornographic material generally).

- It is not clear from the current wording whether cl 23ZF(2) envisages that compensation could be paid if the police and the person agree on the amount while the proceedings are still current (cf subclause (4)).

- The Explanatory Memorandum states:

  > 'A person will be not be entitled to compensation where he or she has been convicted of or is found by a court – either in the current proceedings, or previously – to have committed the Commonwealth child sex offence to which the forfeiture leading to the compensation claim relates.'

  Again, it is not clear what the impact of this provision is on others (including dependents) who may have a legitimate claim to the confiscated item, for example, use of the family computer. The creation of regulations that enable illegal material to be excised from digital storage and destroyed, while other legal content remains intact and can be returned to the owner, might be a suitable way in which to resolve the issue.

- The provisions of the Bill relating to the use of a carriage service for suicide-related material (Subdivision G) are unrelated to other aspects of the Bill. There is no reference to this in the Second Reading Speech or the Attorney-General's Department paper on the proposed reforms (2009) and it does not seem to flow logically from the title and subject matter of the Bill.

References

Attorney-General's Department 2009. *Proposed reforms to Commonwealth child sex-related offences.* Canberra

Australian Institute of Criminology (AIC) 2009. *Online child grooming laws*. High tech crime brief no. 17. Canberra <http://www.aic.gov.au/publications/current series/htcb/1-20/htcb017.aspx>

Choo K-KR 2009a. *Online child grooming: A literature review on the misuse of social networking sites for grooming children for sexual offences*. Research and public policy no. 103. Canberra: <http://www.aic.gov.au/publications/current series/rpp/100-120/rpp103.aspx>

Choo K-KR 2009b. *Responding to online child sexual grooming: An industry perspective*. Trends & issues in crime and criminal justice no. 379. Canberra: AIC <http://www.aic.gov.au/publications/current series/tandi/361-380/tandi379.aspx>

David F 2000. *Child sex tourism*. Trends & issues in crime and criminal justice no. 156. Canberra: AIC <http://www.aic.gov.au/publications/current series/tandi/141-160/tandi156.aspx>

Flanagan K 2004. Global action to combat child sex tourism. *Crime in Australia: International Connections Conference*. 29-30 November. Melbourne: AIC <http://www.aic.gov.au/_events/aicupcomingevents/2004/~/media/conferences/2004/flanagan.ashx>

Krone T 2009a. *Child exploitation*. High tech crime brief no. 2. Canberra: AIC <http://www.aic.gov.au/publications/current series/htcb/1-20/htcb002.aspx>

Urbas G & Choo K-KR 2008. *Resource materials on technology-enabled crime*. Technical and background paper no. 28. Canberra: AIC <http://www.aic.gov.au/publications/current series/tbp/21-40/tbp028.aspx>