

Combating Child Sexual Exploitation Legislation Amendment Bill 2019

Submission to the Senate Legal and Constitutional
Affairs Legislation Committee

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the review of the *Combating Child Sexual Exploitation Legislation Amendment Bill 2019* ('the Bill') that is being undertaken by the Senate Legal and Constitutional Affairs Legislation Committee ('the Committee'). This submission will address the following issues:
 - (1) The definition of 'child sexual abuse offence' – section 273B.1;
 - (2) New offence – Failing to protect child at risk of child sexual abuse offence – section 273B.4
 - (3) New offence – Failing to report child sexual abuse offence – section 273B.5.
2. The ALA is supportive of other aspects of the legislation, including criminalising possession of child pornography or child abuse material, the improvement of the definition of forced marriage and the restricting of the defence of marriage for child sex offences.

Definition of child sexual abuse

3. The ALA supports the object of the Bill to protect children within the care, supervision or authority of the Commonwealth from sexual abuse. However, the ALA strongly recommends that the Bill should also extend this protection to cover physical abuse and psychological abuse. The ALA submits that this can be as traumatic and destructive as sexual abuse and may in many circumstances be difficult to distinguish since it may be a precursor to sexual abuse or may otherwise be associated with sexual abuse. We attach a paper by ALA spokesperson Dr A. S. Morrison RFD SC discussing, *inter alia*, the difficulties of confining the availability of a remedy to sexual abuse [**attached, Appendix 1**]. See paragraph [5] of this paper in particular.

Failing to protect child at risk of sexual abuse offence

4. The ALA supports the new offence of failing to protect a child at risk of child sexual abuse (section 273B.4). The ALA notes that this offence would appear to provide protection to any children who are placed in immigration detention, whether offshore or onshore. The ALA strongly supports the application of this provision to children in immigration detention.

5. Volume 15 of the Royal Commission’s final report made detailed findings that conditions in immigration detention are particularly conducive to the risk of child sexual abuse materialising. As with any institutional abuse, it is the power of the institution over the individual that has given rise to the opportunity for the abuse of these children.
6. Those in immigration detention have committed no crime. For the most part they have been accepted as genuine refugees and they are detained for arriving by boat. The Royal Commission found that refugee children are at high risk of suffering abuse: ‘research suggests that specific impacts associated with the refugee experience and prior trauma can complicate the development of adult identity among adolescent refugees and may lead to acting out through sexual behaviour... Prior experience of or witnessing rape and sexual violence is commonly reported among refugee children.’²
7. The Royal Commission’s report was also clear that the ‘Australian Government and its contracted service providers are responsible, directly or indirectly, for the safety and wellbeing of children in immigration detention... This includes children in community detention.’³ Further, the Royal Commission was clear that ‘it is the [Department of Immigration and Border Protection, now the Department of Home Affairs (referred throughout as the Department)] that carries ultimate responsibility for responses to child sexual abuse within Australia’s immigration detention network.’⁴ Where child abuse has occurred in offshore detention, the same Department is responsible for both the abuse and preventing the survivor from coming to Australia.
8. There are several institutional factors that might effectively facilitate child sexual abuse in immigration detention. The culture of secrecy and isolation that exists, especially in immigration detention; the normalisation of harmful and dehumanising practices; and the prioritisation of the Department’s reputation over children’s safety all increase the risk of abuse, and decrease the likelihood that it will be noticed and appropriately responded to.⁵
9. In relation to onshore detention, ‘the Australian Federal Police [submission] to the [Royal Commission] notes instances in which known offenders convicted of child sexual abuse were

² Volume 15, 189.

³ Volume 15, 172.

⁴ Volume 15, 172.

⁵ Volume 15, 190 (references omitted).

released from corrective service facilities in Australia and placed into immigration detention centres pending the assessment of their immigration status or awaiting deportation. At times, this detention was alongside children.⁶

10. These practices clearly demonstrate that the Department, as an institution, could arguably be found to be at least equally responsible for failing to protect children in detention facilities for which it has oversight from the risk of sexual abuse. Given that the children were placed in immigration detention by the Commonwealth, they are owed a non-delegable duty of care.⁷ These children did not choose to be in immigration detention and have committed no crimes.
11. The ALA notes that while it is an important objective for the legislation through this offence to provide protection for children from child sexual abuse, including children in immigration detention, it is disappointing that those abused while in immigration detention are not eligible for redress compensation under the National Redress Scheme.

Failing to report child sexual abuse offence

11. The ALA supports the new offences created by section 273B.5 of the Bill in relation to failing to report child sexual abuse, where the defendant knows of information that would lead a reasonable person to believe or suspect that a person has engaged or will engage in a sexual abuse offence against a child.
12. The ALA submits that failure to report child sexual abuse in such circumstances should be a criminal offence, and that any Commonwealth officer who knows or suspects that a child is being or has been sexually abused in an institutional context should report the abuse to police.
13. The obligation to report child sexual abuse should rest with every person (subject to some exceptions such as for victims and legal privilege). The history of cover-up in institutions strongly suggests that the criminal offence should apply not just to individuals but to the institutions which have failed victims by exposing them to abuse and then, too often, by protecting their abusers.

⁶ Volume 15, 188.

⁷ *NSW v Bujdoso* (2005) 227 CLR 1; [2005] HCA 76. *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. Conceded by the Commonwealth in *AS v Minister for Immigration and Border Protection* [2014] VSC 593 at [24].

14. The ALA also considers that the failure to report offence should cover any Commonwealth officer who knows or suspects that a child is being or has been subject to any serious criminal offence, not just sexual abuse.
15. The ALA considers that there is no reason why serious criminal offences of any type (not just child sexual abuse) should not give rise to an obligation to report.

Conclusion

14. The Australian Lawyers Alliance (ALA) appreciates the opportunity to have input into the Senate Legal and Constitutional Affairs Legislation Committee inquiry into *Combating Child Sexual Exploitation Legislation Amendment Bill 2019*. The ALA would welcome the opportunity to appear before the Committee to further explain its views.

Andrew Christopoulos

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