Australian Government

Department of Home Affairs | Attorney-General's Department

Joint submission to the Inquiry into the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019

Senate Standing Committee on Legal and Constitutional Affairs

August 2019

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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 sexual abuse.

The Bill was first introduced to the House of Representatives on 14 February 2019. The Committee conducted an inquiry into the Bill in March 2019, and in its report recommended that the Bill be passed in its current form. The Departments made a joint submission to that inquiry, responding to public submissions published on the Committee's website prior to 5 March 2019 (see **Attachment A**). The Bill lapsed with the dissolution of the 45th Parliament.

On 24 July 2019, the Bill was re-introduced to the 46th Parliament in substantially the same form, with some minor technical amendments and the addition of Schedule 7 (expanding the definition of 'child abuse material'). As such, this submission provides responses to issues raised in the public submissions published on the Committee's website after 5 March 2019 and prior to the Committee's new inquiry commenced on 1 August 2019, and discusses new Schedule 7.

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 in the *Criminal Code Act 1995* (Cth) (Criminal Code) 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'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 has a responsibility to ensure the safety and wellbeing of all children who are within the care, supervision or authority of its officers.

The Royal Commission identified that 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. These provisions are intended to support a change in culture and will strongly encourage Commonwealth officers to take responsibility and swifter actions towards protecting children from sexual abuse.

Absolute liability

In its submission to the previous Committee's inquiry into the Bill, the Law Council of Australia noted it believes there are difficulties with the drafting of proposed sections 273B.4 and 273B.5 and the breadth of the proposed application of absolute liability.

The Law Council of Australia stated that "proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) and (2)(c) should relate to the knowledge of the defendant and that proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) and (2)(d) should be amended. In each case, the conduct should be 'sexual conduct' and the prosecution should be required to prove that the accused knew the facts which would amount to a child sexual abuse offence."

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that applying absolute liability to a particular element of an offence may be justified where:

- requiring proof of fault of that element would undermine deterrence
- there are legitimate grounds for penalising persons lacking fault in respect of that element, and
- there are legitimate grounds for penalising persons who made a reasonable mistake of fact in respect of that element (page 23).

Application of absolute liability to paragraphs 273B.4(1)(d), 273B.5(1)(d) and 273B.5(2)(d) of the proposed offences is appropriate to ensure compliance with the reporting regime to report child sexual abuse. This is because it is intended that a Commonwealth officer should report conduct or take preventative action regardless of whether the elements of a child sexual abuse offence would be made out if the conduct itself was subject to prosecution. The importance of reporting on potential sexual abuse, and the potential harm that arises where a report is not made, cannot be overstated.

It is appropriate to impose absolute liability and penalise a person who lacks fault or made a reasonable mistake of fact in respect of the elements under paragraphs 273B.4(1)(d), 273B.5(1)(d) and 273B.5(2)(d). If a fault element of knowledge was applied, this would require the prosecution to prove that the defendant not

only knew of a substantial risk or information in relation to conduct, but also that the conduct, if engaged in, would satisfy each of the elements of a relevant child sexual abuse offence. Imposing additional knowledge elements that must be proved beyond reasonable doubt adds legal complexity and would undermine the regime's objective of deterring non-reporting and non-action in relation to child sexual abuse.

Further, if a fault element of knowledge was applied under paragraphs 273B.4(1)(d), 273B.5(1)(d) and 273B.5(2)(d), this would apply a higher threshold for reporting and could potentially lead to reports not being made in circumstances where a person is unsure whether the conduct of the potential offender would constitute an offence. This could be expected to increase the risk that a child sexual offence would occur or continue occurring, or go unreported.

The preference for reports to be made when any uncertainty exists as to whether conduct meets the definition of a 'child sexual abuse offence' is supported by proposed section 273B.9, which protects a person from the effect of other laws where the report is made in a genuine attempt to avoid liability under Division 273B.

It is also important to note that while absolute liability applies to elements under paragraphs 273B.4(1)(d), 273B.5(1)(d) and 273B.5(2)(d), a person's knowledge remains a central consideration under other elements of the offences. Paragraphs 273B.4(1)(c), 273B.5(1)(c) and 273B.5(2)(c), require a fault element of knowledge of a substantial risk, or information, in relation to sexual abuse conduct.

It is appropriate that the conduct referred to in paragraphs 273B.4(1)(d), 273B.5(1)(d) and (2)(d), that is the subject of the reporting or preventative action, is framed as conduct that would constitute a 'child sexual abuse offence'. The definition of 'child sexual abuse offence' captures the range of Commonwealth child sex offences (as defined in the *Crimes Act 1914* (Cth)) including those relating to child abuse material[1] and State and Territory registrable child sex offences. The term 'sexual conduct' is not used in the Criminal Code and, if used, could have the effect of narrowing the scope of conduct that is intended to be the subject of reporting and preventative action. Rather, it is intended that *all conduct* that would constitute a child sexual abuse offence should be captured by the requirements to report and take preventative action.

Definition of 'responsible person'

In its submission to the previous Committee's inquiry into the Bill, the Law Council of Australia highlighted the inconsistency in the wording of proposed sections 273B.4 and 273B.5. The failure to protect offence includes a requirement that a child be 'under the defendant's care, supervision or authority', while the failure to report offence only refers to 'care or supervision', omitting the word 'authority'.

This distinction is intended. Criminalising failure to protect is primarily designed to prevent child sexual abuse from occurring, while criminalising failure to report is intended to ensure authorities are made aware of abuse that has or may occur. The 'failure to protect' offence is targeted at those in higher positions of authority than the 'failure to report' offences, applying only to those who have actual or effective responsibility for reducing or removing the risk of abuse and negligently fail to do so.

Self-incrimination

The Explanatory Memorandum to the Bill notes that the Royal Commission identified underreporting as a significant barrier to victims and survivors of child sexual abuse accessing justice (page 31). The very purpose of proposed section 273B.5 is to ensure that child abuse offending is reported so that those involved in the offending can be subject to investigation and prosecution.

[1] Section 473.1 currently defines 'child abuse material' as (a) material that depicts a person, or a representation of a person, who (i) is, or appears to be, under 18 years of age; and (ii) is, or appears to be, a victim of torture, cruelty or physical abuse; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or (b) material that describes a person who: (i) is or is implied to be, under 18 years of age; and (ii) is, or is implied to be, a victim of torture, cruelty or physical abuse; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

In submissions to the previous Committee's inquiry into the Bill, the Law Council of Australia and the Australian Greens raised concerns about the abrogation of the privilege against self-incrimination.

Proposed subsection 273B.5(5) explicitly abrogates the privilege against self-incrimination. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that the abrogation of this privilege may be justified where:

- its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence, and
- consistent with the Scrutiny of Bills Committee's previous comments, there is a public benefit in the removal of the common law principle against self-incrimination that outweighs the loss of the privilege (pages 95-96).

The abrogation of the privilege in subsection 273B.5(5) is necessary to ensure that all Commonwealth officers covered by the related offence provisions report abuse or take action to protect against abuse. A person should not be excused from these obligations if, for example, they were concerned that reporting that an employee was abusing a child would expose that the person had not ensured that the employee held a valid working with children check card.

Information disclosed pursuant to this offence is subject to a 'use immunity' under subsection 273B.9(10), which prevents this information from being used in any 'relevant proceedings' against the discloser. This provides a constraint on the use of self-incriminating evidence and complies with the principles of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (pages 96-97).

However, a derivative use immunity is not expressly available to the information disclosed pursuant to the failure to report offence because it would open the immunity up to abuse by persons who are themselves involved in child sex offending. For example, this could occur if such a person made a report for the putative purpose of complying with proposed section 273B.5. The report could lead authorities to discover evidence which showed that the person who had made the report was themselves involved in child sex offending. This evidence would not be able to be used against that person if a derivative use immunity were applied.

A number of safeguards are in place to ensure the offence does not go beyond its stated purpose and unnecessarily infringe on the privilege against self-incrimination. A person will be compelled to make a disclosure only to police, who are bound by extensive obligations under State, Territory and Commonwealth privacy laws. Commonwealth, State and Territory law enforcement and prosecutorial agencies hold the discretion to pursue an investigation or prosecution. Prosecutors must consider whether instituting or continuing prosecution is in the public interest, among other considerations. This requirement is set out in the *Prosecution Policy of the Commonwealth*. Additionally, under proposed section 273B.6, proceedings against a person for a failure to report offence cannot commence without the consent of the Attorney-General, providing an additional safeguard against the bringing of prosecutions in inappropriate circumstances. Further, the offence will not affect the powers of courts to manage criminal prosecutions that are brought before them where they find that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the accused.

Legal professional privilege

The Law Council of Australia raised a concern in its submission to the previous inquiry regarding legal professional and client legal privileges. It argued that within section 273B.9, several subsections may unwittingly capture privileged communications between legal professionals and clients. The Australian Greens also raised this concern, recommending that section 273B of the Bill be amended to ensure that legal professional and client legal privilege are protected.

The offences do not require a person to breach legal professional privilege or any other legal obligation of confidentiality. However, if a person chooses to breach these obligations to genuinely and proportionately avoid liability for the offences, they will not be liable for any breach of their legal obligations in doing so.

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

Purpose

Proposed section 273A criminalises the possession of a child-like sex doll in the Criminal Code and, consequential to the expansion of the term 'child abuse material' in Schedule 7, the Bill proposes to expand the definition of 'child abuse material' to explicitly include child-like sex dolls. Amendments to the *Customs Act 1901* (Cth) (Customs Act) will also ensure that the *Customs Regulations 2015* can provide that child-like sex dolls are 'tier 2' goods and banned from import and export under the Customs Act, the *Customs (Prohibited Imports) Regulations 1956* and the *Customs (Prohibited Exports) Regulations 1958*.

Mandatory minimum sentencing

A number of submissions to the Committee's previous inquiry raised concerns about mandatory minimum sentences for the proposed offences in Schedules 2 and 3 of the Bill.

The Bill no longer contains contingent amendments relating to mandatory minimum penalties and other relevant measures contained in the lapsed Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill, which was first introduced in September 2017.

The Australian Government's position is that it remains committed to the reforms in the Sexual Crimes Against Children and Community Protection Measures Bill, including mandatory minimum penalties for the most serious and repeated child sex offences.

To this end, the Australian Government plans to re-introduce that Bill to the 46th Parliament, which will include measures that would apply mandatory minimum penalties to the offences of possessing child abuse material and possession of child-like sex dolls where it is a second or subsequent offence.

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

Purpose

Schedule 3 of the Bill introduces a new offence for the possession and control of child abuse material. The material must be in the form of data held in a computer or data storage device, and must have been obtained via a carriage service (e.g. the internet).

Summary prosecution

In its submission to the Committee's previous inquiry, the Law Council of Australia submitted that the offences relating to the possession of child abuse material and child-like sex dolls should be capable of summary prosecution where appropriate, as is the case with possession offences across a number of State and Territory jurisdictions.

Under section 4J of the *Crimes Act 1914* (Cth), certain indictable offences may be dealt with summarily, if the offence is punishable by imprisonment for a period not exceeding ten years.

Proposed section 273A (possession of child-like sex dolls etc.) and proposed section 474.22A (possession or control of child abuse material) both carry a maximum penalty of 15 years' imprisonment.

These maximum penalties reflect the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that an offence should have a 'maximum penalty that is adequate to deter and punish a worst case offence' (page 37). These penalties appropriately reflect the seriousness of the misconduct captured by the offences. The penalties are also consistent with other

possession offences for child pornography material (as currently defined) and child abuse material in the Divisions 273, 471 and 474 of the Criminal Code.

These penalties are appropriate and the offences are not capable of being prosecuted summarily.

Schedule 5 – Expanding the definition of forced marriage

Purpose

Schedule 5 of the Bill makes amendments to strengthen the forced marriage offences in the Criminal Code to increase the protections available for children against this serious form of exploitation.

Section 270.7B of the Criminal Code criminalises causing a person to enter a forced marriage, and being party to a forced marriage. The offences carry maximum penalties of seven years' imprisonment, or nine years' imprisonment when aggravating factors are present (such as when the victim is under 18 years of age).

Under subsection 270.7A(1), a marriage is forced if it is entered into without full and free consent because of the use of coercion, threat or deception, or an incapacity to understand the nature and effect of the marriage ceremony (for reasons such as age and mental capacity). Subsection 270.7A(4) provides that a person under 16 years of age is presumed, unless the contrary is proven, to be incapable of understanding the nature and effect of the marriage ceremony.

The Bill repeals the rebuttable presumption in subsection 270.7A(4) and expands the definition of forced marriage in subsection 270.7A(1) to explicitly include all marriages involving children under 16 years. This clarifies that a child's purported consent to a marriage is irrelevant for the purposes of proving a forced marriage offence, in turn reducing the need to call evidence from vulnerable child victims.

Marriageable age

In its submission to the Committee's previous inquiry, Good Shepherd called for the minimum age of marriage to be raised to 18 years.

The marriageable age in Australia is 18 years (section 11, *Marriage Act 1961* (Cth) (Marriage Act)). In 'exceptional and unusual' circumstances, a judge or magistrate may make an order authorising a person aged 16 or 17 years to marry a person aged over 18 years (paragraph 12(2)(b)). In addition to this judicial order, the minor must also obtain the consent of the person or persons required by the Marriage Act to provide their consent to the marriage (for example, the minor's parent(s) (sections 13 and 14, and Schedule 1)).

The measures in the Bill are in line with the marriageable age provisions in the Marriage Act.

Schedule 7 – Expanding the meaning of child abuse material

Purpose

This Schedule updates the terminology used for child sexual abuse offences in Commonwealth legislation. It does this to reflect the gravity of these crimes, the harm inflicted on the children involved, and shifts in national and international best practice.

This measure was previously contained in the Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017, which was introduced in September 2017 but lapsed with the dissolution of the 45th Parliament. The Committee considered the Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill in late 2017 and released its report on 16 October 2017. The Committee received eight submissions on that Bill and reported

that the terminology measure was strongly supported by some submitters, including the Law Council of Australia, Uniting Church in Australia, Anti-Slavery Australia and Collective Shout.

Shift away from 'child pornography'

In its submission to the Committee's previous inquiry into the Bill, the Uniting Church in Australia, Synod of Victoria and Tasmania, asked the Committee to recommend the Bill be amended to include provisions to repeal all references in Commonwealth Acts of 'child pornography' and replace these references with a single definition of 'child abuse material.'

Schedule 7 of the Bill updates Commonwealth legislation to reflect changes to international language norms and the seriousness of harm associated with material that depicts child sexual abuse.

The Criminal Code and other Commonwealth legislation currently distinguish between 'child abuse material' and 'child pornography material'. However, the term 'child pornography material' is no longer considered appropriate or accepted terminology. Attaching the term 'pornography' to this material is a barrier to conveying the seriousness and gravity of the offences, the inherently abusive nature of the material, and the harm faced by the children.

The current international definition of 'child pornography' is nearly twenty years old and was introduced when the internet was in its infancy, at a time when online adult pornography was still novel and retained its social stigma. Due to the increasing normalisation of legal adult pornography in modern society, there is a concern that the term 'child pornography' may inadvertently legitimise that material by associating it with consenting subjects participating in legal behaviour, which is entirely inappropriate where the behaviour depicted involves the abuse of children who are incapable of legally consenting to such abuse.

In 2016, the Global Interagency Working Group released the *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*[2] (the Luxembourg Guidelines). Representatives to the Global Interagency Working Group included international and regional non-government organisations such as the International Centre for Missing and Exploited Children, INTERPOL, Save the Children International, and the United Nations Committee on the Rights of the Child.

The Luxembourg Guidelines note that the term 'child pornography' is being increasingly criticised, including by victims and survivors of child sexual abuse. Some submissions to the Committee's inquiry into the Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017 agreed with this point, and suggested consideration be given to that Bill adopting the term 'child exploitation material' rather than 'child abuse material'.

The Luxembourg Guidelines state that 'the sexual abuse of children requires no element of exchange and can occur for the mere purpose of the sexual gratification of the person committing the act, whereas the sexual exploitation of children can be distinguished by an underlying notion of exchange' (page 18). The Luxembourg Guidelines also note that the term 'child abuse material' may also refer to other forms of violence against children that is not necessarily of a sexual nature (page 40).

The term 'child abuse material' is arguably the most encapsulating term as it builds upon the broad ambit of the 'child exploitation' definition, without applying the implication of a transaction of benefit to a child for partaking in the acts. It also reflects the Australian Government's intention to ensure the definition captures material that depicts other forms of child abuse, including torture, cruelty and physical abuse.

International agencies, including INTERPOL and the WePROTECT Global Alliance, have moved away from labelling offending artefacts as 'child pornography' and now refer to them as 'child abuse material' or 'child abuse and exploitation material'.

[2] *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* ('Luxembourg Guidelines'), adopted by the Interagency Working Group in Luxembourg, 28 January 2016. Available at http://luxembourgguidelines.org/.

The importance of appropriate terminology is further highlighted by international conventions and guidelines recognised by Australia, including the United Nation's Commission on Crime Prevention and Criminal Justice 2019 resolution on *Countering child sexual exploitation and sexual abuse online*.

Australian Government

Department of Home Affairs

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Attorney-General's Department

Attachment A

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

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Introduction

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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 report[1] 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.