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Committee Secretary
Senate Legal and Constitutional Committee
Parliament House
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Submission:

Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

Firstly, Civil Liberties Australia would like to emphasise that giving civil society just nine (9) days to comment on a Bill of this nature is demeaning to:

- Committee Members, if they hold a reasonable expectation of receiving properly considered submissions, with sufficient time to gather diverse viewpoints across organizations and society;
- members of civil society organizations, if the Committee believes that Non Government Organisations need only nine days to prepare their submissions, while the Secretariat can have a full month to condense received submissions into one document (we note that there is no indication any public hearings will be held); or
- the people of Australia, if very important legislation is to be truncated in how it is dealt with by the nation's parliament.

CLA proposes that the Senate Legal and Constitutional Committee institutes a rule that it will give potential contributors at least three weeks (21 days) as a minimum period to consider and prepare a submission on any Bill before the Committee.

There have been occasions in the past when the Executive has treated the Senate Legal and Constitutional Committee contemptuously: for example, allowing a matter of days for consideration of an anti-terrorism Bill for which hindsight and experience now indicates there was no urgency whatsoever.

Unless Senate Committees at some stage take a stand on these matters, the period for proper consideration of Bills will eventually to wound back so far as to be a meaningless exercise in "ticking the consultation" box.

This appears to CLA to be one of those occasions.

Comments on the Bill:

While it is customary for a country to assert jurisdiction over its "citizens" abroad (which, in itself, is legally problematic enough), this bill extends this concept to "residents" of Australia. Under it a person could be sentenced to 20 years' prison in Australia for activities he or she

may have engaged in in Belgium, as a Belgian citizen, that are perfectly legal in Belgium – merely because the person resides in Australia! M. Poirot would not be amused. The relevant clauses require redrafting.

The Bill blithely takes the "Anglo" standard of 16 as the age of consent and applies it globally. This ignores the substantial cultural variation in such matters. Please see: http://en.wikipedia.org/wiki/File:Age_of_Consent.png The age of consent is 14 in much of Europe and Latin America, 13 in Spain and Japan…and these are not "backward, developing countries". The Bill is an attempt to impose Australian standards on the cultures and laws of other nations. The Bill needs re-wording.

The Bill should explicitly make it a valid defence if the conduct engaged in is legal in the jurisdiction where it occurred. Laws are in place around the globe – it's enforcement that is lacking in some places: a Bill like this should only provide a backup for such cases, not attempt to globally enforce Australian rules.

Similarly, the Bill applies the Australian definitions of "child pornography" and "child abuse" globally, without taking into account the substantial variation in these definitions from country to country. Consider fictional depictions: art, books, nudity without sexual connotations, etc. There is plenty of gray area in these matters, and there are different cultural standards, around the world. Again, proving that the "offence" was in fact legal in the jurisdiction it occurred in should be explicitly included as a valid defence.

The defence based on belief about age places an undue burden of proof on the defendant. If the belief was reasonable in the circumstances, the prosecution should have to prove the defendant knew otherwise. Likewise, various sections require the defendant to "prove that he or she did not intend to derive gratification". That is, not only prove that one did not derive gratification, but that one did not "intend" it. How on earth does one prove such a thing? The Bill needs redrafting in this area.

It appears to CLA that in various cases (such as possession of child pornography) the maximum sentences given here for an offence committed outside Australia are higher than those for the same offence committed in Australia. This makes no sense, and should be adjusted.

The new offences of "using a carrier service" to obtain child pornography carry the same higher maximum sentences (15 years instead of 5). A tripling of the maximum sentence is not "plugging gaps and loopholes", which is how the Bill has been promoted, falsely if this penalty stands. While virtually everyone is in favour of strong laws for offences against children, it is arguable whether 15 years in prison is an appropriate sentence comparatively for an offence where there is no physical contact with the victim. By this standard, the person creating the pornography should be sentenced to something like 100 years in prison. CLA suggests the Committee considers rebalancing penalties in a more sensible manner.

Dr Kristine Klugman OAM
President

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