



4 March 2019

International Justice Mission Australia
PO Box 1442
CHATSWOOD NSW 2057

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By upload: aph.gov.au

Dear Honourable Members,

Re: International Justice Mission Australia's submission on the Combating Child Sexual Exploitation Legislation Amendment Bill 2019

Thank you for the opportunity to provide a submission on the Combating Child Sexual Exploitation Legislation Amendment Bill 2019.

International Justice Mission (IJM) works to strengthen public justice systems in developing countries to protect the poor from violence. We are the largest international anti-slavery organisation in the world. In the Philippines, IJM works specifically to combat the online sexual exploitation of children – also known as cybersex trafficking – which is a transnational crime that involves offenders, including many in Australia, who commission the abuse of children in developing countries on a pay-per-view basis.

IJM supports the Australian Government in its efforts to combat child sexual abuse and exploitation, both in Australia and abroad. We are encouraged that the Government is seeking to implement the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and to ensure law enforcement and prosecution agencies are equipped to handle emerging trends in child sexual exploitation, and in particular, the challenges created by new technologies.

We are broadly in support of the proposed legislation. We have two main submissions in response:

1. Schedule 3 should be amended to ensure that offenders who record the abuse of children which is live-streamed over the internet and store these recordings are captured by the new offence of 'possession or control' of child abuse material.
2. Consistent with the objectives of Schedules 3 and 4, the Government should pass the amendments contained in the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 which addresses new forms of online exploitation and attempts to assist prosecutors in obtaining adequate sentences.

Capturing the recording of live-streamed abuse in Schedule 3

The new offences of possessing or controlling child pornography material or child abuse material obtained or accessed using a carriage service (proposed sections 474.19A and 474.22A) are welcome additions to the federal legislation addressing the online exploitation of children. Given that the vast majority of child abuse material is shared via peer-to-peer networks and file sharing, with a growing amount also shared via other carriage service facilitated methods (eg, TOR, cloud storage),¹ this provision will act as a unifying substitute for the various state and territory possession offences in most cases.

Further, the offence provides that the material, if proven to be in the accused's possession, is presumed to have been obtained via a carriage service, unless the contrary is proven on the balance of probabilities.² This means that in most cases law enforcement and prosecution agencies can use this offence without taking on the extra burden of forensic digital investigation.³

As Table 1 below indicates, the maximum penalty of 15 years will be higher than the equivalent possession offences in all state and territory jurisdictions. This is appropriate as it reflects the fact that online exploitation has real victims who experience harm that may be just as severe as victims of contact offending, and that possession offences contribute to the market for such abuse.⁴

Table 1: State and territory offences for possession of child abuse material

| Jurisdiction | Legislation | Section | Maximum Penalty (yrs) | Type of Offence |
|--------------|--|----------------------|---------------------------------|---|
| ACT | Crimes Act 1900 | 65 | 7 | Possession only |
| NSW | Crimes Act 1900 | 91H | 10 | Production, dissemination or possession |
| NT | Criminal Code Act 1983 | 125B | 10 | Possession, production, dissemination or sale/offer |
| Qld | Criminal Code Act 1899 | 228D | 14 | Possession only |
| SA | Criminal Law Consolidation Act 1935 | 63A | 5 ('basic') 7 ('aggravated') | Possession only |
| Tas | Criminal Code Act 1924 | 130C | 21* 3.5 in practice | Possession only |
| Vic | Crimes Act 1958 | 51G | 10 | Possession only |
| WA | Criminal Code Act Compilation Act 2013 | 220 | 7 | Possession only |

* The general maximum penalty for most offences in Tasmania is 21 years, but courts have established their own maximum penalties over time.⁵

However, it is not clear at present whether the legislation covers the situation where an offender views child abuse material which is live-streamed over the internet in real time and records this live-stream for later viewing or sharing. There is evidence that perpetrators who commission and view real time child abuse via live-stream pay-per-view services record these 'sessions'. This occurred in the 2016 case of Kyle Dawson in Queensland,⁶ and that of Victorian Patrick Goggins in 2014.⁷ ECPAT International notes that recorded live-streaming may be

‘substantially adding to the volume of child sexual abuse materials (CSAMs) available on the web as a whole’.⁸

The offences as currently worded require that ‘the person used a carriage service to obtain or access the material’ (subsection 1(c)). Under the *Criminal Code*, ‘material’ includes ‘material in any form, or combination of forms, capable of constituting a communication’.⁹ Conceivably, an accused could argue that the ‘material’ in their possession (the recording of the child abuse material) is in a different form to and is therefore distinct from the ‘material’ which was accessed via the internet (a live-stream, that is, a continuous stream of data which is not downloaded).¹⁰

The legal distinction between these forms of material has been significant in copyright infringement cases.¹¹ Further, Patrick Goggins, who recorded child abuse live-streamed over the internet, was convicted of the offence of ‘producing child pornography material’ under *Criminal Code* (Cth) section 474.20(1).¹² This may provide support for the view that the material comes into existence after the recording is made and is therefore distinct from the material accessed via the internet.

To avoid any possibility for such a defence in circumstances which are arguably more serious than material accessed via file download, the following subsections should be added to both the proposed sections 474.19A and 474.22A:

- (4) To avoid doubt,
 - (a) a reference to ‘material’ in subsection (1) includes both a communication accessed or obtained via a carriage service and a recording of that communication; and
 - (b) a reference to ‘material’ in subsection (1)(a) includes a copy or recording of the ‘material’ referred to in subsection (1)(c).

Such a provision is consistent with the kind of clarifying provisions already present in the Code, such as section 400.1(2).

Alternatively, it may be preferable to consider clarifying the definition of ‘material’ in section 473.1 to include copies or recordings of the original ‘material’.

Addressing other gaps in federal legislation on child exploitation material

IJM supports the ‘zero tolerance’ approach to child sexual abuse perpetrated by Australians, such that it is irrelevant whether the crime is committed in Australia or overseas.¹³ We are pleased to see the government remedying the barriers to obtaining successful prosecutions in cases of persistent sexual abuse as identified by the Royal Commission. The offence of persistent sexual abuse of a child overseas has been used in the past to prosecute perpetrators of online sexual exploitation,¹⁴ and we believe this is important to ensure that online commissioning of abuse is treated as seriously as contact offending.

However, while we commend the government for seeking to ‘criminalise emerging gaps in Commonwealth offences for technology-facilitated child sexual abuse’,¹⁵ we would like to draw the Government’s attention to existing proposed legislation that addresses a range of other

gaps in the coverage of online child sexual exploitation by federal criminal legislation.¹⁶ Specifically, the Government should pass the reforms in the [Crimes Legislation Amendment \(Sexual Crimes Against Children and Community Protection Measures\) Bill 2017](#) (Cth).

This 2017 Bill addresses the following weaknesses:

- While several states have introduced legislation to criminalise the setting up of a network for the purpose of facilitating the distribution of child abuse material, there is no such federal offence, even though this is related to existing carriage service offences.¹⁷
- The continued use of the term ‘child pornography’ in legislation – particularly apparent in the present Bill. This term suggests that the abuse of children in this way is somehow a legitimate subset of adult pornography, which it is not.¹⁸ Describing the content as ‘child exploitation material’ or ‘child abuse material’ more accurately describes the crime that is occurring, and several states have already implemented this change.¹⁹
- The need for higher sentences and aggravating factors to capture severe conduct (violence and young victims) in association with sexual activity via carriage service offences.

The Australian Child Rights Taskforce – the peak body for child rights in Australia made up of over 100 NGOs – recommended that this Bill be passed in its review of Australia’s implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.²⁰

The Government should prioritise bringing about the passage of these reforms and other measures to bring greater strength and uniformity to the prosecution and sentencing of sexual offences against children.

Conclusion

IJM supports the objectives of the proposed legislation. However, we ask that the two recommendations we have proposed be considered to ensure that federal criminal legislation is comprehensive in its response to the growth of online sexual exploitation of children.

Please do not hesitate to contact me if you require further information.

Yours faithfully,

Caroline Best
Director of Corporate and Legal
International Justice Mission Australia

References

- 1 NetClean, '[10 Important Insights into Child Sex Abuse Crime](#)' (2016) 16–17.
- 2 [Criminal Code](#) (Cth) ss 13.4–13.5.
- 3 [Explanatory Memorandum](#), Combatting Child Sexual Exploitation Legislation Amendment Bill 2019, 54 [187]–[190].
- 4 See IJM Australia, [Submission No 31](#) to the Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Human Trafficking*, 24 February 2017, [2.3.3]–[2.3.4].
- 5 Sentencing Advisory Council (Tas), '[Sex Offence Sentencing](#)' (Final Report, August 2015) 10; *Criminal Code Act 1924* (Tas) s 389.
- 6 Rae Wilson, '[Kiwi Jailed Over “Degrading” Acts](#)', *The New Zealand Herald* (online), 28 July 2016; [Australian Cyber Predators Using Live Streaming Technology to Abuse Children Overseas](#) (Reported by Michael Atkin, ABC 7.30, 2016).
- 7 [R v Goggins](#) [2014] VCC 1086 (7 July 2014); Peta Carlyon, '[Melbourne Man Jailed or Using Internet to Sexually Abuse Children Living in Poverty in Philippines](#)', *ABC News* (online), 7 July 2014; Lindsay Murdoch, '[Philippine Children Exploited in Billion-Dollar Webcam Paedophilia Industry](#)', *The Sydney Morning Herald* (online), 8 July 2014.
- 8 Andrea Varrella, '[Live Streaming of Child Sexual Abuse: Background, Legislative Frameworks and the Experience of the Philippines](#)' (2017) 12 *ECPAT Journal* 47, 49.
- 9 [Criminal Code](#) (Cth) s 473.1 (definition of 'material').
- 10 University of Missouri System, [File Sharing vs. Online Streaming: What's the Diff?](#) (23 August 2017) Make it Safe.
- 11 Ibid; [Dallas Buyers Club LLC v iiNet Limited](#) [2015] FCA 317, [25]–[32] (Perram J).
- 12 [R v Goggins](#) [2014] VCC 1086 (7 July 2014) [13] (Judge Davis).
- 13 Commonwealth, [Parliamentary Debates](#), House of Representatives, 14 February 2019, 1–2 (Peter Dutton).
- 14 See [Director of Public Prosecutions \(Cth\) v Beattie](#) [2017] NSWCCA 301 (8 December 2017); [R v Goggins](#) [2014] VCC 1086 (7 July 2014).
- 15 [Explanatory Memorandum](#), Combatting Child Sexual Exploitation Legislation Amendment Bill 2019, 13 [80].
- 16 See IJM Australia, [Submission No 31](#) to the Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Human Trafficking*, 24 February 2017, [2.3.3]–[2.3.5]; Australian Child Rights Taskforce, [The Children's Report: Australia's NGO Coalition Report to the United Nations Committee on the Rights of the Child](#) (UNICEF, 2018) 75–6.
- 17 Australian Child Rights Taskforce, above n 16, 75–6.
- 18 Australian Federal Police, '[Northern Territory Man Arrested on Child Exploitation Charges](#)' (Media Release, 15 January 2016); Jeremy Prichard and Caroline Spiranovic, '[Child Exploitation Material in the Context of Institutional Child Sexual Abuse](#)' (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, September 2014) 8.
- 19 See, eg, [Crimes Amendment \(Child Pornography and Abuse Material\) Act 2010](#) (NSW).
- 20 Australian Child Rights Taskforce, above n 16, 75–6; [The Australian Child Rights Taskforce](#).