



Senate Legal and Constitutional Affairs Committee

Submission to the Crimes Legislation Amendment
(Sexual Crimes Against Children and Community
Protection Measures) Bill 2017 [Provisions] Inquiry



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Anti-Slavery Australia welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 [Provisions].

Established in 2003, Anti-Slavery Australia is a research, policy and legal centre at the University of Technology Sydney with the mission to abolish human trafficking, organ trafficking, slavery and slavery-like practices such as forced labour and forced marriage in Australia. Anti-Slavery Australia provides legal advice and representation to men, women and children who have experienced human trafficking, slavery, slavery-like conditions and forced marriage in Australia.

This submission draws upon the research and findings of Anti-Slavery Australia's report, Behind the Screen: Online Child Exploitation in Australia released on 25 May 2017. The full report and summary is attached to this submission.

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EXECUTIVE SUMMARY

The Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 proposes to amend a range of criminal justice legislation to strengthen protections against child sexual exploitation. Anti-Slavery Australia commends the Government's commitment to enhancing the Australian criminal justice response to this developing crime-type.

Anti-Slavery Australia's submission is limited to select proposed amendments in Schedule 4, 5, and 6 concerning online child exploitation or abuse materials, and live-streamed child abuse. This submission draws extensively upon Anti-Slavery Australia's research and findings from the report *Behind the Screen: Online Child Exploitation in Australia* (2017).

In addressing these proposed amendments, Anti-Slavery Australia makes the following key recommendations:

1. Anti-Slavery Australia endorses the removal of the term 'child pornography' from all Commonwealth legislation. This term is inappropriate and does not reflect the impact of the horrendous crimes depicted in this material.
 - 1.1. The proposed term 'child abuse material', while significantly more appropriate than 'child pornography', represents one subset of the broader category of 'child exploitation material'. Anti-Slavery Australia recommends that the Bill be amended to use the internationally accepted term 'child exploitation material'.
2. Anti-Slavery Australia supports Item 20, which proposes to introduce an offence of providing an electronic service with the intention that the service will facilitate the dissemination of child abuse material. This amendment would address significant, developing gaps in the law regarding the administration of online child abuse material networks.
3. Anti-Slavery Australia commends Items 1, 22 and 23 which strengthen and clarify the law to reflect the growing practice of live-streamed child abuse.
 - 3.1. Anti-Slavery Australia recommends that the definitional clarification of 'engage in sexual activity' in Item 1 of the Bill also applies to the offence of sexual intercourse with child outside Australia under subsection 272.8 of the Criminal Code.
4. Anti-Slavery Australia recommends that the committee consider the need for further consultation concerning Schedule 6, particularly the introduction of mandatory minimum sentences for online child abuse materials offences. The introduction of a mandatory

minimum custodial sentence for child abuse materials offences does not reflect the spectrum of material offending. Mandatory minimum custodial sentences may also serve to reduce the incentive for defendants to assist police in ongoing investigations.

5. Anti-Slavery Australia recommends that the Bill be expanded to repeal the defence based on a valid and genuine marriage contained in subsection 272.17 of the Commonwealth Criminal Code. The purpose of this defence is unclear. It also appears to be inconsistent with the Commonwealth offence of forced marriage.

1. TERMINOLOGY

Anti-Slavery Australia commends the Government's initiative to remove the term 'child pornography' from Commonwealth legislation. This reflects the opinion of a number of experts interviewed for *Behind the Screen: Online Child Exploitation*:¹

*"[T]he term 'child pornography', just immediately lessens the impact. I mean, these are children who are being sexually assaulted, these are child sexual assault images, this is child exploitation material. [These] are really serious crimes...."*²

*"There's an international movement to call it what it is, and it is not pornography. I mean honestly, it is not pornography... Anything like that is a move in the right direction. You'll never hear me, publically or in the media refer to it as child pornography, or 'kiddie porn' which I've heard people call it as well. It's just bloody ignorant."*³

This amendment reflects the growing international consensus that the term 'child pornography' is unacceptable, as it risks trivialising or legitimising the depiction of serious crimes against children.⁴ It is also representative of the movement within the law enforcement community to characterise these materials as forensic evidence of the sexual exploitation or abuse of children.⁵

1.1. Child abuse materials and child exploitation materials

The 'Luxembourg Guidelines' define child abuse materials as a subcategory of child exploitation materials. Child exploitation material is defined as a broader category of sexualised content depicting or representing children,⁶ whereas child abuse material is defined more narrowly as depiction of child sexual abuse.⁷ Anti-Slavery Australia recommends that the Bill be amended to use the term 'child exploitation material', to reflect the international standard and to reflect the spectrum of material offences that are contemplated by these provisions.

¹ 'Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) <<http://www.antislavery.org.au/images/behind%20the%20screen%20-%20report.pdf>> xii.

² Interview with a representative from an NGO (Telephone interview 8 August 2016).

³ Interview with a Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

⁴ Susanna Greijer and Jaap Doek, 'Terminology Guidelines For the Protection of Children from Sexual Exploitation and Sexual Abuse' (Guidelines, Terminology and Semantics Interagency Working Group on Sexual Exploitation of Children, 28 January 2016) (hereinafter Luxembourg Guidelines), 38-40.

⁵ Ibid, 39.

⁶ Ibid.

⁷ Ibid.

Recommendation:

Anti-Slavery Australia strongly endorses the removal of the term ‘child pornography’ from all Commonwealth legislation. This term is inappropriate and does not reflect the impact of the horrendous crimes depicted in this material.

Anti-Slavery Australia recommends that the Bill be amended to use the internationally accepted term ‘child exploitation material’.

2. ELECTRONIC SERVICES AND SYSTEM ADMINISTRATORS

Anti-Slavery Australia commends the introduction of a new offence of conduct for the purposes of electronic service used for child abuse material. This will fill a significant gap in the Commonwealth criminal justice framework and ensure that the law reflects the harm inflicted by Australia-based administrators of vast online child exploitation material networks.

Interviews with law enforcement officers conducted for *Behind the Screen* identified the substantial need for Commonwealth legislation which targeted head administrators of online networks that distributed child exploitation material.⁸

“[T]he legislation wasn’t really written to address these head administrators... [they] are not only proliferating sexual abuse material of children, but in many cases they are administering networks that demand ongoing abuse of children to maintain membership.”⁹

The need for further criminalisation of these types of offences can also be seen in the recent high profile cases of *Graham* and *McCoole*¹⁰. These cases illustrate the ways in which new developments in online, anonymising technologies has facilitated the mass possession and distribution of images and videos that comprise online child exploitation material. These cases also provide examples of how these networks encourage the further abuse and exploitation of children in Australia and overseas.

⁸ ‘Behind the Screen: Online Child Exploitation in Australia’ (Anti-Slavery Australia, 2017)

<<http://www.antislavery.org.au/images/behind%20the%20screen%20-%20report.pdf>> 68-69.

⁹ Interview with a Senior Officer of the Queensland Police Project Argos (Telephone interview, 4 July 2016).

¹⁰ Discussed in Section 2.1.

2.1. Australian network administrators

*R v Shannon Grant McCooles*¹¹

In 2014, police became aware of child exploitation images that were identified as having been photographed by an Australian offender, Shannon Grant McCooles. These images were posted and distributed through website ‘Q’, an anonymised service which could be accessed through the a Darknet.¹²

The children were identified in the images taken by McCooles on his own digital camera, as children who were left in the offender’s care, in the context of his employment under Families South Australia and Nanny South Australia.¹³

McCooles ultimately pleaded guilty to 18 State offences and 2 Commonwealth offences, relating to sexual offending against children and the production, dissemination and possession of child exploitation material. Of the Commonwealth offences, one related to the transmission of child pornography using a carriage service and the other offence involved urging or inciting the transmission of child pornography over the internet, with the intention that the offence incited would be committed.¹⁴

The sentencing judge, in discussing the Commonwealth charges, outlined that website ‘Q’ was:

“A website that functioned for the sole purpose of facilitating the distribution of child pornography material and encouraging discussion about child abuse amongst its significant number of members.”

“...The head administrator was responsible for the administration of the board by enabling others to distribute child exploitation material through it, encouraging the production of child exploitation material and causing child exploitation material to be transmitted to yourself and others.”¹⁵

McCooles’s position as head administrator was evidenced by a post published by him on website Q, reminding members of the requirement that they upload to the website child

¹¹ (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

¹² The name of the network in question has been suppressed.

¹³ Ibid

¹⁴ *Criminal Code Act 1995* (Cth) Div 474.19 (iii) and Div 11.4 (for Incitement Provisions).

¹⁵ *R v Shannon Grant McCooles* (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015) 5-6.

exploitation material at least once a month. At the point that this post was published, the website had approximately 45,000 members.¹⁶

The sentencing judge, His Honour Judge Rice, observed that McCoolle did not administer the website for financial gain, but to satisfy his deviant sexual appetites and those of other likeminded people. Administrators of large networks housing child exploitation material use the images themselves as a form of online currency to expand their online communities, encouraging and facilitating extreme abuse of children.

Regarding the two counts related to Commonwealth offences, McCoolle was sentenced to a minimum of three years for the transmission of child pornography, and a minimum of one year for the offence of incitement, to be served cumulatively.

The Queen v Graham¹⁷

Graham was the administrator of a series of online websites and forums between 2012 and 2014. Through these websites Graham, under the pseudonym 'Lux', connected with other online offenders and was linked to prolific Australian offenders, such as Shannon McCoolle. During this time period, Graham administered hundreds of thousands of images, including videos of the torture and rape of a toddler in the Philippines, and in one instance encouraged the rape and murder of a child in Russia. The United States Federal Bureau of Investigations (FBI) described Graham's network as "one of the largest and most extreme in the world."¹⁸

The matter was referred to the AFP and Victoria Police by FBI officers. Graham was arrested in 2014 and ultimately pleaded guilty to 13 Commonwealth charges. He was sentenced to 15 years and 6 months, with a non-parole period of 10 years.¹⁹

2.2. State-based legislation concerning network administrators

The introduction of a Commonwealth offence of conduct for the purposes of electronic service used for child abuse material (child exploitation material) is also consistent with new legislation in Victoria and Queensland which further criminalise individuals found to be administrators of online child exploitation networks.²⁰

In Victoria, it is an offence to administer or encourage the use of a "child pornography website",²¹ and it is also an offence to provide information to a person that is likely to assist

¹⁶ 'Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) 123.

¹⁷ [2016] VCC 305.

¹⁸ Ibid, [56].

¹⁹ Ibid, [29]-[54].

²⁰ 'Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) 71-72.

²¹ *Crimes Act 1958* (Vic) ss 70AAAB and 70AAAC.

them in avoiding capture or prosecution for committing one of these offences.²² The legislation provides examples of this latter offence, including circumstances where:²³

1. A provides information to B about how to use a website to deal with child pornography anonymously or how to encrypt electronic files containing child pornography.
2. A provides information to B about how to delete electronic data that records information about B's identity.

In 2016, similar provisions were added to Queensland legislation.²⁴ Where a hidden network or anonymising service is used to commit an offence under these new provisions, the maximum penalty will increase from 14 years to 20 years.²⁵ The proposed amendments in the Bill will ensure that there is consistency throughout Australia in the criminalization of child exploitation material network administrators.

Recommendation:

Anti-Slavery Australia supports the creation of the new offence of conduct for the purposes of electronic service used for child abuse material. This new offence will reflect the role of network administrators in the proliferation of online child exploitation materials, and their complicity in the further abuse and exploitation of children in Australia and overseas.

3. LIVE-STREAMED CHILD ABUSE

Anti-Slavery Australia also commends Items 1, 22 and 23 to the Committee, which strengthen and clarify the law to reflect the growing practice of live-streamed child abuse.

Non-government organisations report that children in the Philippines are lured to sex tourism “hot spots”, such as Angeles City, Metro Manila and Cebu City on the promise of legitimate jobs in the city. Thereafter they are physically and/or emotionally coerced into working in the sex industry including, increasingly, online exploitation dens, where they are made to perform on webcams to foreign online sex tourists. In 2013, it was estimated that tens of

²² *Crimes Act 1958* (Vic) s 70AAAD(1).

²³ *Ibid.*

²⁴ *Criminal Code Act 1899* (QLD) ss 228DA, 228DB and 228DC.

²⁵ *Ibid.*

thousands of boys and girls were in the webcam sex tourism trade alone, with that number predicted to increase.²⁶

Unlike saved videos and pictures, streamed videos used in the webcam online child exploitation industry are far more difficult for law enforcement to identify and investigate. There are indications that not all live-streamed child abuse occurs for financial remuneration.²⁷ It may involve multiple perpetrators using video streaming programs to stream the simultaneous abuse of children in a variety of locations.

Live-streamed child abuse has also been associated with child trafficking and slavery in the Asia Pacific region. As other forms of slavery and trafficking are being combatted in countries like the Philippines, there has been an increase in trafficking activity for the sole or primary purpose of online child exploitation. This industry is driven by the financial support from Australian offenders who encourage the production of online sexual exploitation materials.

There have been several high-profile Australian cases of live-streamed child abuse. In July 2014, Patrick Goggins was convicted by the Victorian County Court of over 20 sex offences involving the systemic sexual abuse of Filipino children, in particular causing children to engage in sexual intercourse, streamed over webcam, in his presence. Goggins paid more than \$15,000 to view live-streamed abuse, which was streamed to his location in Melbourne.²⁸

In August 2014 Brett Le Gassick was sentenced to over 20 sex offences, including making transfers of \$3,676.90 as payment for online live sex shows performed by children in the Philippines and causing children to engage in sexual intercourse outside of Australia.²⁹ Le Gassick was refused entry to the Philippines and the Court heard that Le Gassick had plans to meet with girls for sex, which is just one of many examples of online child exploitation materials offenders progressing into contact crimes.

Both Goggins and Le Gassick were successfully prosecuted under Australian child sex laws, which have since 2010 been applicable to extraterritorial conduct. Though not directly responsible for the transport and detention of their victims, their custom supports the trafficking of children in the Philippines.

²⁶ Terre Des Hommes, 'Webcam Child Sex Tourism', (2013) <<http://www.terredeshommes.org/wp-content/uploads/2013/11/Webcam-child-sex-tourism-terre-des-hommes-NL-nov-2013.pdf>> 35.

²⁷ Behind the Screen: Online Child Exploitation in Australia' (Anti-Slavery Australia, 2017) 98-99.

²⁸ *R v Goggins* [2014] VCC 1086.

²⁹ *DPP v Le Gassick* [2014] VCC 1288.

The clarification of the meaning of sexual conduct will ensure that the harm inflicted by Australia-based offenders engaging in live-streamed child abuse is correctly characterised as sexual conduct.

3.1. Extending the definitional clarification to subsection 272.8.

Anti-Slavery Australia recommends that the definitional clarification of 'engage in sexual activity' in Item 1 of the Bill also applies to the offence of sexual intercourse with child outside Australia under subsection 272.8 of the Criminal Code.

Anti-Slavery Australia recommends that a definitional clarification, of the kind proposed in Schedule 4, Item 1, is also added to subsection 272.8 of the Criminal Code. This will ensure that an Australian directing and engaging in live-streamed, serious sexual abuse of a child overseas,³⁰ is properly characterised as culpable for the significant harm caused to the child.

Recommendation:

Anti-Slavery Australia commends Items 1, 22 and 23 to the Committee, which strengthen and clarify the law to reflect the growing practice of live-streamed child abuse.

Anti-Slavery Australia recommends that the definitional clarification of 'engage in sexual activity' in Item 1 of the Bill also applies to the offence of sexual intercourse with child outside Australia under subsection 272.8 of the Criminal Code.

4. MINIMUM SENTENCES

Anti-Slavery Australia recommends that the Committee consider engaging in further consultation regarding the proposed amendments in Schedule 6 of the Bill, particularly the introduction of mandatory minimum sentences for online child abuse materials offences.

The introduction of a mandatory minimum custodial sentence will not reflect the spectrum of child exploitation material offending. This spectrum is evidenced by the categorisation system used in Australia, the Child Exploitation Tracking System ('CETS') Scale, used in the Australian National Victim Image Library (ANVIL).³¹ The scale categories child exploitation material from Level 1, depictions of children with no sexual activity to Level 5, which involves sadism, bestiality, humiliation or child abuse. The scale also captures depictions of fictional

³⁰ As defined in *Criminal Code Act 1995* (Cth) sch 1, s 272.4(1).

³¹ Cybercrime Convention, Explanatory Report, cited in Jonathan Clough, *Principles of Cybercrime* (Cambridge University Press, 1st ed, 2010) 303.

children under Level 6, defined as anime, cartoons, comics and drawings depicting child or children engaged in sexual poses or activity.³²

Mandatory minimum custodial sentences may reduce the incentive for defendants to assist police in ongoing investigations. This may be particularly damaging to police investigations concerning online child exploitation, as defendants have no incentive to voluntarily provide passwords to encrypted devices and systems.

The importance of this kind of information to police investigations in this area can be seen through the investigations surrounding the arrest of Shannon McCoolle.³³ This operation began with evidence provided to Queensland Police Taskforce Argos following the arrest of a man who owned a company that distributed child exploitation films in Canada. This information led to the investigation and arrest of a number of people in Australia. One of the Australians arrested was a member of a bulletin board website on a Darknet. Membership of the website was closely controlled. Inactive accounts raised suspicion and could be suddenly terminated. Members were required to upload new material frequently. More than 45,000 people complied with these rules. Following his arrest, officers of Argos assumed the offender's membership and investigated those using the website.³⁴

In this case, Danish authorities provided information that the administrator of the website was located somewhere in Australia, probably in Adelaide. Argos officers used their membership of the website to search for clues into the administrator's identity. The investigation led to the identification and arrest of Shannon McCoolle, a 32 year old childcare worker for Families SA in Adelaide.³⁵ McCoolle was sentenced in August 2015 to 35 years imprisonment with a 28 year non-parole period for 18 State and two Federal offences he committed between 2011 and 2014. The charges included persistent sexual exploitation of children, sexual intercourse with children, aggravated indecent assault, and the production and dissemination of images of child abuse.³⁶ McCoolle's arrest was suppressed allowing Argos officers to secretly take control of the bulletin board website as the administrator.³⁷

Taskforce Argos' investigation lead to the rescue of 85 child victims and the arrest of hundreds of offenders across the globe.³⁸ One of the offenders arrested was Richard Huckle from the United Kingdom. Huckle abused children in Malaysia and was arrested at Gatwick

³² *DPP v Zarb*, [2014] VCC 1517, [5].

³³ (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

³⁴ *Ibid*

³⁵ *Ibid*.

³⁶ *R v Shannon Grant McCoolle* (Unreported, District Court of South Australia, Rice DCJ, 7 August 2015).

³⁷ *Ibid*.

³⁸ Michael Safi, 'The Takeover: how police ended up running a paedophile site' *The Guardian*, 13 July 2016 (online) < <https://www.theguardian.com/society/2016/jul/13/shining-a-light-on-the-dark-web-how-the-police-ended-up-running-a-paedophile-site>>.

airport in December 2014. Upon arrest, over 20,000 indecent images of children were found on hardware owned by Huckle, including approximately 1,000 images of children that he had abused.³⁹ Huckle has refused to provide access to various encrypted files found on his personal laptop, which is suspected to contain images and videos, including images of additional victims.⁴⁰

Recommendation:

Anti-Slavery Australia recommends that the committee consider the need for further consultation concerning Schedule 6, particularly the introduction of mandatory minimum sentences for online child abuse materials offences. The introduction of a mandatory minimum custodial sentence for child abuse materials offences does not reflect the spectrum of material offending. Mandatory minimum custodial sentences may also serve to reduce the incentive for defendants to assist police in ongoing investigations.

5. DEFENCE OF A VALID MARRIAGE

Anti-Slavery Australia recommends that the Bill be expanded to repeal the defence based on a valid and genuine marriage contained in subsection 272.17 of the Commonwealth Criminal Code. This subsection provides a defence to a number of overseas child sex offences, and offences involving procuring or "grooming" a child for sexual activity.⁴¹ The subsection states that it is a defence to these offences if:

- (a) at the time he or she committed the offence, there existed between the defendant and the child a marriage that was valid, or recognised as valid, under the law of:
 - (i) the place where the marriage was solemnised; or
 - (ii) the place where the offence was committed; or
 - (iii) the place of the defendant's residence or domicile; and
- (b) when it was solemnised, the marriage was genuine.⁴²

It appears that this defence may be available in a situation of overseas child sexual abuse in which the offender legally marries the young person who is below the legal age of consent in Australia. Globally, the minimum legal age of marriage varies widely. In Sudan, girls can legally marry at 10 years old. In the Philippines couples must be 21 to marry without

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ *Criminal Code Act 1995* (Cth) sch 1, ss 272.17(1) and (2).

⁴² Ibid, ss 272.17(1)(a) and (2)(a).

permission, whereas Muslim girls can marry at puberty. Muslim and Hindu girls can marry at 12 in Tanzania, as long as the marriage is not consummated until the girl is 15.⁴³ It is unclear if this defence would be available to an offender of overseas child sex abuse who was legally married to a child as young as 10 or 12 years old in a country where that marriage is legally permitted.

This defence also appears to be inconsistent with the definition of the Commonwealth offence of forced marriage under subsection 270.7A of the Commonwealth Criminal Code. Subsection 270.7A defines forced marriage as:

- 1) A marriage is a forced marriage if one party to the marriage (the victim) entered into the marriage without freely and fully consenting:
 - (a) because of the use of coercion, threat or deception; or
 - (b) because the party was incapable of understanding the nature and effect of the marriage ceremony.⁴⁴

A person under 16 is presumed to be incapable of understanding the nature and effect of a marriage ceremony, unless it is proved otherwise.⁴⁵

Recommendation:

Anti-Slavery Australia recommends that the Bill be expanded to repeal the defence based on a valid and genuine marriage contained in subsection 272.17 of the Commonwealth Criminal Code. The purpose of this defence is unclear. It also appears to be inconsistent with the Commonwealth offence of forced marriage.

⁴³ Aleksandra Sandstrom and Angelina E. Theodorou, *Many countries allow child marriage* (12 September 2016) Pew Research Center <<http://www.pewresearch.org/fact-tank/2016/09/12/many-countries-allow-child-marriage/>>.

⁴⁴ *Criminal Code*, s 270.7A(1).

⁴⁵ *Ibid*, s 270.7A(4).