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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

TUESDAY, 9 MARCH 2010

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Tuesday, 9 March 2010

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Marshall

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin and Ludlam.

Terms of reference for the inquiry:

Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010

WITNESSES

Committee met at 5.47 pm

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010. This legislation was referred to the committee by the Senate on 4 February 2010 for inquiry and report by 15 March 2010.

A division has been called. We will just hold this thought while we go down to the chamber for the division.

Proceedings suspended from 5.47 pm to 6.07 pm

CHAIR—I will finalise the official introduction to the public hearing and then go to the witnesses for their evidence. The Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 amends a number of acts to ensure comprehensive coverage of sexual offences against children where those offences occur across or outside Australian jurisdictions, such as over the internet or overseas. The bill seeks to strengthen the existing child sex tourism regime; introduce new offences relating to child pornography, child abuse material and use of a postal service for child sex related activity; enhance the coverage of offences relating to the use of a carriage service for sexual activity with a child, child pornography or child abuse material; make minor amendments relating to existing and relevant law enforcement powers; and introduce a number of forfeiture schemes relating to child pornography and child abuse material.

This inquiry has received eight submissions. They have been authorised for publication and are on the committee's website. I remind witnesses that if you want to provide answers in confidence you can request to provide that evidence in camera.

[6.08 pm]

CLARKE, Dr Roger, Chair, Australian Privacy Foundation

SVANTESSON, Dr Dan Jerker Borje, Vice-chair, Australian Privacy Foundation

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Dr Clarke—I am an information technology consultant, but I am appearing as Chair of the Australian Privacy Foundation. My colleague is Dan Svantesson, who is an associate professor of law at Bond University but is appearing as an APF vice-chair.

CHAIR—We have received your submission as No. 5. Do you want to make any amendments or changes to your submission?

Dr Clarke—No.

CHAIR—Would you like to make an opening statement?

Dr Clarke—The Australian Privacy Foundation is the country's primary public interest organisation focusing on privacy. It was formed in 1987 and it works in concert with councils for civil liberties and with consumer organisations. It also frequently provides evidence to Senate committees. It is concerned with all aspects of privacy and that encompasses not only data privacy but also the communications privacy arena and physical privacy. Physical safety is fundamental and protection of the vulnerable, such as children and young people, is a high priority so we strongly support the motivations underlying this bill. However, during more than 20 years of analysing draft legislation it has been very clear that, in complex areas like this, good law is challenging to formulate especially when it is prepared in a highly charged context.

A couple of areas where we watch out for problems are in the effectiveness of provisions in practice—questions like the ease of interpretation and implementation, which were discussion points in the previous session, and resource availability. Another area is the scope of the provisions, including scope that is wider than was intended or is justified. Another is unintended side effects or what is sometimes referred to as collateral damage. The APF's written submission was prepared by Dr Svantesson and he will speak briefly to the details.

Dr Svantesson—I want to start by talking a bit about our specific concerns about how this area of law will apply to what is referred to as 'sexting'. Sexting can be defined as electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner. This seems to be mainly a teenage phenomenon and some studies in the US suggest that about 20 per cent of teenagers there are engaging in sexting.

I will outline a brief scenario and then talk about how the relevant bill would apply to that scenario. Let us imagine we have a 15-year-old girl meeting an 18-year-old boy. They start dating and after a few months perhaps the girl, on her own initiative, sends an image of herself in the nude to the 18-year-old boy. She might also ask him to do the same for her and let us say that he complies with that. In that scenario, which does not seem to be entirely uncommon, both the boy and the girl could be convicted of child pornography offences of various kinds both under the existing law and under the new crimes introduced through the bill. For example, if we look at section 474.19 of the Criminal Code Act, as well as at the bill's introduction of a crime under proposed section 474.27A, we see that both of those provisions would have been violated in the scenario I outlined.

I am not here to express any views on whether or not the boy and girl acted rightly or wrongly in this scenario, but I think it is important to highlight this as a concern for how the crimes discussed here can be applied. I think there are serious risks in applying child pornography offences to the type of sexting scenario that I described. Even leaving aside the serious effect that it will have on the people involved I think it has the potential to dilute, in a sense, child pornography offences, which is not in the interests of preventing child pornography in the future.

I think that this is a very important point in time to stop and consider how the law is dealing with sexting. The key task in relation to the bill would be to find some sort of exception, defence or something along those lines excluding sexting from child pornography offences while at the same time avoiding creating some sort of a loophole that can be used by serious child pornography offenders.

The general privacy concerns that we raised in our submission relate mainly to how this area of law will be enforced. The only thing I want to say about that is that even in this very serious context we need to remember that privacy is a fundamental human right that needs to be taken into account. We would be very concerned to see some sort of a mass surveillance being used to achieve the very important goals set out in the bill.

CHAIR—Thank you. In relation to what you have just outlined for us—I think sexting is what it is defined as—how do you think the bill can or should be amended to avoid situations that you are concerned about?

Dr Svantesson—I am afraid that all I can do today is, in a sense, highlight the risks of how the bill is currently drafted. To find a solution to the problem of how to deal with this will take a little more research than I have done at this stage. But there are two things I want to say. The research that I have carried out to date shows that there are several areas of law, both criminal and civil law and both federal and state law, that affect sexting. So this is all part of a bigger picture, and that might be something worth pursuing through research. Looking at the bill more directly or specifically, I do not think that this problem can be overcome with some simple re-wording or other minor measures because any such attempt could lead to the types of loopholes that I highlighted before. We have to be very careful not to undermine the real purposes of a bill.

CHAIR—So isn't it better, in that sense, to have a bill like this that might be fairly broad and catch-all and leave it up to the people pursuing prosecution of an offence to sift out those that are genuine from those that might not be? For instance, in relation to your example of the 15-year-old and the 18-year-old, surely prosecutors might come to the conclusion that that was a reasonable relationship—as opposed to a relationship where, for example, someone was posing as an 18-year-old and enticing a 15-year-old to get involved?

Dr Svantesson—I see your point. I think the very best outcome would be to restructure the bill so that it adequately deals with these issues rather than to leave it to the enforcement of the bill. In the US we have seen several cases of teenagers being found guilty of child pornography offences for sexting activities. I am not saying that that would necessarily happen in Australia—

CHAIR—Sorry—were they genuine offences, or were they just teenagers caught up in a relationship?

Dr Svantesson—There was, for example, a group of 20 girls at one school who had sent around pictures of themselves in various states of undress—one girl was dressed in her swimwear, and so on—and they were threatened with prosecution for child pornography offences. And there are other situations like that. So my point is: I think we need to come up with a piece of legislation that addresses this issue, not leave it to how it would be enforced. That would be the better approach.

Dr Clarke—I would add something to that. I do believe that there is a problem with an environment in which policy decisions are imposed on or delegated to investigators and prosecutors, from two different perspectives. From their perspective, they have enough difficulty as it stands in performing their professional activities, and there was evidence led this morning by the commander from the AFP on that matter. There is already enough challenge there. So it adds to their weight of responsibility. But you are also putting members of the public in a position of jeopardy whereby they are, prima facie, committing an offence—and, what is more, given the nature of what is being done here, a quite serious offence—and then becoming dependent upon investigators and prosecutors seeing through the complexity and perceiving it to be really not that bad after all. That is not really what the law was meant to do. Asking policemen to read second reading speeches is a little unfair. So I do think there is a need for greater clarity, and the notion—as it exists in the bill—of a number of defences being specified is one approach that could tackle this kind of a problem. Alternatively, there could be alternative definitions of the nature of the offence.

CHAIR—Instead of reading second reading speeches we could go to the guidelines. You note that the investigation of offences under the amended child sex offences regime will actually require robust guidelines as to how investigations are carried out—such investigations, I am assuming, then leading either to possible prosecutions or not. So do you think the guidelines are sufficiently robust now and, if not, what do you think needs to happen to those to complement this legislation?

Dr Svantesson—On that point I would just emphasise what I said before. We need to get the law right first. We cannot rely on guidelines, in the sense of enforcement, to get things right. That is the starting point. As for the concerns we have about the guidelines, we have not had a sufficient amount of time to look into the guidelines as they stand. As for the concerns we express about mass surveillance and so on, I hope they will be taken into account properly in these guidelines, which I have not looked at fully.

Dr Clarke—I would like to address that from a slightly different direction, because I have given expert evidence in a number of cases of relevance to this matter. When there are questions of technical complexity

involved, it is quite common for police forces to have difficulty marshalling the evidence and for prosecutors to have difficulty understanding the evidence. I would like to give an example which is actually directly relevant to this bill, judging by how I was reading it this morning—and I had not read it in any detail until this morning. Clauses 273.5(1)(a)(i) and 273.6(1)(a)(i) create an offence of possession of materials. I could not see a defence which deals with a couple of common circumstances. Therefore those clauses would prima facie, on my reading, criminalise the following activities. You have to get down to a level of detail, which I am happy to talk about if you wish, in order to get the technical examination right in order to then make decisions as to whether an offence has really occurred or whether it is the kind of thing that the legislation was designed to catch.

To use a simple case for examples, emailed attachments reach your and my machines all the time and we do not have control over the content of those emailed attachments. Indeed we may not know they are there. We may never have any understanding of that material. If there is no defence available and if the specification is, as I read it, that mere possession is sufficient—no mens rea and no actus reus necessary—then I am dependent on, since I live in the ACT, the Australian Federal Police choosing not to prosecute. It is an indefensible crime. You simply cannot present a defence as a defendant in court.

In a couple of cases as an expert witness called by the defendant, I have explained what would have to be done to show that was not how the offending material came to be on the machine, and the police had not done that. On reconsidering the evidence, pulling it off and bringing it back before court again a few months later, the police gave up on three-quarters of the material and narrowed it down to a very small number of files. In this case the defendant turned queen's on himself and said: 'Oh yes, those! You're right; I did download those.' That was six items. From my experience in talking with other people, I believe that is a fairly common problem, because of the technical complexity. It is not because we have silly policemen; it is because it is technically difficult. Therefore, as Dan says, resorting to guidelines when you have quite generic legislation is very difficult and dangerous for all concerned.

CHAIR—In your submission you express concerns about 'function creep' and 'extreme measures' justified for 'exceptional circumstances'. Could you elaborate a bit on specific concerns you might have in relation to this aspect?

Dr Svantesson—Everyone agrees that this is a very serious type of offence. If we were to accept some form of mass surveillance for the detection of child pornography offences, there is the risk of function creep such that we also start seeing mass surveillance for other, lesser crimes, and so it just becomes a standard approach rather than a more targeted form of investigation. That is one example of what I had in mind there.

CHAIR—What protections do you think should be put in place to ensure that function creep does not occur?

Dr Clarke—I had not moved on to that. I was working on the problem. I will expand on the other one first and then I will come to that question. There is a risk with moving into an environment that involves surveillance of, for example, instant messaging sites or social networking services. For instance, moving to the stage of saying, 'Ah, we've got some smart software which will do a keyword search, which will enable us to pick up on phrases that have been used in the past by people who were grooming. Now let's have alarm bells ring and deflect to this, or draw it to attention,' is the kind of thing that can very easily move into a broader sphere of suspicion generation. That is the sort of thing that the Privacy Foundation tends to watch out for when it talks about function creep. In this case, we would have to get so deep into the bill to try to work out which aspects are at risk of that. This bill does not create powers, does it; it creates offences?

Dr Svantesson—No.

Dr Clarke—So it would need to be cross-read in conjunction with previous legislation which has produced powers and which these new offences will become pertinent to. We would be concerned that there could be some risk of expansion beyond the original intention.

CHAIR—I see.

Dr Clarke—I am sorry that is vague.

CHAIR—That is okay. I do not have any other questions for you. Those were the three that I had prepared for today. With the passage of legislation, my colleagues have been caught up in the Senate chamber to deal with the next piece of legislation this afternoon. That is always a problem we run into when we have public hearings at the same time as the Senate chamber is operating. Given your constraints in terms of flights, I will thank you for your submission and your evidence this afternoon. If my colleagues have questions that they

desperately want to ask you we could send them to you, but I think we have covered things. I apologise again, but thank you very much for your evidence and for at least answering my questions this afternoon. I am very grateful. Thank you both very much.

[6.30 pm]

DONOVAN, Ms Helen, Co-Director, Criminal Law and Human Rights, Law Council of Australia

MOULDS, Ms Sarah, Senior Policy Lawyer, Law Council of Australia

Evidence was taken via teleconference—

CHAIR—I warmly welcome representatives from the Law Council of Australia to our public hearing into the sexual offences against children bill. The Law Council of Australia has lodged a submission for us which we have numbered eight. We certainly do appreciate the work that you put into these. Do you need to make any amendments or alterations to the submission before I ask you to make an opening statement?

Ms Donovan—No.

CHAIR—If you would like to talk to your submission, we would welcome that. We will then have some questions for you.

Ms Donovan—Firstly, I would like to thank the committee for the opportunity to appear this evening to speak to the Law Council's submission. The Law Council, as I imagine it goes without saying, shares the government's, and indeed the community's, abhorrence at child sexual abuse and exploitation and, for that reason, the Law Council is generally supportive of legislative reforms and other initiatives which are designed to ensure that the perpetrators of such abuse do not escape prosecution and punishment simply because they seek to, or in fact commit, their crimes abroad. However, the Law Council does not support the introduction of offence professions which criminalise very nascent intentions which have only been advanced in the most preliminary way and are several steps from being realised—and may, in fact, be abandoned well before they are ever acted upon and realised. For that reason, the Law Council does not support the introduction of the preparation and planning offence in clause 272.20. Likewise, the Law Council does not support the introduction of offence provisions which are so broadly framed that they capture a range of harmless and innocuous behaviour and then place the onus on the defendant to prove that their conduct was not ill intentioned. For that reason, the Law Council does not support the offence provision in clause 272.9, at least as it is currently framed.

With both of these problematic offence provisions, the Law Council submits that there is a real risk that entirely innocent behaviour may become the subject of criminal charge and prosecution, and essentially both provisions, and some other provisions in the bill, rely very heavily on police and prosecutorial discretion for their appropriate and proportionate enforcement. In the Law Council's submission, that is not acceptable in this context.

The sort of community reaction that allegations of this kind provokes means that even a charge which is later dropped or an unsuccessful prosecution is likely to be devastating and life changing for the accused person. And further, in the Law Council's submission, it is not fair in this context to put the burden of so much discretion on enforcement agencies—where they are damned if they do take action and dammed if they do not—because they have not been given sufficient guidance from the legislature.

In its submission, the Law Council has also raised again, as it did in respect to the 2007 bill, some concerns about the available defences. Firstly, the Law Council continues to question whether the retention of the valid and genuine marriage defence is consistent with the broader rationale behind the bill and secondly, the Law Council submits, as it did in 2007, that some provision needs to be made to plug the gap where the sexual activity which is the subject of the charges is non-consensual, or there is evidence that it is non-consensual or forced, but the defendant is able to escape conviction because he or she has successfully made out a defence of mistaken belief as to age or valid and genuine marriage.

There are a few other points that the Law Council has raised and I will mention just one before concluding. The bill will introduce a requirement for the Attorney-General to give consent before proceedings under division 272 are commenced against a person under the age of 18. The Law Council submits that this is a positive development and we understand that this formalises in legislation arrangements which are already in place. However, the Law Council would submit that the Attorney-General's consent requirement should perhaps be extended to a number of other child sex offence provisions as some sort of safeguard against the misapplication of those provisions to behaviour which some of us may regard as socially undesirable or harmful but which is not predatory or exploitative of children and therefore is not the sort of behaviour that is sought to be targeted by this bill and broader legislation. I think that perhaps summarises the main points of

our submission sufficiently so if there are any questions I am happy to attempt to field them or to take them on notice if needs be.

CHAIR—Thanks, Ms Donovan. Ms Moulds, did you have anything that you wanted to add?

Ms Moulds—No, thank you.

CHAIR—Regarding section 272.20, you say that the Law Council does not support this—this is the proposed section which relates to the proposed offence for planning a child-sex tourism offence. Let me get this right here: you are suggesting that the offence targets purely preparatory acts and goes beyond the principles of criminal liabilities. In your view should it be deleted from the legislation or should amendments be made in relation to this section?

Ms Donovan—Our primary submission is that it is not necessary and therefore it does not need to be included. If you go further—and that is why it is included in here; the attempt offence already applies to other offence provisions—this 272.20 attempts to catch even more preliminary behaviour which would not amount to an attempt under the Criminal Code. Our submission is essentially that it is not necessary particularly in light of the encouraging offence or the procuring offence that is already in there. Other more advanced preparatory acts, which might not themselves amount to an attempt, are already captured and this is just a catch-all for anything that does not fit under those other existing provisions, and in that respect it is dangerous.

CHAIR—So you are suggesting that by the very nature of the fact that you might be preparing or planning an activity in relation to child-sex tourism does not necessarily lead you to breaching the Criminal Code?

Ms Donovan—It depends at what stage that preparatory conduct has reached and how advanced it is and whether or not there is still an opportunity for you to change your mind about going through with that conduct, whether or not your conduct has already set in train other events which may themselves be harmful even if you change your mind, or whether or not you are so committed at that stage that we can say that the criminal intent has already sufficiently formed that it ought to be the subject of a charge. This offence, 272.20, does not distinguish at all in that way.

The example offered in the explanatory memorandum is quite helpful, I think. It talks about conducting research on the internet about child-sex tourism destinations, which, we would submit, is very preliminary conduct which somebody might undertake, firstly, for entirely innocent reasons. But even if they did undertake that research with ill intentions, it is still an intention which may never be realised or advanced in any other way and therefore ought not to be the subject of criminal prosecution, otherwise, it is essentially approaching a thought crime.

The other examples which are given in the explanatory memorandum include booking a ticket, which again is something which may not be followed through with. The person may not actually take the trip or, even if they do take the trip, they may never realise their intentions. Or they may have booked the trip with innocent intentions. While that might not lead to a successful prosecution, it might nonetheless lead to a prosecution—which is one of the other points we are trying to make.

The third activity which is described in the explanatory memorandum is actually making contact with a child sex tourism provider to essentially ask them about making arrangements to make a child available. We would submit that that is a bit more advanced because that is the sort of conduct that can set in train other actions which are in themselves harmful. But the Law Council's submission is that conduct that is a bit more advanced in that way would fall within the encouraging offence because it would amount to intentionally contributing to a person committee the procuring offence.

CHAIR—Do you have a similar concern with proposed section 272.92 in relation to causing a child to engage in sexual activity in the presence of a defendant?

Ms Donovan—No, our concern—

CHAIR—That is a bit more about capturing innocent behaviour, isn't it?

Ms Donovan—I think there is an acknowledgement that that offence is very broad. Because it captures causing a child to engage in sexual activity—and 'engaging in sexual activity' might simply mean being present while sexual activity is engaged in—it could potentially, as we say in our submission, capture even parents on a holiday who arrange for the pullout bed to be provided in their hotel room for their children and then engage in some sort of sexual activity in front of their children, which could be as low level as kissing or hugging. There is an acknowledgement that the offence provision is that broad and there is provision there for a defence where there is no intention to derive sexual gratification from the presence of the child. But our

submission says that that ought not be included as a defence; it should be a part of the actual offence provision. That is, the onus should be on the prosecution to demonstrate that the accused person sought to derive sexual gratification from the presence of the child.

This offence provision is a conglomeration or simplification of some existing offence provisions, including the inducing offence provision. It is an element of that inducing offence provision that the person seeks to derive sexual gratification from the presence of the child. So in transferring that offence provision and joining it with some others to make a simplified provision, this element of the offence—the intent to derive sexual gratification—has been taken out of the offence proper and turned into a defence that a person bears a legal burden in relation to. Our submission is that it ought to have remained part of the offence proper and, if not, at the very least it should only be an evidential burden.

CHAIR—Can I then ask you about proposed section 272.16, which relates to activity between persons between the age of 16 and 18 years. Do you think that is too broad and captures, again, innocent domestic situations?

Ms Donovan—Possibly. This provision is certainly mirrored in a number of domestic jurisdictions. Sarah will correct me if I am wrong here. I know the ACT does not have an equivalent provision, but most domestic jurisdictions do have an equivalent provision. In comparing the domestic provisions with this provision we noted that a number of the domestic provisions only capture sexual intercourse rather than the full scope of sexual activity—bearing in mind that the definition of sexual activity is very broad. In that regard, we would submit that that defence provision ought to be inclined to sexual intercourse.

The other thing that we noted in relation to this provision, the inclusion of which was recommended by the Model Criminal Code Officers Committee, is that the list of relationships which they recommended was a little bit narrower than the list of relationships which is included in this bill and did not include, for example, the employer-employee relationship or the sports coach relationship. We do not press that point strongly. We are simply raising for the committee's consideration the fact that it is a very broad offence. Again, it is foreseeable that this conduct could be captured under that, which it was not intended to be. The example that we have offered in our submission is a couple, perhaps a 19-year-old and a 17-year-old, who head overseas on their backpacking holiday, having already been engaged in a sexual relationship before they left, and both find employment overseas at a pub or the like whereby essentially the 19-year-old becomes the supervisor of his or her younger partner and suddenly they fall foul of this legislation. We make that point to demonstrate that you do need to look very carefully at these provisions. Although it is easy to at first think of the worst-case scenario, they do capture a lot more than the sorts of scenarios that might first come to mind.

Ms Moulds—I would add that I think the definition of sexual activity in this proposed legislation does give these offences a much broader character than do a lot of the provisions that are similar in the domestic jurisdiction. I think you can see that in some jurisdictions that do prohibit kinds of conduct similar to this the types of activities that they are directed at are much more limited.

Ms Donovan—Sarah makes a good point. These provisions capture causing someone to engage in sexual activity where engaging in sexual activity means simply being present while another engages in sexual activity.

CHAIR—Before I hand over to Senator Barnett for questioning, I refer to the case of double jeopardy. You say that the bill does not actually contain adequate provisions or protections against this. Is this in the case where one may well be subject to a charge and prosecution in another jurisdiction? So it doesn't pick this up?

Ms Donovan—That point was made specifically in relation to the persistent sexual abuse offence. It appears that great care has been taken with the drafting of that provision to ensure that it cannot be used to give the prosecution a second bite of the cherry where there has already been a domestic prosecution for a particular sexual offence where there is a sexual relationship. So if that prosecution is unsuccessful there cannot then be a further prosecution in relation to one of the particular incidents which were initially alleged to demonstrate the existence of a relationship. So great care has been taken in that regard, but the Law Council's concern is that perhaps it does not foreclose the possibility whereby a person who has already been tried and convicted or acquitted of a particular incident overseas can then be charged with the persistent sexual abuse of a child where the earlier incident, which has already been the subject of prosecution, forms one of the three incidents relied upon to establish the existence of the relationship. There is a general provision dealing with double jeopardy and overseas prosecutions. The concern is that it might not be sufficient in relation to the persistent sexual abuse offence because the persistent sexual abuse offence targets a course of conduct, rather than a particular incident, and therefore the original prosecution and a prosecution under section 272.11 may

be seen as very different in character. I should say that that might be something that Attorney-General's has already considered and has advice on.

CHAIR—All right; we might ask them.

Senator BARNETT—Thanks, Ms Donovan and Ms Moulds, for your evidence today and for your submission. It is most appreciated. The chair, I think, has covered the key questions and concerns. I just have a couple of minor ones. Firstly, do you think the 25-year penalty is fair and reasonable? It seems to be, according to the Institute of Criminology, outside the normal scope when they compare it to Canada, with five years; New Zealand, 10 years; Singapore, 10 years and the UK, 14 years—versus 25 years as a maximum penalty for the offence of sexual exploitation of women and young people with a mental disability. What is your view on that?

Ms Donovan—We have not addressed that issue in our submission, and I must admit that maximum penalties are an issue that the Law Council does not often address. I can take that to the committee and see if they have a view. It may be that they do not. I do not know why they are reluctant to express a view on that—perhaps because, regardless of what maximum penalty is set, it always remains at the discretion of the court. I would not like to just offer a personal view. I am sorry to be unhelpful.

Senator BARNETT—No, that is fine. I am happy for you to take it on notice. We do not need to delay, because of course it is at the discretion of the courts. But, if you have a view, please let us know. The other question is about your views questioning the defence of a valid and genuine marriage. Why don't you think that such a defence should be appropriate?

Ms Donovan—The justification that is given for the retention of the valid and genuine marriage defence is that the government of Australia does not have sovereignty in other jurisdictions; it can only make laws for marriage in Australia, and therefore if somebody can marry legally overseas then their conduct is lawful and we ought not to interfere. But I think that is inconsistent with the rationale behind the legislation, which is that, regardless of what the law in other jurisdictions may say and what protections it may or may not offer, either on paper or in practice, Australia has an obligation to protect children under the age of 16 from harm. Our submission would be that the justification for the retention of the defence does not actually explain how marriage changes the nature of behaviour which is sexually exploitative or predatory into something different.

Senator BARNETT—Thanks very much.

CHAIR—Ms Donovan and Ms Moulds, I do not have any other questions for you. Thank you again for your submission and for highlighting some of those issues in the legislation, which we will clarify very soon, I think. Again, I thank the Law Council for the work you provide us in scrutinising this legislation.

Ms Donovan—Thank you very much for your time.

CHAIR—Thanks, both of you.

[6.53 pm]

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

ORANGE, Ms Kate, Senior Legal Officer, Criminal Law and Law Enforcement Branch, Attorney-General's Department

TAYLOR, Commander Stephanie, Manager, High Tech Investigations and Business Delivery, Australian Federal Police

WHOWELL, Mr Peter, Manager, Government Relations, Australian Federal Police

CHAIR—I welcome representatives from the Attorney-General's Department and the Australian Federal Police. I think you all know the drill. We do not have a submission from either of your organisations. Do you want to make any opening comments or remarks?

Ms Chidgey—If I could, Chair. I just want to thank the committee for the opportunity for the Attorney-General's Department to appear in support of the bill. I thought I might usefully be able to address in some opening remarks some of the issues raised by the Law Council.

Firstly, I note the Law Council's objection to the offence of preparing or planning for child sex tourism. The rationale for this offence is that advances in technology and the expansion of the internet have resulted in offenders becoming increasingly sophisticated in their networking activities and they are able to plan child sex tourism activities. This evidence often comes to the attention of law enforcement authorities before the person departs Australia. The intention of including this offence is to allow law enforcement authorities in Australia to intervene at an earlier stage and deal with that issue before the person leaves for overseas. We think the offence is appropriate. It certainly extends beyond the offensive attempt which requires an actual specific attempt to carry out the offence. We think it is appropriately focused because it requires a proof of intention that the person is actually preparing or planning a child sex tourism offence, which means that innocuous research would never ground a prosecution for this offence—you would need some actual proof that the person was intending to go on and engage in the child sex tourism offence.

Secondly, the Law Council raised the issue about causing a child to engage in sexual activity and a question about whether that was too broad, given it would be possible to commit that offence if you engaged in sexual activity in the presence of a child. We have specifically considered this issue and made an intentional decision to take the element about 'intention to derive gratification' out as an element of the offence and include it as a defence to which a legal burden of proof will apply to the defendant.

CHAIR—Is that an amendment you will need to make?

Ms Chidgey—That is one that the bill currently makes to the existing provisions. At the moment the current provision requires that the prosecution prove intention to derive gratification. Under the offences it is amended by the bill. That will not be an element of the offence but it will be open to the defendant to prove that they had no intention to derive gratification on the balance of probabilities. It is the department's view that, where there is sufficient evidence for that evidence and you can demonstrate that a defendant has caused a child to engage in sexual activity, it is appropriate that demonstrating that there was no intention of deriving gratification rests on the defendant because that knowledge is wholly within their mental state. The Commonwealth Director of Public Prosecutions advised us that it had proven to be an extremely problematic element of the offence because, for the prosecution to try and prove the state of mind of a defendant was very difficult. It is much easier for a defendant to disprove that. In relation to the double jeopardy for overseas issues that the Law Council mentioned for persistent sexual abuse, we were able to confirm that the general overseas double jeopardy provision operates in exactly the same way as the specific provisions in the persistent sexual abuse offence. So we are confident that double jeopardy also works in relation to overseas convictions in that respect.

Finally, I will just mention the concern of the Law Council about the definition of sexual activity for individuals between 16 and 18 for that offence and the list of individuals who are considered to be in a position of trust or authority. I can say that we have looked at state offences in that respect. I mention that both New South Wales and Victoria include individuals like sports coaches in their definitions and Victoria also includes employers, so we have very much followed existing models. We would also refer to the fact that there

is scope for law enforcement and prosecution agencies, obviously, to determine where it is appropriate to take action in the public interest. I might finish there.

CHAIR—That covers most of the issues. The only thing I wanted to ask you about was: what were some of the main issues that drove the development and design of the forfeiture scheme introduced by the bill?

Ms Chidgey—That was advice from the Director of Public Prosecutions and the AFP about difficulties. The only avenue at the moment for agencies to be able to confiscate that material is under the Proceeds of Crime Act. It is a very lengthy process where you have to demonstrate that the proceeds are an instrument of crime. They wanted a more streamlined process that was more effective in order to deal immediately with forfeiture of child pornography and child abuse material. We created the forfeiture scheme to be able to deal with that in a far more immediate way.

CHAIR—It is not necessarily a proceeds of crime offence, is it? How does it link?

Ms Chidgey—No. The Proceeds of Crime Act also covers confiscation of an instrument of crime, which is something that is used in the commission of a crime. That aspect of the Proceeds of Crime Act could cover such material, but it is a quite lengthy process to go through that procedure. When it is material, it is quite clearly unacceptable material—it made sense—and both the AFP and the CDPP indicated they felt it would be extremely useful to have a far more streamlined approach to dealing with the confiscation of that kind of material.

CHAIR—I would like to ask you two questions that came from the Victoria police submission. They sought clarification in that the term 'document' in proposed section 273.1 includes copies of documents. Are you or the department able to clarify this point?

Ms Chidgey—Yes. 'Document' applies to all documents. Even a document that is a copy of a document is encompassed within that term.

CHAIR—In their submission they also noted that the reference to sections in the Crimes Act 1914, in items 62 and 63, are not contained in that act. Can you clarify that for us as well?

Ms Chidgey—Would we be able to take that on notice and give you a written answer? It might take us a little bit of time.

CHAIR—Sure. I am just seeking clarification on the *Hansard* for their people who may want to have that section clarified—that is all.

Ms Chidgey—Certainly.

CHAIR—We have probably covered the rest.

Senator BARNETT—Thank you for your evidence. On the issue of the penalty, could you give us advice as to the reason for the 25 years? That seems to be a very high number of years compared to like jurisdictions around the world.

Ms Chidgey—Certainly. We based that penalty on equivalent state and territory offences, which range from 20 years to life imprisonment. We felt that, in that context, 25 years was an appropriate penalty to reflect the seriousness of that aggravated offence.

Senator BARNETT—Going back a step, in the minister's second reading speech he talked about feedback from the community and the key stakeholders and the consultation process. Could you outline for the committee the consultation process and the feedback that you have had.

Ms Chidgey—The process that we followed was that, on 11 September 2009, the Minister for Home Affairs released for comment a public consultation paper that detailed all of the proposed reforms, with a full explanation of the reforms. The public was invited to make submissions for a period of six weeks, with the consultation period closing on 23 October. The minister also wrote directly to state and territory Attorneys-General, police ministers and child safety commissioners as well as to interested non-government organisations, including the Law Council, Child Wise, Bravehearts, the National Association for the Prevention of Child Abuse and Neglect, Save the Children and World Vision, and sought their views directly as part of the consultation process. The submissions that we received expressed support for the provisions.

Senator BARNETT—How many did you receive?

Ms Chidgey—We will be able to give you that on notice. I do not have that in front of me.

Senator BARNETT—But they were all reasonably positive, were they?

Ms Chidgey—Yes, they were. Some of the state and territory ministers raised a couple of specific issues but all the responses were supportive.

Senator BARNETT—On the issue of technological change—we are in the 21st century and things are changing fast in areas such as the internet, web sites and chat rooms. Can you or the AFP outline some of the main areas of technological development that the bill is aiming to target into the coming years?

Ms Chidgey—I will begin, before handing over to the AFP, by referring to the fact that the offences that we have that apply to carriage services are quite broad; they apply to the internet, mobile phones and are technology specific in that way. So long as the offences are conducted over a telecommunications network the exact mode of transmission does not matter. The main thing we have done regarding technology is to expand significantly the range of offences that apply to internet conduct. There is a new aggravated offence for conduct on three or more occasions involving two or more people—a criminal organisation involved with child pornography offence. We have added new offences for using a carriage service for sexual activity with a child, a new aggravated sexual activity offence over the internet dealing with children who have mental impairment or individuals in positions of trust as well as a new offence for transmitting an indecent communication to a child. Those are the key areas in which we have expanded the range of technology-enabled offences.

Senator BARNETT—Do you mind me saying that is one of the key reasons for the bill? I think in the second reading speech the minister talked about the importance of introducing these offences to cover the potential exploitation of children over the internet or via electronic media or what have you.

Ms Chidgey—Yes, that is right. It is particularly important for the Commonwealth because internet offences cross jurisdictions.

Senator BARNETT—Is the AFP able to add anything to that?

Cmdr Taylor—Certainly, Senator. As we know, the technology is evolving at such a rapid pace that it is difficult for us to keep up with it if the law and the legislative frameworks do not change with those advancements. The Attorney-General's Department has touched on the issue that it is a truly global phenomenon now. We are not operating just in a domestic space; we have to be flexible enough to be able to manage investigations across multiple jurisdictions and overseas. Things such as webcams are commonplace and there are modes of communication that we have not seen previously. As was mentioned in some of the submissions, there is a rapid uptake in mobile phones and those types of communication which is going to be quite significant in the future. We need to be in a space where we can respond to some of these crimes effectively and in a timely way, but also have the legislative framework behind us that will allow us to have a critical impact in relation to the protection of our children.

Senator BARNETT—Did you want to say anything, Mr Whowell?

Mr Whowell—The only thing I will add is that we are also aware of how adaptable some of these people can be. That is why there are some offences that might seem like old technology offences—using the postal services—to ensure that we cover the different means that people use to distribute this sort of material because it can involve using a data device through the post and things like that. We are trying to be comprehensive.

Senator BARNETT—My final question is not directly related to the bill. Let me be reasonably blunt with you: my view is that the classification system that we have in this country is flawed—deeply flawed—and is failing Australian kids and families. There are hundreds and hundreds of publications out there in the community which are in breach—where the suppliers or distributors are acting in breach of the law.

You have the Classification Board; they do what is called a call-in notice to say, 'This hasn't been classified or has been classified inappropriately, and it's out there in our milk bars, newsagents and shops more broadly.' They do the call-in notice, and of course nobody responds, and then they refer it to the state police and Federal Police and again, while I am not saying it is too hard, basically not much happens and the material stays in the community. So have you looked at that as an issue and considered any legislative or policy options to remedy those flaws—either the AFP or the department? I do not know if the AFP have ever been involved in following up those notices from the Classification Board, for example.

Cmdr Taylor—Not that I am aware of.

Mr Whowell—Not that I am aware of.

CHAIR—It is not a matter directly related to this piece of legislation. I know it is a matter that has been pursued during estimates, so—

Senator BARNETT—Let me just say that it has been raised during estimates, and I draw your attention to it. It is a great concern. I know this is a bill that relates to the exploitation of children and the important response to it, and I commend the objectives of the bill absolutely, but if we are just acting on that front and not in other ways to protect kids then I think we are letting them down. So I just draw that to your attention.

CHAIR—I just want to finish with two quick questions for you, Ms Chidgey, about the CrimTrac submission. They express a concern that the amended and new offences being introduced to the Criminal Code will not be classed as registrable offences for the purposes of the ANCOR regime—the Australian National Child Offender Register. So they have suggested that amendments must be made to the state and territory legislation. Do you have a response to that?

Ms Chidgey—That is correct—ANCOR, supported by legislation in each state and territory that specifies the offences to which it applies. We intend to prepare letters to state and territory attorneys-general to seek amendments to the state and territory legislation.

CHAIR—So they will need to do that. Okay. They also indicate in their submission that defences for offences relating to the use of carriage services for child pornography material or child abuse material may not be available to CrimTrac staff who are dealing with this. I ask whether you are aware of those concerns and whether amendments will be required to ensure that CrimTrac officers have a valid defence where they deal with such material in connection with their work.

Ms Chidgey—Yes.

CHAIR—Will there need to be changes made in that respect as well?

Ms Chidgey—No, we are confident that the existing defences cover CrimTrac staff. CrimTrac appear to have potentially misread the defence as applying only to law enforcement officers, but it applies to anyone who assists in enforcing, monitoring or investigating a contravention of the law, and that would clearly cover CrimTrac staff involved with the Australian National Victim Image Library. So we feel confident that they are covered by the existing defence. I would also mention that those offences and the defences have applied since 2005 without any issues.

CHAIR—And you are fairly confident that the states and territories will then amend their legislation to reflect the ANCOR changes?

Ms Chidgey—Yes. It reflects the current Commonwealth offences, so we do not envisage any problems. It will obviously mean that they will have to put amendments through their parliaments, so it is dependent on that, but we do not foresee any objections, because it would fit with the current scope and intention of their legislation.

CHAIR—All right. The two of us do not have any other questions, but if, in formulating our report, we need to clarify issues with you then we will send you further questions. Thank you for your cooperation in answering those promptly if we need you to do that. That brings us to the end of our public hearing on the sexual offences against children bill. I want to thank everyone who has provided a submission to this inquiry and the witnesses who have been here today.

Committee adjourned at 7.13 pm