

## **EXPLANATORY STATEMENT**

Issued by the Minister for Home Affairs

*Proceeds of Crime Act 2002*

*Crimes Act 1914*

*Crimes Legislation Amendment (Economic Disruption) Regulations 2021*

The *Proceeds of Crime Act 2002* (the POC Act) provides a scheme to trace, restrain and confiscate the proceeds and benefits gained from, and the instruments used in the commission of, Commonwealth indictable offences, foreign indictable offences and certain offences against state and territory law.

The *Crimes Legislation Amendment (Economic Disruption) Regulations 2021* (the Regulations) improve the POC Act by amending the *Proceeds of Crime Regulations 2019* (the POC Regulations) and the *Crimes Regulations 2019* to:

- allow the Official Trustee in Bankruptcy to recoup its costs, charges, expenses and remuneration incurred in exercising its statutory functions, duties and powers under section 9A of the *Crimes Act 1914* (Crimes Act) and section 208DA or Division 3 of Part XIII of the *Customs Act 1901* directly from the Confiscated Assets Account from the moment they are incurred;
- update the definitions of ‘corresponding law’, ‘interstate forfeiture orders’, ‘interstate pecuniary penalty orders’ and ‘interstate restraining orders’ under the POC Act to ensure that specified declarations and orders under South Australian legislation can be registered and enforced in other jurisdictions;
- repeal sections of the POC Regulations that are duplicated in the POC Act; and
- provide that specified offences relating to child sexual abuse, grooming third parties to procure a child for sexual activity, possessing child-like sex dolls, conduct in relation to child abuse material, failing to report child sexual abuse and failing to prevent child sexual abuse are ‘serious offences’ for the purposes of the POC Act.

The Regulations are made under the POC Act and the Crimes Act.

Section 328 of the POC Act provides that the Governor-General may make regulations prescribing matters required or permitted by the POC Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Section 338 of the POC Act provides that:

- ‘corresponding law’ – means a law of a State or of a self-governing Territory that is declared by the regulations to be a law that corresponds to the POC Act;
- ‘interstate forfeiture order’, ‘interstate pecuniary penalty order’, ‘interstate restraining order’ – means an order that is made under a ‘corresponding law’ and is of a kind declared by the regulations to be within this definition; and

- ‘serious offence’ – means an indictable offence specified in the regulations.

Subsection 288(1) of the POC Act provides that the regulations may make provision relating to the costs, charges and expenses incurred in connection with, and the Official Trustee’s remuneration in respect of, the Official Trustee’s exercise of powers and performance of functions or duties under the POC Act, under Part VI of the *Mutual Assistance in Criminal Matters Act 1987* or under section 208DA or Division 3 of Part XIII of the *Customs Act 1901*.

Subsection 288(2) of the POC Act provides that an amount equal to each amount of remuneration that the Official Trustee receives under the regulations is to be paid to the Commonwealth.

Section 91 of the Crimes Act provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 9B(1) of the Crimes Act provides that the regulations may make provision in relation to the costs, charges and expenses incurred in connection with, and the Official Trustee’s remuneration in respect of, the performance or exercise by the Official Trustee of functions, duties or powers under section 9A. Subsection 9B(2) of the Crimes Act provides that an amount equal to each amount of remuneration that the Official Trustee receives under the regulations is to be paid to the Commonwealth.

Details of the Regulations are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights is set out in [Attachment B](#).

The Regulations are informed by consultation with Commonwealth agencies, including: the Department of Home Affairs, Treasury, Australian Federal Police, Australian Criminal Intelligence Commission, Attorney-General’s Department, Australian Financial Security Authority, Commonwealth Director of Public Prosecutions, and Department of Finance. The Attorney-General’s Department (South Australia) was also consulted. These agencies supported the changes.

The POC Act and the Crimes Act specify no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after registration on the Federal Register of Legislation.

Authority: Section 328 of the  
*Proceeds of Crime Act 2002*;  
Section 91 of the *Crimes Act 1914*

## ATTACHMENT A

### Details of the *Crimes Legislation Amendment (Economic Disruption) Regulations 2021*

#### Section 1 – Name

This section provides that the title of this instrument is the *Crimes Legislation Amendment (Economic Disruption) Regulations 2021* (the Regulations).

#### Section 2 – Commencement

This section provides that the whole of the instrument commenced on the day after the instrument was registered.

#### Section 3 – Authority

This section provides that this instrument was made under the *Crimes Act 1914* (the Crimes Act) and the *Proceeds of Crime Act 2002* (the POC Act).

#### Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

#### Schedule 1 – Amendments

##### ***Crimes Regulations 2019***

##### **Item 1 – After Part 1**

This item inserts new Part 1A into the *Crimes Regulations 2019* (the Crimes Regulations).

Where a court orders that articles are to be forfeited to the Commonwealth under section 9 of the Crimes Act, these articles must be transferred to the Official Trustee under subsection 9(4). Under section 9A, the Official Trustee must then, subject to any direction from the Minister administering the POC Act, sell or otherwise dispose of the articles before crediting the sale proceeds to the Confiscated Assets Account (the Account).

The Official Trustee works on a cost-recovery basis, and must recover its costs, charges, expenses and remuneration incurred in dealing with the property under section 9A directly from the proceeds of the sale of a forfeited article under subsection 9A(2).

This cost-recovery mechanism, however, is not sufficient when the value of the forfeited article is less than the costs, charges, expenses and remuneration incurred. Where the Official Trustee is required to deal with the property for an extended period of time, without being able to sell the property, it is also unable to meet its relevant costs as they arise, causing difficulties in meeting cost-recovery obligations on an annual basis.

Part 1A addresses these issues by allowing the Official Trustee to recover its costs, charges, expenses and remuneration in managing forfeited articles under section 9A of the Crimes Act

directly from the balance of the Account from the moment these costs, charges, expenses and remuneration are incurred.

This allows the Official Trustee to meet its cost-recovery obligations in the course of dealing with forfeited property under Part 1A, rather than at the conclusion of a matter, and ensures that these obligations can be met where the value of the sale proceeds of the property is otherwise insufficient.

Part 1A interacts with paragraph 297(ea) of the POC Act and subsection 9B(1) of the Crimes Act to achieve this objective. Paragraph 297(ea) of the POC Act provides that the Account can be debited to pay the Official Trustee amounts that were payable to it under Regulations made for the purposes of subsection 9B(1) of the Crimes Act.

Subsection 9B(1) of the Crimes Act provides that regulations made for the purposes of that subsection may make provision in relation to: the costs, charges and expenses incurred in connection with; and the Official Trustee's remuneration in respect of; the performance or exercise of the Official Trustee's functions, duties or powers under section 9A.

Part 1A is comprised of two new sections.

#### Section 4A – Costs etc. payable to Official Trustee

New section 4A provides that, for the purposes of paragraph 9B(1)(a) of the Crimes Act, there is payable to the Official Trustee an amount equal to the amount of costs, charges and expenses incurred in connection with the performance or exercise by the Official Trustee of functions, duties or powers under section 9A of the Crimes Act.

This allows the Official Trustee to directly recover the costs, charges and expenses it incurs performing or exercising its functions, duties or powers under section 9A directly from the balance of the Account, from the moment these costs, charges and expenses are incurred.

#### Section 4B – Remuneration of the Official Trustee

New section 4B provides that, for the purposes of paragraph 9B(1)(b) of the Crimes Act, the amount of remuneration payable to the Official Trustee in respect of the performance or exercise by the Official Trustee of its functions, duties or powers under section 9A is the equivalent amount of remuneration that is payable to the Official Trustee in respect of the Official Trustee's exercise of powers and performance of functions or duties under the POC Act.

Relevantly, new section 4B also includes a note, which provides that:

- Regulation 22 of the POC Regulations sets out the amount of remuneration that is payable to the Official Trustee in respect of the Official Trustee's exercise of powers and performance of functions or duties under the POC Act.

At the time the Regulations were made, the amount of remuneration specified in section 22 of the POC Regulations is \$62.50 for each period of 15 minutes, or part of 15 minutes.

This allows the Official Trustee to directly recover its remuneration from the balance of the Account from the moment the Official Trustee becomes entitled to this remuneration.

## ***Proceeds of Crime Regulations 2019***

### **Item 2 – Section 7 (at the end of the table items headed “South Australia”)**

This item provides that the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA Unexplained Wealth Act) is a ‘corresponding law’ under the POC Act.

The POC Act (at section 338) provides that ‘corresponding law’ means a law of a ‘State’ or a ‘self-governing Territory’ that is declared by the regulations to be a law that corresponds to the POC Act.

Prescribing the SA Unexplained Wealth Act as a corresponding State law ensures that:

- where a court makes an order in a Commonwealth proceeding, the court must take into account the effect of any interstate proceeds of crime orders under the SA Unexplained Wealth Act that have already been made (sections 159, 161, 179J and 179K of the POC Act), and
- where interstate pecuniary penalty or restraining orders under the SA Unexplained Wealth Act apply to property in a ‘non-governing territory’, they may be registered in that territory’s Supreme Court and enforced as if they had been made under the POC Act (section 303 and 307 of the POC Act).

The SA Unexplained Wealth Act is prescribed as it is in force from time to time. This is permitted by section 10A of the *Acts Interpretation Act 1901* (as applied by paragraphs 13(1)(a) and 13(1)(b) of the *Legislation Act 2003*) which has the effect that references to state Acts can also be taken to be references to those Acts as in force from time to time.

### **Item 3 – Section 14**

Item 3 repeals section 14 of the Regulations.

Following the commencement of the *Crimes Legislation Amendment (Economic Disruption) Act 2021*, section 14 is now replicated in subsections 57A(6)-(9) of the POC Act. Section 14 is therefore duplicative and is removed.

### **Items 4 and 5 – Section 15**

Item 4 omits “sections 102 and 103” from the heading of section 15 of the POC Regulations, while item 5 omits the words “or 103” from this section. Section 15 reads “To avoid doubt, the responsible authority may represent the Commonwealth in proceedings relating to an application for an order under section 102 of the Act”.

Following the commencement of the *Crimes Legislation Amendment (Economic Disruption) Act 2021*, these changes were necessary as section 15 of the POC Regulations, as it applies to buy back orders under section 103 of the POC Act, was duplicative of subsection 104(7) of the POC Act.

Section 15 of the POC Regulations will continue to apply in relation to transfer orders under section 102 of the POC Act, as there is no equivalent provision in the POC Act that applies in relation to these orders.

### **Item 6 – Sections 21 and 22**

Under section 208DA of the *Customs Act 1901* (Customs Act) all condemned goods that are narcotic-related goods must be transferred to the Official Trustee, which must then, subject to any direction from the Minister, sell or otherwise dispose of the goods before crediting the sale proceeds to the Account.

Under Division 3 of Part XIII of the Customs Act, the Official Trustee is also responsible for discharging pecuniary penalty orders, and must sell or otherwise dispose of relevant property before crediting the sale proceeds to the Account under section 243G.

Under both of these confiscation mechanisms, the Official Trustee works on a cost-recovery basis, and must recover its costs, charges, expenses and remuneration incurred in relation to these mechanisms from the proceeds of the sale of relevant property.

These cost-recovery mechanisms, however, were not sufficient when the value of the forfeited article was less than the costs, charges, expenses and remuneration incurred. Where the Official Trustee is required to deal with the property for an extended period of time, without being able to sell the property, it was also unable to meet their relevant costs as they arose, causing difficulties in meeting cost-recovery obligations on an annual basis.

Item 6 addresses this issue by amending sections 21 and 22 of the POC Regulations to allow the Official Trustee to recoup its costs, charges, expenses and remuneration in discharging their functions, powers and duties under section 208DA and Division 3 of Part XIII of the Customs Act directly from the balance of the Account, from the moment these costs, charges, expenses and remuneration accrue.

This allows the Official Trustee to meet its cost-recovery obligations in the course of dealing with property under section 208DA and Division 3 of Part XIII of the Customs Act, rather than at the conclusion of a matter, and ensures that these obligations can be met where the value of the sale proceeds of the property would otherwise be insufficient.

Under section 22 of the POC Regulations, the amount of remuneration payable to the Official Trustee in respect of the performance or exercise by the Official Trustee of its functions, duties or powers under section 208DA and Division 3 of Part XIII of the Customs Act is \$62.50 for each period of 15 minutes, or part of 15 minutes.

Item 6 achieves this objective due to the interaction between sections 21 and 22 of the POC Regulations, and subsection 288(1) and paragraph 297(e) of the POC Act. Paragraph 297(e) of the POC Act provides that amounts in the Account can be debited to pay the Official Trustee amounts that were payable to the Official Trustee under Regulations made for the purposes of paragraphs 288(1)(a) or 288(1)(b) of the POC Act.

Subsection 288(1) provides that the POC Regulation may make provision relating to:

- a) the costs, charges and expenses incurred in connection with the Official Trustee's exercise of powers and performance of functions or duties under the POC Act, Part VI of the MACMA, or under section 208DA or Division 3 of Part XIII of the Customs Act;
- b) the Official Trustee's remuneration in respect of those activities.

It is important to note that the current sections 21 and 22 of the POC Regulations, when considered alongside subsection 288(1) and paragraph 297(e) of the POC Act, currently allow the Official Trustee to recover the costs, charges, expenses and remuneration it incurs in the performance or exercise of its functions, powers and duties under the POC Act and Part VI of the MACMA from the Account from the moment these costs, charges, expenses and remuneration accrue, without having to wait for the conclusion of the relevant matter.

#### **Item 7 – Clause 1 of Schedule 1 (Table 5, after table item 2)**

This item provides that a declaration that particular property has been forfeited under Division 1 of Part 4 of the *Criminal Assets Confiscation Act 2005* (SA), as made under section 56B of that Act, is an 'interstate forfeiture order' for the purposes of the POC Act.

Prescribing this declaration as an 'interstate forfeiture order' ensures that:

- where a court determines the amount to be confiscated under a literary proceeds order or unexplained wealth order, the court must deduct the value of any property forfeited under such a declaration (sections 159, 161, 179J and 179K of the POC Act), and
- where a declaration applies to property in a 'non-governing territory', it may be registered in that territory's Supreme Court and enforced as if it had been made under the POC Act (section 309 of the POC Act).

#### **Item 8 – Clause 1 of Schedule 2 (at the end of Table 5)**

This item provides that an unexplained wealth order under section 9 of the SA Unexplained Wealth Act is an 'interstate pecuniary penalty order' for the purposes of the POC Act.

Prescribing this unexplained wealth order as an 'interstate pecuniary penalty order' ensures that:

- where a court determines the amount to be confiscated under a literary proceeds order or unexplained wealth order, the court must deduct the amount payable under the unexplained wealth order (sections 159, 161, 179J and 179K of the POC Act), and
- where an unexplained wealth order applies in relation to property in a 'non-governing territory', it may be registered in that territory's Supreme Court and enforced as if it had been made under the POC Act (section 307 of the POC Act).

### **Item 9 – Clause 1 of Schedule 3 (at the end of Table 5)**

This item provides that a restraining order under section 20 of the SA Unexplained Wealth Act is an ‘interstate restraining order’ for the purposes of the POC Act.

Prescribing this restraining order as an ‘interstate restraining order’ ensures that, where the order applies in relation to property in a ‘non-governing territory’, it may be registered in that territory’s Supreme Court and enforced as if they had been made under the POC Act (see sections 303 and 308 of the POC Act).

### **Items 10-18 Prescribing child sexual abuse offences as ‘serious offences’**

Items 10-18 prescribe specific child sexual abuse offences as ‘serious offences’ for the purposes of the POC Act. Additional prescribed offences include indictable offences relating to historic child sexual abuse, grooming third parties to procure a child for sexual activity, possession of child-like sex dolls, conduct in relation to child abuse material, and failing to report child sexual abuse and failing to prevent child sexual abuse.

The POC Act provides enhanced restraint and confiscation powers where property is linked to a ‘serious offence’ or a person commits a ‘serious offence’. A ‘serious offence’ is defined in section 338 of the POC Act to include a number of indictable offences. Paragraph 338(h) of the definition of ‘serious offence’ provides that a ‘serious offence’ includes an ‘indictable offence’ specified in the regulations. ‘Indictable offence’ is defined in section 338 of the POC Act to mean an offence against the law of the Commonwealth, or a non-governing Territory, that may be dealt with as an indictable offence (even if it may also be dealt with as a summary offence in some circumstances). Section 4G of the Crimes Act further clarifies that offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are ‘indictable offences’, unless the contrary intention applies.

If a person is reasonably suspected of committing a ‘serious offence’, a court is able to make a restraining order against property under a person’s ‘effective control’ and to forfeit this property unless the person can establish that, on the balance of probabilities, it was not derived from unlawful activity (sections 18, 29, 47 and 73 of the POC Act). In addition, if a person is convicted of a ‘serious offence’, all property subject to a restraining order under section 17 or 18 will automatically forfeit six months after the date of conviction unless the person can prove it was not the proceeds of unlawful activity or an instrument of a serious offence (sections 29, 92 and 94 of the POC Act).

The court also has the ability to restrain and forfeit instruments of serious offences under the ‘asset-directed’ restraint and forfeiture powers in the POC Act, even where the offender cannot be identified (subparagraphs 19(d)(ii) and 49(1)(c)(iv) of the POC Act).

Prescribing the offences at items 10-18 as ‘serious offences’ for the purposes of the POC Act is appropriate, particularly given that child sexual abuse has clear links to transnational, serious and organised crime groups and has devastating and long-term impacts on victims and their families. These offences also represent a growing crime type in Australia, which has been exacerbated by the effects of the COVID-19 pandemic, with a growing number of reports being received by the Australian Federal Police. Each report can contain thousands of images and videos.



Sophisticated global networks are profiting from the sexual abuse of children, with low operating costs and high profits incentivising offenders. Child abuse material has become a growing commodity on the Dark Net, as well as on the Clear Net more broadly. For example, pay-per-view services allow offenders to watch—in real time—a child being sexually abused by an adult or another child. Perpetrators are also increasingly travelling overseas in order to sexually abuse or exploit children. Their offending may be comprised of short-stay contact offending, long-term embedded contact offending, and/or online offending.

Under the existing definition of ‘serious offence’ in subparagraph 338(a)(iii) of the POC Act, unless an offence is explicitly prescribed, an indictable offence will only fall within the definition of ‘serious offence’ where the conduct subject to the offence has caused, or is intended to cause a benefit or loss to the value of at least \$10,000.

However, determining the monetary benefit derived from child sexual abuse offences can be difficult, in part because the exploitation or abuse may not be motivated by direct financial gain—although financial gain is an outcome for some active participants, such as producers and online administrators. Further, relying solely on a benefit or loss threshold of \$10,000 would not reflect the significant physical and emotional abuse and distress caused by this type of offending, as well as its broader social impacts and costs to society. Survivors whose images are shared online can be re-victimised hundreds of times a day.

It is essential that those child sexual abuse offences that do not reach the \$10,000 benefit or loss threshold still qualify as ‘serious offences’ for the purposes of the POC Act. Designating these offences as ‘serious offences’ enhances law enforcement’s ability to undermine the business model of child exploitation networks, and prevents seized funds from being reinvested in criminal activity.

#### **Item 10 – After clause 2 of Schedule 4**

This item designates the following repealed offences under the *Crimes Act 1914* (the Crimes Act), as they were in force before 15 April 2010, as ‘serious offences’ for the purposes of the POC Act:

- section 50BA (sexual intercourse with child under 16);
- section 50BB (inducing child under 16 to engage in sexual intercourse);
- section 50BC (sexual conduct involving child under 16);
- section 50BD (inducing child under 16 to be involved in sexual conduct);
- section 50DA (benefiting from offence against Part IIIA); and
- section 50DB (encouraging offence against Part IIIA).

The *Crimes Amendment (Sexual Offences Against Children) Act 2010*, which commenced on 15 April 2010, repealed these offences and replaced them with strengthened offences under sections 272.8, 272.9, 272.16 and 272.18 of the *Criminal Code Act 1995* (the Criminal Code). Despite being repealed, however, the Crimes Act offences are still utilised to prosecute

offenders for historical child sexual abuse offences where the offending occurred prior to 15 April 2010.

Prescribing these offences as ‘serious offences’ is appropriate as these offences deal with serious and abhorrent criminal conduct, and their contemporary analogues—offences under sections 272.8, 272.9, 272.16 and 272.18 of the Criminal Code—are already designated as ‘serious offences’ for the purposes of the POC Act.

#### **Item 11 – Clause 3 of Schedule 4 (table item 29)**

This item repeals table item 29 of Table 3 of Schedule 4 to the POC Regulations and substitutes new wording. Table item 29 prescribes offences under section 272.10 of the Criminal Code to be serious offences. This section was expanded by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020*.

This amendment does not change the effect of table item 29, which without amendment read ‘section 272.10 (aggravated offence—child with mental impairment or under care, supervision or authority of defendant)’, but simply amends the description of that provision to more accurately reflect its expanded scope by substituting ‘section 272.10 (aggravated offence—sexual intercourse or other sexual activity with child outside Australia)’.

#### **Item 12 – Clause 3 of Schedule 4 (after table item 34)**

This item provides that an offence against section 272.15A of the Criminal Code (“grooming” a person to make it easier to engage in sexual activity with a child outside of Australia) is a serious offence for the purposes of the POC Act.

Section 272.15A of the Criminal Code was developed in response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and in recognition of the concerns of law enforcement that offenders were establishing and nurturing relationships with third parties as means of perpetrating abuse against children. Prescribing offences under section 272.15A as ‘serious offences’ is appropriate as it further responds to these concerns, providing law enforcement with enhanced powers to strip criminals of the benefits they obtain through the commission of such abhorrent conduct.

#### **Item 13 – Clause 3 of Schedule 4 (after table item 40)**

This item prescribes the following offences under the Criminal Code as ‘serious offences’ for the purposes of the POC Act:

- section 273A.1 (possession of child-like sex dolls etc.);
- section 273B.4 (failing to protect child at risk of child sexual abuse offence); and
- section 273B.5 (failing to report child sexual abuse offence).

### Section 273A.1 (possession of child-like sex dolls etc.)

It is appropriate that section 273A.1 of the Criminal Code, which deals with conduct relating to the possession and importation of child-like sex dolls, is designated as a ‘serious offence’ for the purposes of the POC Act.

Child-like sex dolls are an emerging form of child abuse material that pose significant community safety risks. Australian law enforcement agencies have observed a significant increase in the quantity of child-like sex dolls being imported into Australia. Online retail and e-commerce services are capitalising on the increasing popularity of these products, with dedicated vendors of child-like sex dolls being uncovered on popular online marketplaces.

The business models developed by these vendors is directly related to generating profit. However, the benefit obtained through the commission of an offence against section 273A.1 of the Criminal Code will in many cases be below the \$10,000 threshold required to have the offence automatically captured as a ‘serious offence’ under subparagraphs 338(a)(iii) and 338(a)(iv) of the POC Act.

As such, prescribing offences against section 273A.1 of the Criminal Code as ‘serious offences’ in the POC Act is appropriate and necessary to ensure that law enforcement can undertake enhanced asset restraint and confiscation against persons and property connected to the commission of these abhorrent offences. It is also appropriate given research shows that the use of child-like sex dolls has direct consequences for community safety as this conduct may lead to heightened risks for real children. Brown and Shelling (2019) revealed that child-like sex dolls may: lead to escalation in contact offending; desensitise users from the potential harm of actual child sexual abuse; increase the risk that children will be objectified as sexual beings; and be used as a tool to groom children for abuse.<sup>1</sup> This demonstrates the seriousness of offending and potential links with other forms of child sexual abuse.

### Section 273B.4 (failing to protect child at risk of child sexual abuse offence) and section 273B.5 (failing to report child sexual abuse offence)

It is appropriate that offences under section 273B.4 (failing to protect child at risk of child sexual abuse offence) and section 273B.5 (failing to report child sexual abuse offence) of the Criminal Code are designated as ‘serious offences’ for the purposes of the POC Act.

The offences were created in response to recommendations 33 and 36 of the Report of the Royal Commission into Institutional Responses to Child Sexual Abuse, and require Commonwealth officers in positions of care, supervision or authority over a child to carry obligations to prevent and report the sexual abuse or exploitation of children in their power.

The offences seek to address the situations raised in many historical cases where individuals knowingly concealed child sexual abuse, or failed to protect children in their care. In many cases, individuals who commit these offences did so to obtain a personal, professional, financial, or other benefit (noting that the avoidance of a loss, including reputation loss, is considered to be a benefit).

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<sup>1</sup> Brown, R. and Shelling, J. 2019. Exploring the implications of child sex dolls. Trends and Issues in Crime and Criminal Justice, No. 570, March 2019. Australian Institute of Criminology, Australian Government.

Part 2-4 of the POC Act allows courts to make pecuniary penalty orders to seize any benefits gained from offending. The benefits that can be confiscated include ‘financial advantages’ which, under section 338, includes the avoidance, deferral or reduction of a debt, loss or liability. In targeting the benefits a person obtains through failing to report or prevent child sexual abuse, pecuniary penalty orders help achieve the underlying policy objectives of these offences, ensuring that an individual does not put their personal or organisational needs ahead of the safety of the child under their care.

Establishing these offences as ‘serious offences’ strengthens this important safeguard, allowing courts to impose a pecuniary penalty order where one of these offences can be established on the balance of probabilities (i.e. where it is more likely than not that offending occurred).

Without these reforms, a pecuniary penalty order can only be made if a person was:

- convicted of an offence and derived benefits from the commission of the offence, or
- committed an offence under 273B.4 (failing to protect child at risk of child sexual abuse offence) or 273B.5(1) (failing to report child sexual abuse offence after holding reasonable belief regarding child sexual abuse) and causes, or is intended to cause, a benefit or loss of at least \$10,000 on the balance of probabilities.

These requirements undermine the important deterrent effect of pecuniary penalty orders. Where it is more likely than not that a person has failed to report or prevent child sexual abuse under section 283B.4 or 273B.5 of the Criminal Code, it is appropriate that courts be empowered to order the confiscation of any benefit gained. This is appropriate regardless as to whether the person has been convicted of relevant offending, or the value of the benefit or loss caused, and will dissuade individuals from engaging in this conduct to avoid personal or reputational loss.

These enhanced confiscation powers also improves law enforcement’s ability to undermine the business model of child abuse networks and prevent seized funds from being retained as profit by individuals and organisations, or utilised to cover up the abuse of children under their care.

#### **Item 14 – Clause 3 of Schedule 4 (after table item 59)**

This item provides that offences under section 471.25A of the Criminal Code (using a postal or similar service to “groom” another person to make it easier to procure persons under 16) are ‘serious offences’ for the purposes of the POC Act.

Section 471.25A of the Criminal Code was developed in response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and recognising the concerns of law enforcement that offenders were establishing and nurturing relationships with third parties as means of perpetrating abuse against children, including in the online environment.

Prescribing offences under section 471.25A of the Criminal Code as ‘serious offences’ further responds to these concerns, providing law enforcement with enhanced powers to strip criminals of the benefits they obtain through the commission of such abhorrent conduct.

### **Item 15 – Clause 3 of Schedule 4 (after table item 63)**

This item provides that offences under section 474.22A of the Criminal Code are ‘serious offences’ for the purposes of the POC Act.

Section 474.22A of the Criminal Code criminalises possessing or controlling child abuse material obtained or accessed using a carriage service. These offences carry a maximum sentence of up to 15 years’ imprisonment, and respond to alarming trends in the growth of sites and forums dedicated to sharing child abuse material amongst patrons, often with the assistance of encryption and anonymising technologies.

The possession and sharing of child abuse material, which includes material depicting a child subjected to sexual abuse, cruelty, torture and/or physical abuse, is a technology-facilitated crime with devastating impacts on victims and survivors. Offenders perpetuate a market for this cruel material resulting in the abuse of more children. Further, the harm caused to the child who is the subject of ‘child abuse material’ can be prolific and enduring given that material can be circulated in online forums and between offenders, including for profit, over a long period of time and causing the child to be repeatedly re-traumatised and re-victimised.

Prescribing these offences as ‘serious offences’ provides law enforcement with the ability to undertake enhanced asset restraint and forfeiture action against both persons and property linked to the commission of these offences, and target the profit motivation underpinning them.

### **Item 16 – Clause 3 of Schedule 4 (after table item 64)**

This item prescribes offences against section 474.23A of the Criminal Code as ‘serious offences’ for the purposes of the POC Act. Section 474.23A criminalises conduct undertaken in relation to an electronic service, such as creating a website or chat room, for the purpose of committing, or facilitating the commission of, a child abuse material offence.

These offences carry a maximum sentence of up to 20 years’ imprisonment, and respond to alarming trends in the growth of sites and forums dedicated to sharing child abuse material amongst patrons, often with the assistance of encryption and anonymising technologies.

Research and operational insights show that these online forums operate as extremely organised and sophisticated criminal networks, adept at utilising existing online financial infrastructure (such as advertising and file-sharing services) to fiscally bolster and sustain their activities. These services can attract significant profit due to the quantity of users and patrons.

Prescribing these offences as serious offences provides law enforcement with the ability to undertake enhanced asset restraint and confiscation action against both persons and property linked to the commission of these offences, and target the profit motivation underpinning them.

### **Item 17 – Clause 3 of Schedule 4 (table item 67)**

This item repeals table item 67 of Table 3 of Schedule 4 to the POC Regulations and substitutes new wording. Table item 67 prescribes offences against section 474.25B of the

Criminal Code to be serious offences. This section was expanded by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020*.

This amendment does not change the effect of table item 64, which without amendment reads ‘section 474.25B (aggravated offence—child with mental impairment or under care, supervision or authority of defendant)’, but simply amends the description of that provision to more accurately reflect its expanded scope by substituting ‘section 474.25B (aggravated offence—using a carriage service for sexual activity with person under 16 years of age)’.

**Item 18 – Clause 3 of Schedule 4 (after table item 69)**

This item provides that offences against section 474.27AA (using a carriage service to “groom” another person to make it easier to procure persons under 16 years of age) are ‘serious offences’ for the purposes of the POC Act.

Section 474.27AA of the Criminal Code was developed in response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and recognising the concerns of law enforcement that offenders were establishing and nurturing relationships with third parties as means of perpetrating abuse against children.

Prescribing offences under section 474.27AA of the Criminal Code as ‘serious offences’ further responds to these concerns, providing law enforcement with enhanced powers to strip criminals of the benefits they obtain through the commission of such abhorrent conduct.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Crimes Legislation Amendment (Economic Disruption) Regulations 2021***

1. This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

**Overview of the Disallowable Legislative Instrument**

2. The *Proceeds of Crime Act 2002* (the POC Act) provides a scheme to trace, restrain and confiscate the proceeds and benefits gained from, and the instruments used in the commission of, Commonwealth indictable offences, foreign indictable offences and certain offences against state and territory law.

3. The *Crimes Legislation Amendment (Economic Disruption) Regulations 2021* (the Regulations) amends the *Proceeds of Crime Regulations 2019* (the POC Regulations) and the *Crimes Regulations 2019* (the Crimes Regulations) to:

- allow the Official Trustee in Bankruptcy to recoup its costs, charges, expenses and remuneration incurred in exercising its statutory functions, duties and powers under section 9A of the *Crimes Act 1914* (Crimes Act) and section 208DA or Division 3 of Part XIII of the *Customs Act 1901* (Customs Act) directly from the Confiscated Assets Account (the Account) any time after they arise;
- update the definitions of ‘corresponding law’, ‘interstate forfeiture orders’, ‘interstate pecuniary penalty orders’ and ‘interstate restraining orders’ under the POC Act to ensure that specified declarations and orders under South Australian legislation can be registered and enforced in other jurisdictions;
- repeal sections of the POC Regulations that are duplicated in the POC Act; and
- provide that specified offences relating to child sexual abuse, grooming third parties to procure a child for sexual activity, possessing child-like sex dolls, conduct in relation to child abuse material, failing to report child sexual abuse and failing to prevent child sexual abuse are ‘serious offences’ for the purposes of the POC Act.

*Official Trustee cost-recovery amendments (items 1 and 6)*

4. The Official Trustee is responsible for managing property placed under its control under the following restraint and confiscation mechanisms:

- The POC Act – The Official Trustee is responsible for managing confiscated property and restrained property placed under its custody and control.

- Part VI of the *Mutual Assistance in Criminal Matters Act 1987* (MACMA) – The Official Trustee is responsible for managing confiscated property and restrained property placed under its custody and control.
- Section 208DA of the Customs Act – The Official Trustee is responsible for managing condemned goods that are narcotic-related goods.
- Division 3 of Part XIII of the Customs Act – The Official Trustee is responsible for discharging pecuniary penalty orders, which provide that a person owes a specific debt to the Commonwealth.
- Section 9A of the Crimes Act – The Official Trustee is responsible for managing articles forfeited to the Commonwealth under section 9 of the Crimes Act.

5. Where confiscation is finalised under these mechanisms, the Official Trustee must, subject to any applicable direction from the Minister, sell or otherwise dispose of confiscated property before crediting the sale proceeds to the Account. The Official Trustee works on a cost-recovery basis, and must recoup its costs, charges, expenses and remuneration incurred in dealing with the property directly from the proceeds of the sale of the confiscated property.

6. These cost-recovery mechanisms, however, are not sufficient when the value of the forfeited article is less than the costs, charges, expenses and remuneration incurred. Where the Official Trustee is required to deal with the property for an extended period of time, without being able to sell the property, it is also unable to meet its relevant costs as they arise, causing difficulties in meeting cost-recovery obligations on an annual basis.

7. Sections 21 and 22 of the POC Regulations, when read alongside subsection 288(1) and paragraph 297(e) of the POC Act, currently deal with this issue by allow the Official Trustee to recoup its costs, charges, expenses and remuneration incurred in exercising its statutory functions, duties and powers under the POC Act and Part VI of the MACMA directly from the Account any time after they arise.

8. Items 1 and 6 of the Regulations amend the POC Regulations and Crimes Regulations to allow this cost-recovery mechanism to be used in relation to costs, charges, expenses and remuneration incurred by the Official Trustee in exercising its statutory functions, duties and powers under section 9A of the Crimes Act and section 208DA or Division 3 of Part XIII of the *Customs Act 1901*. These amendments operate in this manner due to their interaction with subsection 288(1) and paragraph 297(e) and (ea) of the POC Act, as well as subsection 9B(1) of the Crimes Act.

9. These amendments ensure that the Official Trustee can meet all of its cost-recovery obligations in the course of dealing with property placed under its control, rather than at the conclusion of a matter, and ensures that these obligations can be met where the value of the sale proceeds of the property would otherwise be insufficient.



*South Australia – corresponding laws and interstate orders (items 2 and 7-9)*

10. Items 2 and 7-9 designate particular South Australia laws as ‘corresponding laws’ and interstate orders for the purposes of the POC Act, specifically providing that:

- the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) is a ‘corresponding law’ for the purposes of the POC Act;
- a declaration under section 56B of the *Criminal Assets Confiscation Act 2005* (SA) that particular property has been forfeited under Division 1 of Part 4 of this Act is an ‘interstate forfeiture order’ for the purposes of the POC Act;
- an unexplained wealth order under section 9 of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) is an ‘interstate pecuniary penalty order’ for the purposes of the POC Act; and
- a restraining order under section 20 of the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) is an ‘interstate restraining order’ for the purposes of the POC Act.

11. These amendments ensure that:

- where property has been confiscated under a declaration or unexplained wealth order, the court must take this into account in determining the amount to be confiscated under a literary proceeds order or unexplained wealth order (sections 159, 161, 179J and 179K of the POC Act), and
- where a declaration, restraining order or unexplained wealth order applies to property in a ‘non-governing territory’, they may be registered in that territory’s Supreme Court and enforced as if they had been made under the POC Act (sections 303, 307 and 309 of the POC Act).

*Deletion of duplicative provisions (items 4-5)*

12. Items 4-5 repeal section 14 and amend section 15 of the POC Regulations to remove provisions that currently duplicate subsections 57A(6)-(9) and 104A(7) of the POC Act. These subsections in the POC Act came into force on 17 February 2021, with the commencement of the *Crimes Legislation Amendment (Economic Disruption) Act 2021*.

*Inclusion of additional child sexual abuse offences as serious offences (items 10-18)*

13. Items 10–18 of the Regulations amend Schedule 4 of the POC Regulations to provide that the following child sexual abuse offences under the Criminal Code and repealed offences under former Part IIIA of the Crimes Act are ‘serious offences’ for the purposes of the POC Act.

14. Offences that are designated as ‘serious offences’ include the following offences under the *Criminal Code Act 1995* (the Criminal Code):

- section 272.15A (grooming a person to make it easier to engage in sexual activity with a child outside Australia)

- section 273A.1 (possession of child-like sex dolls etc.)
- section 273B.4 (failing to protect child at risk of child sexual abuse offence)
- section 273B.5 (failing to report child sexual abuse offence)
- section 471.25A (using a postal or similar service to ‘groom’ another person to make it easier to procure persons under 16)
- section 474.22A (possessing or controlling child abuse material obtained or accessed using a carriage service)
- section 474.23A (conduct undertaken for the purposes of using an electronic service for child abuse material)
- section 474.27AA (using a carriage service to ‘groom’ another person to make it easier to procure persons under 16 years of age)

15. The following repealed offences under the Crimes Act, that were in force before 15 April 2010, are also designated as ‘serious offences’:

- section 50BA (sexual intercourse with child under 16);
- section 50BB (inducing child under 16 to engage in sexual intercourse);
- section 50BC (sexual conduct involving child under 16);
- section 50BD (inducing child under 16 to be involved in sexual conduct);
- section 50DA (benefiting from offence against Part IIIA); and
- section 50DB (encouraging offence against Part IIIA).

16. The *Crimes Amendment (Sexual Offences Against Children) Act 2010*, which commenced on 15 April 2010, repealed these offences and replaced them with strengthened offences under sections 272.8, 272.9, 272.16 and 272.18 of the *Criminal Code Act 1995* (the Criminal Code). Despite being repealed, however, the Crimes Act offences are still utilised to prosecute offenders for historical child sexual abuse offences where offending occurred prior to 15 April 2010.

17. Items 11 and 17 merely make minor amendments to headings of existing ‘serious offences’ under sections 272.10 and 474.25B of the Criminal Code, and make no substantive changes to these provisions.

### **Human rights implications**

18. Items 10 – 18 of the Regulations engage Australia’s international obligations under the right to freedom from arbitrary and unlawful interference with privacy, family, home and correspondence in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

### ***Right to privacy – Article 17 of the ICCPR***

19. Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. In General Comment 16, the United Nations Human Rights Committee stated that the term ‘home’ is to be understood to indicate the place where a person resides or carries out their usual occupation. ‘Correspondence’ also includes electronic means of communication. Interferences are permissible so long as they are authorised by law and are not arbitrary.

20. The United Nations Human Rights Committee has not defined ‘privacy’, however it should be understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

21. The term ‘unlawful’ in Article 17 means no interference can take place except in cases authorised by law. What is ‘arbitrary’ will be determined by the circumstances of each case. In order for an interference with the right to privacy not to be arbitrary, the interference must be for a reason consistent with the provisions, aims and objectives of the ICCPR and be reasonable in particular circumstances. The United Nations Human Rights Committee has interpreted reasonableness in this context to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

22. The Regulations are clearly lawful, in that they are prescribed by law. To the extent that these provisions limit the rights in Article 17, these limitations are not arbitrary, as they are reasonable, necessary and proportionate to achieve the legitimate purpose of protecting public order and the rights and freedoms of others.

### ***Freedom from arbitrary or unlawful interference with privacy – home and family***

23. Article 17 of the ICCPR includes a right to be protected against arbitrary or unlawful interference with a person’s home, family and correspondence. Items 10–18 may engage this right, as these items designate specified child sexual abuse offences as ‘serious offences’ and thereby enhance restraint and confiscation action under the POC Act in relation to these offences.

24. Under these enhanced arrangements, if a person is reasonably suspected of committing a ‘serious offence’, a court is able to make a restraining order against property under a person’s ‘effective control’ and to forfeit this property unless the person can establish that, on the balance of probabilities, the property is not derived from the proceeds of unlawful activity or the instrument of a serious offence (sections 18, 29, 47 and 73 of the POC Act). In addition, if a person is convicted of a ‘serious offence’, all property subject to a restraining order under section 17 or 18 will automatically forfeit six months after the date of conviction unless the person can prove it was not the proceeds of unlawful activity or an instrument on the balance of probabilities (sections 29, 92 and 94 of the Act).

25. The court also has the ability to restrain and forfeit instruments of serious offences under the ‘asset-directed’ restraint and forfeiture powers in the POC Act, even where the offender cannot be identified (subparagraphs 19(d)(ii) and 49(1)(c)(iv) of the POC Act). In addition, a court may make a pecuniary penalty order confiscating the value of the benefit a person has derived from offending under Part 2–4 of the POC Act where it can be established on the balance of probabilities that the person has committed a ‘serious offence’.

26. If enhancing restraint and forfeiture for these ‘serious offences’ limits the right to protection against interference with a person’s home, this limitation is necessary, reasonable and proportionate to achieve the legitimate objective of preserving public order and the rights and freedoms of the victims of child sexual abuse.

Prescribing ‘serious offences’ is necessary

27. It is necessary to prescribe the offences under items 10-18 as ‘serious offences’ as these offences have a corrosive effect on public order and the rights and freedoms of victims of child sexual abuse, and strong asset restraint and confiscation powers are necessary to target the criminal networks that perpetrate these offences.

28. Child sexual abuse has clear links to transnational, serious and organised crime groups and has devastating and long-term impacts on victims and their families. These offences also represent a growing crime type in Australia, which has been exacerbated by the effects of the COVID-19 pandemic, with a growing number of reports being received by the Australian Federal Police. Each report can contain thousands of images and videos.

29. Sophisticated global networks are profiting from the sexual abuse of children, with low operating costs and high profits incentivising offenders. Child abuse material has become a growing commodity on the Dark Net, as well as on the Clear Net more broadly. For example, pay-per-view services allow offenders to watch—in real time—a child being sexually abused by an adult or another child. Perpetrators are also increasingly travelling overseas in order to sexually abuse or exploit children. Their offending may be comprised of short-stay contact offending, long-term embedded contact offending, and/or online offending.

30. Classifying child sexual abuse offences as ‘serious offences’ is necessary to give law enforcement the tools to undermine the business model of these abhorrent child abuse networks, and to prevent funds from being reinvested in these networks.

31. Extending these enhanced asset confiscation powers to these classes of child sexual abuse offences is also reasonable and proportionate and will protect the rights and freedoms of victims. The transnational, serious and organised criminal syndicates that directly engage in this offending, and facilitate the offending of others, need assets to perpetrate their conduct and grow by reinvesting the proceeds of their offending to enable their perpetration of further, more horrific criminal conduct. By confiscating these assets, and the proceeds obtained from the offending, law enforcement is able to reduce their capacity and their ability to perpetrate further offending.

32. Under the existing definition of ‘serious offence’ in subparagraph 338(a)(iii) of the POC Act, unless an offence is explicitly prescribed, an indictable offence will only fall within the definition of ‘serious offence’ where the conduct subject to the offence has caused, or is intended to cause a benefit or loss to the value of at least \$10,000.

33. In prescribing offences as ‘serious offences’, items 10-18 remove the need to prove the value of an actual or intended financial benefit or loss arising from these offences. This is necessary as determining the monetary benefit from child sexual abuse offences can be difficult, in part because the exploitation or abuse of children may not be motivated by direct financial gain—although financial gain is an outcome for some active participants, such as producers and online administrators.

34. Further, relying solely on a benefit or loss threshold of \$10,000 would not reflect the significant physical and emotional abuse and distress caused by this type of offending, as well as its broader social impacts and costs to society. For example, it is currently estimated that every seven minutes, a webpage shows a child being sexually abused. Survivors whose images are shared online can be re-victimised hundreds of times a day.

35. Further offence-specific information regarding the necessity of these reforms has been included below.

*Child abuse material offences (items 15 and 16)*

36. Items 15-16 of the Regulations prescribe offences under the Criminal Code of possessing or controlling child abuse material obtained online or accessed using a carriage service (section 474.22A), or engaging in conduct relating to an electronic service for the purposes of facilitating a child abuse material offence (section 474.23A) as ‘serious offences’ for the purposes of the POC Act.

37. These offences carry a maximum sentence of up to 15 years’ (section 474.22A) or 20 years’ (section 474.23A) imprisonment, and respond to alarming trends in the growth of sites and forums dedicated to sharing child abuse material amongst patrons, often with the assistance of anonymising technologies.

38. Research and operational insights show that these online forums operate as extremely organised and sophisticated criminal networks, adept at utilising existing online financial infrastructure (such as advertising and file-sharing services) to fiscally bolster and sustain their activities. These services can attract significant profit due to the quantity of users and patrons.

39. Providing law enforcement with enhanced asset confiscation powers to restrain and confiscate the property of persons linked to the commission of these offences is not only necessary in order to disrupt these abhorrent criminal networks, but is also reasonable and proportionate. The criminal syndicates that profit from the vile and systemic abuse of children operate a business model that is reliant on reinvesting the profits obtained from the sale of child abuse material into perpetrating further offending. Confiscating this criminally derived wealth, and the assets that facilitate the offending is reasonable and proportionate when the devastating harm caused by this offending is considered.

40. Victims of child sexual abuse experience unquantifiable harm and the socio-economic cost of child abuse material is significant. Victim statements highlight that the psychological damage perpetrated by the material being re-shared, coupled with fear of being recognised by offenders, means that survivors have ongoing health concerns and limited capacity to achieve financial security. Enabling law enforcement to restrain and forfeit the assets of the offenders who perpetrate these offences will protect the rights and freedoms of the victims of child sexual abuse by preventing the proceeds obtained through the sharing of child abuse material from funding further offending, ultimately reducing the capacity of offenders.

*Grooming of third parties (items 12, 14 and 18)*

41. The Regulations also prescribe offences of grooming a person to make it easier to procure a child for sexual activity under sections 272.15A, 471.25A and 474.27AA of the Criminal Code as ‘serious offences’ for the purposes of the POC Act.

42. These offences respond to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, and recognise law enforcement's concerns that offenders were establishing and nurturing relationships with third parties, such as parents or carers, as means of perpetrating abuse against children. While this commonly happens by offenders fomenting trust and rapport with a third party through mutual networks (such as friends, colleagues or sporting clubs), online services such as dating applications have enabled offenders to groom single parents or siblings in order to gain access to children.

43. Prescribing these offences as 'serious offences' for the purposes of the POC Act provides law enforcement with enhanced asset restraint and confiscation powers to target the property used by offenders to groom parents, carers or other persons with supervision over children in order to make it easier to sexually abuse a child. This is necessary as it will allow law enforcement to directly target any property used by the offender to groom a third party, through asset-directed forfeiture, prior to the offender having actually procured the child for sexual abuse. This approach is a reasonable and proportionate means of undermining an offenders' ability to use that property to, for example, purchase gifts, extend favours, provide special attention or otherwise build a relationship and sense of trust with, or indebtedness from, that third party which can be exploited to access and abuse a child. Allowing the third party to retain property used to facilitate such a serious crime would also be inappropriate in these circumstances.

#### *Possession of child-like sex dolls (item 13)*

44. The Regulations prescribe an offence against section 273A.1 of the Criminal Code for the possession of child-like sex dolls as 'serious offences' for the purposes of the POC Act.

45. Child-like sex dolls are an emerging form of child abuse material that pose significant community safety risks. Australian law enforcement agencies are seeing a steady increase in the quantity of child-like sex dolls being imported into Australia. In 2020, the Australian Border Force seized 212 child-like sex dolls and/or parts that individuals were attempting to import from overseas manufacturers. This compares to a total 133 dolls detected over the five years between July 2013 and June 2018.

46. Online retail and e-commerce services are capitalising on the increasing popularity of these products, with dedicated vendors of child-like sex dolls being uncovered on popular marketplace websites. In some cases, vendors have developed business models that enable buyers to customise dolls with the child-like appearance of their choice, including the ability to model the doll on a specific child and digitally programme it to respond positively to abuse.

47. These trends are particularly concerning because—apart from the objects' abhorrent nature—research by the Australian Institute of Criminology indicates that use of these dolls may escalate child sexual abuse offending. While manufacturers and sellers of child-like sex dolls may market them as therapeutic alternatives to contact sexual offending, these actors are generating profit from objects that normalise, desensitise and arguably encourage, contact sexual abuse.

48. Prescribing these offences as serious offences will allow law enforcement to confiscate the proceeds obtained from its importation or sale. Providing law enforcement with these enhanced powers will directly protect the rights and freedoms of potential victims. An increasing body of research is revealing that child-like sex dolls may: lead to escalation in

contact offending; desensitise users from the potential harm of actual child sexual abuse; increase the risk that children will be objectified as sexual beings; and be used as a tool to groom children for abuse. By confiscating these articles, and preventing the proceeds from the manufacture, sale or importation from being reinvested into further child sexual abuse offending, this item will directly protect the rights and freedoms of potential victims.

49. There are also links between child-like sex doll offences and other child abuse material offences, as ABF operational experience demonstrates that offenders arrested for importing child-like sex dolls are commonly found to be in possession of child abuse material on their electronic devices.

*Failure to protect children from, or report, child sexual abuse (item 13)*

50. The Regulations also prescribe offences of failing to protect a child from a sexual abuse offence and failing to report child sexual abuse under sections 273B.4 and 273B.5 of the Criminal Code as ‘serious offences’ for the purposes of the POC Act.

51. The offences were created in response to recommendations 33 and 36 of the Report of the Royal Commission into Institutional Responses to Child Sexual Abuse, and require Commonwealth officers in positions of care, supervision or authority over a child to carry obligations to prevent and report the sexual abuse or exploitation of children in their power.

52. The offences seek to address the situations raised in many historical cases where individuals knowingly concealed child sexual abuse, or failed to protect children in their care or under their supervision or authority. In many cases, individuals who commit these offences did so to obtain a personal, professional, financial, or other benefit (noting that the avoidance of a loss, including reputation loss, is considered to a benefit).

53. Part 2-4 of the POC Act allows courts to make pecuniary penalty orders to seize any benefits gained from offending. The benefits that can be confiscated include ‘financial advantages’ which, under section 338, includes the avoidance, deferral or reduction of a debt, loss or liability. In targeting the benefits a person obtains through failing to report or prevent child sexual abuse, pecuniary penalty orders help achieve the underlying policy objectives of these offences, ensuring that a relevant individual does not put their personal or organisational needs ahead of the safety of the child. Establishing these offences as ‘serious offences’ will strengthen this important safeguard, allowing courts to impose a pecuniary penalty order where one of these offences can be established on the balance of probabilities (i.e. where it is more likely than not that offending occurred).

54. Without these reforms, a pecuniary penalty order can only be made if a person was:

- convicted of an offence and derived benefits from the commission of the offence, or
- committed an offence under 273B.4 (failing to protect child at risk of child sexual abuse offence) or 273B.5(1) (failing to report child sexual abuse offence after holding reasonable belief regarding child sexual abuse) and causes, or is intended to cause, a benefit or loss of at least \$10,000 on the balance of probabilities.

55. These requirements undermine the important deterrent effect of pecuniary penalty orders. Where it is more likely than not that a person has failed to report or prevent child sexual abuse under section 273B.4 or 273B.5 of the Criminal Code, it is appropriate that

courts be empowered to order the confiscation of any benefit gained. This is appropriate regardless as to whether the person has been convicted of relevant offending, or the value of the benefit or loss caused, and will dissuade individuals from engaging in this conduct to avoid personal or reputational loss.

56. These enhanced confiscation powers also improve law enforcement's ability to undermine the business model of child abuse networks and prevent seized funds from being retained as profit, or utilised by individuals to cover up the abuse of children under their care.

#### *Child sexual abuse offences (item 10)*

57. The Regulations also prescribe a number of repealed child sexual abuse offence provisions in former Part IIIA of the Crimes Act, as they were in force before 15 April 2010, as 'serious offences' for the purposes of the POC Act. These offences are still utilised to prosecute offenders for historical child sexual abuse offences where offending occurred prior to 15 April 2010.

58. Prescribing these offences as 'serious offences' is appropriate as these offences deal with serious and abhorrent criminal conduct, and their contemporary analogues—offences under sections 272.8, 272.9, 272.16 and 272.18 of the Criminal Code— are already designated as 'serious offences' for the purposes of the POC Act.

#### Prescribing 'serious offences' is reasonable and proportionate

59. If prescribing the offences specified in items 10-18 of the Regulations as 'serious offences' for the purposes of the POC Act limits the right against interference with a person's privacy, family, home or correspondence, this limitation is also reasonable and proportionate in achieving the legitimate objective of preserving public order and the rights and freedoms of those subject to serious criminal behaviour.

60. The POC Act contains a number of safeguards and procedures to provide additional protections to individuals whose property may be subject to restraint or forfeiture orders on the basis of a link to a 'serious offence':

- if an individual's property is subject to a restraining order, a court may be able to make allowances for expenses to be met out of property covered by the restraining order (section 24), exclude property from the scope of the order or revoke the order (sections 24A, 29, 42), or refuse to make the order where it is not in the public interest to do so (sections 17(4) and 19(3)).
- if an individual's property is restrained and subject to a forfeiture order or automatic forfeiture, a court can exclude the person's interest from the scope of the order or from automatic forfeiture (sections 73, 94 and 102).
- a court can refuse to make an order in relation to an 'instrument' of an offence in certain circumstances, including where making the order is not in the public interest (sections 47(4), 48(2) and 49(4)).
- an individual may also seek a compensation order for the proportion of the value of the property they did not derive or realise from the commission of an offence (sections 77 and 94A) or a buy back order (sections 57 and 103).



- where an individual acquires property that constituted ‘proceeds’ or an ‘instrument’ in the legitimate situations outlined under section 330(4), this property ceases to be ‘proceeds’ or an ‘instrument’ of crime and generally cannot be subject to restraint or forfeiture. This ensures that third parties who acquire property legitimately are adequately protected.

61. Proceeds of crime authorities are also Commonwealth agencies that are bound by an obligation to act as model litigants (see paragraph 4.2 and Appendix B of the *Legal Services Directions 2017*). This obligation requires these authorities to act honestly and fairly in handling litigation brought under the Act, and includes (but is not limited to) obligations not to take advantage of a claimant who lacks resources to litigate a legitimate claim and not to rely on technical defences except in limited circumstances.

### Conclusion

62. To the extent the Regulations limits the right to protection against interference with a person’s privacy, family, home or correspondence, this limitation is necessary, reasonable and proportionate to achieve the legitimate objective of protecting public order and the rights and freedoms of others, by ensuring that property that can be linked to criminal conduct can be restrained and confiscated in appropriate circumstances.

### **Conclusion**

63. The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving legitimate objectives.