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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**COMBATTING CHILD SEXUAL EXPLOITATION LEGISLATION AMENDMENT
BILL 2019**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Home Affairs, the Hon Peter Dutton MP)

COMBATting CHILD SEXUAL EXPLOITATION LEGISLATION AMENDMENT BILL 2019

General Outline

1. The Bill protects children from sexual exploitation by improving the Commonwealth framework of offences relating to child abuse material, overseas child sexual abuse, forced marriage, failing to report child sexual abuse and failing to protect children from such abuse.
2. The Bill implements a number of recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) by:
 - creating an offence of failure to protect a child at risk of a child sexual abuse offence
 - creating an offence of failure to report a child sexual abuse offence, and
 - strengthening overseas persistent child sexual abuse laws.
3. The other measures in the Bill form a suite of child protection measures to target child exploitation that occurs both overseas and in Australia, enhancing investigation and prosecution outcomes at the Commonwealth level. These measures:
 - criminalise the possession or control of child abuse material in the form of data that has been obtained or accessed using a carriage service
 - prevent certain dealings with child-like sex dolls
 - criminalise the possession of child-like sex dolls
 - improve the definition of forced marriage
 - restrict the defence based on a valid and genuine marriage to overseas child sex offences, and
 - remove references to ‘child pornography material’ in a number of Commonwealth Acts and replace with ‘child abuse material’.
4. The Bill amends the *Criminal Code Act 1995* (Criminal Code), the *Customs Act 1901* (Customs Act), the *Crimes Act 1914* (Crimes Act), the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979* to achieve these objectives.

Schedule 1 – Failure to protect a child at risk of a child sexual abuse offence

5. Recommendation 36 of the Royal Commission’s *Criminal Justice Report* stated that State and Territory governments should introduce legislation to create a criminal offence of failure to protect a child within an institution from a substantial risk of sexual abuse by an adult associated with the institution.
6. The Bill recognises that the Commonwealth also has the scope and the responsibility to introduce a similar offence. As Commonwealth representatives engage with children in various capacities, it is important that the Commonwealth take all reasonable steps to protect children within its care, supervision or authority from sexual abuse.
7. The Bill introduces a new offence in the Criminal Code for a Commonwealth officer who negligently fails to reduce or remove the risk of a child under their care, supervision or

authority being sexually abused, if it is part of their actual or effective responsibilities as a Commonwealth officer to reduce or remove that risk.

8. Criminalising the failure to protect is primarily designed to prevent child sexual abuse from occurring, while criminalising the failure to report (below) is intended to bring to light abuse that has occurred or will occur. Reporting a suspected perpetrator to police may be one of the steps that could be taken to protect a child, but it may not sufficiently reduce or remove the risk in the particular situation. In such circumstances, more immediate steps and interventions may be required to mitigate the risk. For example, a Commonwealth officer may decide that reasonable steps to protect a child require them to suspend a suspected person from all duties that involve direct contact with children or any unsupervised interactions with children.

Schedule 1 – Failure to report a child sexual abuse offence

9. Recommendation 33 of the Royal Commission’s *Criminal Justice Report* was also directed at State and Territory governments, and stated that jurisdictions should introduce a criminal offence for failing to report child sexual abuse. The Bill recognises that Commonwealth officers should also have responsibilities to report child sexual abuse to the police and should face criminal sanctions for failing to do so.

10. The Bill introduces a new offence in the Criminal Code for failing to report a child sexual abuse offence. Under this offence, a Commonwealth officer, who exercises care or supervision over children, will be guilty of an offence if they know of information that would lead a reasonable person to believe or suspect that another person has or will engage in conduct in relation to a child that constitutes a child sexual abuse offence, and they fail to disclose that information as soon as practicable to a police force or service of a State or Territory or the Australian Federal Police.

Schedule 2 – Preventing the possession of child-like sex dolls

11. The Bill criminalises the possession of a child-like sex doll in the Criminal Code and, consequential to the expansion of the term ‘child abuse material’ in Schedule 7, makes a child-like sex doll ‘child abuse material’ for the purposes of the Criminal Code and the Customs Act.

12. Schedule 2 responds to an emerging form of child abuse material: child-like sex dolls. These objects are three-dimensional, resemble children and have imitation orifices that are intended to be used for simulating sexual intercourse. The purported sexual abuse of children through the use of child-like sex dolls must be criminalised to reduce the risks that these behaviours may escalate the risk posed to real children. Contemporary research is more frequently referencing this risk.

13. In 2019, research by the Australian Institute of Criminology revealed that:

- a. it is possible that the use of child-like sex dolls may lead to escalation in child sex offending, for example similar to the way that viewing online child abuse material may lead to contact sexual offending
- b. the use of child-like sex dolls may desensitise users from the potential harm that actual child sexual abuse causes
- c. the sale of child-like sex dolls potentially results in the risk of children being objectified as sexual beings, and

- d. child-like sex dolls could be used to groom children for sex (in the same way that adult sex dolls have already been used).¹

14. These amendments are intended to further implement Australia's obligations under Articles 19 and 34 of the United Nations *Convention on the Rights of the Child* [1991].

15. The Commonwealth framework of child sexual abuse and exploitation offences covers a range of dealings with material that constitutes child sexual abuse, primarily in relation to a carriage service, postal service, dealings with child abuse material committed overseas, and its importation/exportation. It is important that these offences are amended to keep pace with the evolving threats posed by child sex offenders. The amendments made by the Bill will ensure that these new forms of child sexual abuse are clearly criminalised.

16. By amending the definition of 'child abuse material' in the Criminal Code, it will be put beyond doubt that it is criminal to, for example, use a carriage service to advertise or solicit, or use a postal service to send, child-like sex dolls. Similarly, the Bill amends the Customs Act to clarify that child-like sex dolls are a form of child abuse material. This will provide certainty to officers at the border, who are responsible for detecting different forms of child abuse material, that these objects are prohibited.

Schedule 3 – Possession or control of child abuse material that has been sourced using a carriage service

17. The Bill introduces a new offence in Subdivision D of Division 474 of the Criminal Code for the possession or control of 'child abuse material' in the form of data held in a computer or contained in a data storage device and that was obtained or accessed via a carriage service.

18. The introduction of the offence will strengthen the Commonwealth's framework for criminalising online child abuse. Existing offences criminalise other online dealings in child abuse material, including transmitting, accessing, distributing and soliciting material, and possessing child abuse material with the intention to deal with it over a carriage service. The new offence captures the act of possessing child abuse material obtained through a carriage service (e.g. the internet) to ensure the possession itself is captured under Commonwealth criminal laws.

Schedule 4 – Strengthening overseas persistent child sexual abuse laws

19. The Bill also strengthens existing laws for overseas persistent child sexual abuse by reducing the difficulties associated with distinguishing particular occasions of offending from repeated and regular child sexual abuse.

20. Section 272.11 of the Criminal Code criminalises persistent sexual abuse of a child overseas. The offence requires at least three underlying occasions of child sexual abuse overseas against the same child to be proved over any period of time. The offence carries a maximum penalty of 25 years' imprisonment.

21. The Bill lowers the minimum number of underlying occasions of abuse required to prove the offence in section 272.11 from three occasions to two. These amendments require the trier of fact to agree on the same two underlying occasions of abuse. This is more compatible with the way in which child victims remember repeated and regular sexual abuse. These amendments reduce the difficulties associated with requiring such a victim to

¹ 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.

distinguish particular occasions of offending. This will increase the ability to prosecute for repeated, regular and ongoing child sexual abuse overseas.

22. The Royal Commission heard evidence that there is a real risk that the most extensive cases of repeated child sexual abuse may be the hardest to prosecute. This is because of the difficulties for a victim to distinguish specific instances of abuse in cases of repeated, regular, and ongoing child sexual abuse. These difficulties may arise where the offending is the same or similar on each occasion, occurs regularly over a period of time, where the victim is very young at the time of offending, and/or there are delays in reporting the abuse. In response, recommendations 21 and 22 of the Royal Commission's *Criminal Justice Report* recommended that State and Territory governments strengthen persistent child sexual abuse offences to reduce the difficulties associated with proving the particulars of repeated instances of abuse.

23. The Bill recognises that the Commonwealth also has the responsibility to strengthen the Commonwealth offence of persistent child sexual abuse overseas. By bringing the minimum number of occasions of abuse required to prove the overseas offence from three to two, the Bill responds to relevant Royal Commission recommendations.

Schedule 5 – Expanding the definition of forced marriage

24. The Bill also makes amendments to strengthen the forced marriage offences in the Criminal Code to increase the protections available for children against this serious form of exploitation.

25. Section 270.7B of the Criminal Code criminalises causing a person to enter a forced marriage, and being party to a forced marriage. The offences carry maximum penalties of seven years' imprisonment, or nine years' imprisonment when aggravating factors are present (such as when the victim is under 18 years of age).

26. Under subsection 270.7A(1), a marriage is forced if it is entered into without full and free consent because of the use of coercion, threat or deception, or an incapacity to understand the nature and effect of the marriage ceremony (for reasons such as age and mental capacity). Subsection 270.7A(4) provides that a person under 16 years of age is presumed, unless the contrary is proven, to be incapable of understanding the nature and effect of the marriage ceremony.

27. The offences capture forced marriages that occur in Australia, as well as those that occur overseas, where the offender is an Australian citizen or resident. The offences apply to legally recognised marriages, registered relationships and marriages that are void, invalid or not recognised by law for any reason, including those formed by purely cultural and religious ceremonies. Despite not intending to have any legal effect, cultural and religious marriages are regarded as binding and place children at increased risk of repeated sexual, physical and psychological abuse.

28. Vulnerable young women and girls are disproportionately affected by forced marriage, globally and domestically. Operational experience has shown that perpetrators of these crimes are often the victims' parents, close relatives, and religious or community leaders who are in a position to exert subtle and prolonged familial, religious and cultural pressure upon victims.

29. The intended effect of the existing rebuttable presumption in subsection 270.7A(4) was to make the consent of a child irrelevant. However, in practice it has equated a child's understanding of what marriage is with their consent to that marriage. Operational experience has shown that the majority of child victims have, on their own evidence, clearly

demonstrated that they understood the nature and effect of the marriage ceremony, which is commonly expressed as resulting in an exclusive commitment for life, a sexual relationship, co-habitation and children. Paired with many victims' reluctance to give evidence against their own family or community members, the offences as currently drafted have made it difficult to prosecute forced marriage offences involving child victims.

30. The Bill repeals the rebuttable presumption and expands the definition of forced marriage in subsection 270.7A(1) to explicitly include all marriages involving children under 16 years. The age of 16 years is in line with the marriageable age provisions in Part II of the *Marriage Act 1961* (Cth) (Marriage Act). Under the Marriage Act, a person is of marriageable age if the person has attained the age of 18 years, or where an Australian court order is in force that permits a person who has attained the age of 16 years but not 18 years to marry a person aged over 18 years in exceptional circumstances provided there is the required consent (usually parental).

31. By explicitly criminalising underage marriages, the Bill reduces the need to call evidence from vulnerable child victims and simplifies the prosecutorial burden of demonstrating a lack of full and free consent resulting from coercion, threat, deception or incapacity to understand the nature and effect of the marriage ceremony. The Bill is intended to further fulfil Australia's obligations under the relevant international treaty articles, for example the Convention on the Rights of the Child, relating to the protection of children. This ensures that appropriate protections are afforded to vulnerable children at risk of being forced to marry.

Schedule 6 – Restricting the defence to overseas child sex offences based on a valid and genuine marriage

32. The Bill also restricts the defence to overseas child sex offences based on a valid and genuine marriage.

33. Australian offenders are known to travel overseas to sexually abuse and exploit vulnerable children in foreign jurisdictions where criminal law and child protection frameworks are weak or non-existent, and their offending behaviour is less likely to be investigated by local authorities.

34. Division 272 of the Criminal Code criminalises sexual offences committed by Australians against children (under 16 years of age) outside Australia. It also criminalises sexual offences committed against young people (at least 16 years of age but under 18 years) overseas, where the Australian offender is in a position of trust or authority (such as a teacher, medical practitioner or employer).

35. Section 272.17 currently provides a defence to certain offences in Division 272 if, at the time the offence was committed, a valid and genuine marriage existed between the defendant and the child or young person. The defendant must prove the marriage was recognisable as valid under the law of the country where the marriage was solemnised or where the offence was committed or where the defendant resides, and that the marriage was genuine at the time it was entered into.

36. Globally, the minimum legal age of marriage varies widely, with some jurisdictions permitting the marriage of children as young as 10 years old. Many foreign jurisdictions also permit persons younger than the minimum age to be married by order of the court, including for religious reasons. In some countries, child marriages pursuant to customary law may be recognised as valid and genuine for the purposes of this defence.

37. People in positions of trust or authority over young people outside Australia are often entrusted to care for the welfare and best interests of those young people. The power imbalance in this relationship makes it inherently exploitative, resulting in long-term consequences and lengthy delays in reporting.

38. The Bill repeals section 272.17 to ensure the existence of a marriage between the defendant and a child under 16 years is no longer a valid defence to conduct that is otherwise criminal. The Bill substitutes section 272.17 with a narrower defence for people in positions of trust or authority, who engage in sexual activity with young people (at least 16 years but under 18 years) outside Australia, provided the defendant can prove the young person was at least 16 at the time the valid and genuine marriage was entered into. This will bring Australia's overseas child sex offences in line with Australia's broader efforts to combat child exploitation and forced marriage.

Schedule 7 – Expanding the meaning of child abuse material

39. The Bill also updates the terminology used for child sexual abuse offences in Commonwealth legislation. It does this to reflect the gravity of these crimes, the harm that is inflicted on the children involved, and shifts in national and international best practice.

40. The Criminal Code and other Commonwealth legislation currently distinguish between 'child abuse material' and 'child pornography material'. However, the term 'child pornography material' is no longer considered appropriate or accepted terminology. Attaching the term 'pornography' to this material is a barrier to conveying the seriousness and gravity of the offences, the inherently abusive nature of the material, and the harm faced by the children. Further, labelling content as 'child pornography material' may inadvertently legitimise that material by associating it with legal forms of (adult) pornography. The inference that 'pornography' is associated with consenting subjects participating in legal behaviour is entirely inappropriate where the behaviour depicted involves the abuse of children.

41. The shift away from 'child pornography' is reflected in the Australian Federal Police's standard communications regarding child sexual abuse cases, as well as materials developed by relevant non-government organisations. The importance of appropriate terminology is further highlighted by international conventions and guidelines recognised by Australia, including the United Nation's Commission on Crime Prevention and Criminal Justice 2019 resolution on *Countering child sexual exploitation and sexual abuse online*. In 2016, the Global Interagency Working Group released the *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, which notes that terms like 'child pornography' are being increasingly criticised, including by victims and survivors of child sexual abuse. Representatives to the Global Interagency Working Group included international and regional non-government organisations such as the International Centre for Missing and Exploited Children, INTERPOL, Save the Children International, and the United Nations Committee on the Rights of the Child.

42. The Bill proposes to repeal references to 'child pornography material' and reconstitute the current definitions of 'child abuse material' and 'child pornography material' into a single definition of 'child abuse material'. Amendments to the terminology are also reflected in Schedule 2.

FINANCIAL IMPACT

43. There will be limited increase in costs borne by state and Commonwealth agencies for investigating and prosecuting new offences. These costs will be absorbed.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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44. The Bill 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 Bill

45. The Bill amends the *Criminal Code Act 1995* (Criminal Code), the *Crimes Act 1914* (Crimes Act), the *Customs Act 1901* (Customs Act), the *Telecommunications (Interception and Access) Act 1979* (TIA Act) and the *Surveillance Devices Act 2004* (SD Act) to strengthen the laws protecting children from sexual abuse. It does this by improving the framework of offences relating to child sexual abuse material, overseas child sexual abuse, forced marriage, failing to report child sexual abuse and failing to protect children from such abuse.

46. The Bill implements a number of recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) by:

- creating a new offence of failure to protect children at risk of a child sexual abuse offence
- creating a new offence of failure to report a child sexual abuse offence, and
- strengthening the offence of persistent sexual abuse of a child outside Australia under section 272.11 of the Criminal Code.

47. The Bill also seeks to combat child sexual abuse by:

- creating a new offence of possessing a child-like sex doll, and expressly extending current offences relating to dealings with ‘child abuse material’, such as advertising, ordering, posting and importation, to child-like sex dolls
- creating a new offence of possessing or controlling ‘child abuse material’ in the form of data that was accessed or obtained using a carriage service
- strengthening the forced marriage offences under section 270.7B of the Criminal Code by ensuring they explicitly capture all marriages involving children under 16 years
- restricting the defence of valid and genuine marriage for sexual offences committed against children outside Australia under section 272.17 of the Criminal Code, and
- updating the terminology used for child sexual abuse offences in Commonwealth legislation to more appropriately reflect the gravity of and harm associated with child abuse materials.

48. Schedule 1 creates new offences of failure to report, and failure to protect children from, a child sexual abuse offence. These offences have been created in response to recommendations 33 and 36 of the Royal Commission’s *Criminal Justice Report*, which found that these offences were required to incentivise the reporting and prevention of child sexual abuse. While these recommendations were directed at State and Territory

governments, the introduction of offences directly applicable to Commonwealth officers is necessary and appropriate given the various capacities in which such officers engage with children.

49. Schedule 2 inserts a new offence for possessing child-like sex dolls into the Criminal Code and clarifies that existing offences relating to dealings such as advertising, ordering, posting and importing ‘child abuse material’ extend to these dolls. The measures in this Schedule will allow investigations and prosecutions relating to child-like sex dolls to be carried out, including consistently across jurisdictions.

50. Schedule 3 amends Division 474 of the Criminal Code to introduce a new offence of possessing or controlling ‘child abuse material’ that was accessed or obtained using a carriage service, addressing a gap in Commonwealth child sexual abuse offences.

51. Schedule 4 strengthens the existing offence of persistent sexual abuse of a child outside Australia in section 272.11 of the Criminal Code. These amendments reduce difficulties associated with proving repeated instances of abuse and respond to recommendations 21 and 22 of the Royal Commission’s *Criminal Justice Report*.

52. Schedule 5 strengthens the existing forced marriage offences by ensuring they explicitly capture all marriages, including those formed by cultural and religious ceremonies, which involve children under 16 years. This clarifies that a child’s consent or apparent acquiescence is irrelevant for the purposes of proving a forced marriage offence, and will simplify prosecutorial burden and reduce the need to call evidence from child victims.

53. Schedule 6 repeals section 272.17 of the Criminal Code, which currently provides a defence to certain child sexual offences committed outside Australia where a valid and genuine marriage existed between the defendant and alleged victim at the time the conduct constituting the offence was committed. It substitutes section 272.17 with a narrower defence based on a valid and genuine marriage for people in positions of trust or authority in relation to young people (at least 16 years but under 18 years) outside Australia, provided the young person had attained the age of 16 when the marriage was solemnised. This deters Australian offenders from sexually abusing vulnerable children and young people overseas.

54. Schedule 7 expands the meaning of ‘child abuse material’ and removes references to ‘child pornography material’ in a number of Commonwealth Acts. A number of Commonwealth Acts currently distinguish between ‘child abuse material’ and ‘child pornography material’. Attaching the term ‘pornography’ to this material is a barrier in conveying the seriousness and gravity of the offences depicted in that material, as well as the harm faced by the children in that material. The inference remains that pornography is associated with consenting subjects, which is entirely inappropriate given this behaviour involves the sexual abuse of children.

Human rights implications

55. The human rights and freedoms engaged by the Bill fall under the following conventions to which Australia is a State Party:

- *Convention on the Rights of the Child* [1991] ATS 4 (CRC)
- *International Covenant on Civil and Political Rights* [1980] ATS 23 (ICCPR)
- *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5 (ICESCR), and

- *Convention on the Elimination of All Forms of Discrimination Against Women* [1983] ATS 9 (CEDAW).

56. The measures contained in Schedule 2 of the Bill give further effect to Australia's obligations under the CRC, while the other measures positively engage with the principles underpinning— and the fundamental rights and freedoms protected by— the CRC, including:

- the best interests of the child as a primary consideration (Article 3)
- the right of the child to be protected from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse (Article 19)
- requirement to abolish traditional practices prejudicial to the health of children (Article 24(3))
- the right of the child to be protected from all forms of sexual exploitation and sexual abuse (Article 34),
- the right of the child to be protected against all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36), and
- the right of the child not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment (Article 37).

57. The measures contained in the Bill also advance obligations under the ICCPR, including:

- the right to freedom from slavery (Article 8(1)), and
- right to respect for the family, in particular the requirement that marriages shall be entered into with the free and full consent of the intending spouses (Article 23(3)).

58. The Bill also engages, and in some cases positively engages, the following rights from the ICCPR:

- the presumption of innocence (Article 14(2))
- right to protection against arbitrary and unlawful interferences with privacy (Article 17(1))
- freedom of thought, conscience and religion (Article 18(1))
- freedom of expression (Article 19(2)), and
- right to enjoy and benefit from culture (Article 27).

59. The Bill also positively engages Article 10(1) of the ICESCR, which provides (in part) that marriages shall be entered into with the free consent of the intending spouses.

60. The Bill also positively engages the following rights from the CEDAW:

- right to freely choose a spouse and enter into a marriage with free and full consent (Article 16(1)(b)), and

- that the marriage of a child shall have no legal effect (Article 16(2)).

The best interests of the child as a primary consideration (Article 3 of the CRC)

61. Article 3(1) of the CRC provides that in all actions concerning children the best interests of the child shall be a primary consideration, including by social welfare institutions, courts of law, administrative authorities and legislative bodies.

62. Under Article 3(2) of the CRC, States Parties undertake to ensure the child have such protection and care as is necessary for their well-being, taking into account the rights and duties of individuals legally responsible for them. This shall be done through appropriate legislative and administrative measures.

Failing to protect children from or report child sexual abuse

63. The new offences of failure to protect children from, or failure to report, child sexual abuse at proposed Division 273B of the Criminal Code positively engage Article 3 by ensuring that the best interests of the child are a primary consideration for Commonwealth officers who have care, supervision or authority over children.

64. The offences ensure that Commonwealth officers who provide care or supervision for children are compelled to report child sexual abuse to the police, and Commonwealth officers who provide care, supervision or authority over children take steps to protect children from this abuse.

65. In criminalising a failure to report or protect children from abuse, these measures positively engage Article 3(1) of the CRC by ensuring that the best interests of the child are a primary consideration and are protected over other considerations such as institutional, organisational or governmental reputation.

66. The offences also positively engage Article 3(2) as they compel persons with legal responsibility for children to provide protection and care that is necessary for their wellbeing. The offences also positively engage Article 3(3) as they ensure that Commonwealth officers responsible for care and protection of children conform to proper safety standards, ensuring that signs of child sexual abuse are quickly and effectively dealt with.

Forced marriage and restricting the defence of valid and genuine marriage

67. The Bill amends the definition of ‘forced marriage’ to capture all marriages involving children under 16 years. It also repeals the defence of valid and genuine marriage under the Criminal Code, which can currently be used by offenders to escape culpability for sexual crimes committed against children under 16 years outside Australia if they can prove that they were legally married to the child in any jurisdiction (which includes a place outside Australia). In some overseas jurisdictions, adults are permitted to marry children as young as 10 years old.

68. These amendments positively engage and go beyond Article 3(1) as they compel courts of law to treat the best interests of the child, specifically the harmful effects of child marriage, not just as a primary consideration but actually paramount to other considerations such as cultural sensitivities and recognition of foreign laws.

Right of the child to be protected (Articles 19, 34 and 36 of the CRC)

69. Article 19(1) of the CRC provides that States Parties shall take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment

or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has care of the child.

70. Further, Article 19(2) provides that such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

71. Article 34 of the CRC provides that States Parties should undertake to protect children from all forms of sexual exploitation and sexual abuse, including taking all appropriate measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and materials.

72. Article 36 of the CRC provides that States Parties should protect children against all other forms of exploitation prejudicial to any aspects of their welfare.

Failing to protect children from or report child sexual abuse

73. The new offences at proposed Division 273B of the Criminal Code require Commonwealth officers with care or supervision of children to report the sexual abuse of children, and Commonwealth officers with care, supervision or authority over children to remove known risks of the sexual abuse of children.

74. These offences positively engage Article 19(1) as they are appropriate legislative measures that criminalise: the failure to protect children from sexual abuse whilst under the care, supervision or authority of a person in their capacity as a Commonwealth officer; and Commonwealth officers who care for or supervise children and fail to report suspected or believed child sexual abuse to police. Further, the proposed 'failure to protect' offence protects children from neglect or negligent treatment, as it criminally punishes a defendant's negligent failure to reduce or remove a substantial risk of child sexual abuse that the defendant knows of.

75. The new offences also positively engage Article 19(2) by making it criminal to fail to report child sexual abuse to police and reinforcing the use of existing reporting, referral and investigation procedures (raising the possibility of judicial involvement through criminal proceedings or other preventative action) to reduce or remove the risk that this abuse would occur.

76. The new offences also positively engage the right of the child not to be induced or coerced into unlawful sexual activity under Article 34 of the CRC. It does this by imposing criminal sanctions on Commonwealth officers who fail to report, or take steps to reduce or remove the risk of, child sexual abuse once they become aware of relevant information. This obligation will prevent the inducement or coercion of children into sexual activity from occurring, continuing or being concealed.

77. The offences in relation to the failure to report or prevent child sexual abuse offences positively engage Articles 19 and 34 of the CRC.

Persistent child sexual abuse

78. The Bill strengthens the offence of persistent child sexual abuse overseas by reducing difficulties associated with charging repeated instances of child sexual abuse. The amended offence would criminalise two or more occasions of the following conduct over any period:

engaging in sexual intercourse or sexual activity with a child overseas, or causing a child to engage in sexual intercourse or sexual activity overseas in the presence of the defendant. This is a departure from the current offence, which requires three or more occasions of this conduct occurring.

79. These amendments positively engage Article 19(1) as they are appropriate legislative measures to protect children from repeated child sexual abuse when it occurs outside Australia. These amendments further protect children from violence, injury, abuse and exploitation overseas, including by perpetrators against children under their care. These amendments also positively engage Article 19(2) as they increase the general and specific deterrence for committing sex offences against children overseas.

80. The amendments positively engage Article 34 by strengthening offences to protect children from overseas sexual exploitation and abuse. The amendments have a preventative and deterrent effect on the commission of repeated unlawful sexual activity with a child overseas. For example, the amendments strengthen the ability to prosecute a perpetrator who causes a child to engage in repeated sexual activity in their presence for the exploitative use of the child in prostitution-like performances.

81. Therefore, the amendments to the offence of persistent child sexual abuse overseas positively engage Articles 19(1), 19(2) and 34 of the CRC.

Possession and other dealings with child-like sex dolls

82. The new offence at section 273A.5 of the Criminal Code criminalises the possession of child-like sex dolls. Additionally, the term ‘child abuse material’ at section 473.1 of the Criminal Code has been extended to clearly capture these dolls or objects, thereby also criminalising certain dealings with these dolls or objects. This would include using a carriage service to advertise or order a child-like sex doll, using a postal service to send a child-like sex doll, or importing a child-like sex doll.

83. These measures give further effect to Australia’s obligations under Articles 19 and 34, given the likelihood that child-like sex dolls increase the risk of harm to real children. The Australian Institute of Criminology has reported: it is possible that use of child-like sex dolls may lead to escalation in child sex offending, from viewing online child abuse material to contact sexual offending; the use of child-like sex dolls may desensitise users from the potential harm that child abuse causes; the sale of child-like sex dolls potentially results in the risk of children being objectified as sexual beings; child-like sex dolls could be used to groom children for sex (in the same way that adult sex dolls have already been used).²

84. Prohibiting child-like sex dolls is necessary to prevent and reduce the risk of child sexual abuse. The proposed offences therefore give further effect to Articles 19(1), 19(2) and 34 of the CRC.

Possession of child abuse material

85. The new offence at section 474.22A criminalises the possession of ‘child abuse material’ where the material is in the form of data obtained or accessed using a carriage service.

86. This measure positively engages with Australia’s obligations under Articles 19, 34 and 36, as ‘child abuse material’ includes material that depicts a child who is a victim of sexual abuse, torture, cruelty, or physical abuse. Schedule 3 of the Bill positively engages

² 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.

Article 34 by increasing the general and specific deterrence for committing child sex offences through the creation of new offences to criminalise emerging gaps in Commonwealth offences for technology-facilitated child sexual abuse. Furthermore, the victimisation and harm caused to the child who is the subject of ‘child abuse material’ which is available to be accessed or obtained by use of a carriage service can be prolific, causing the child to be re-traumatised and re-victimised.

87. The proposed offence criminalises a greater variety of ‘child abuse material’ and types of dealings with this material, reducing their influence and, by extension, any further abuse of children that may arise following the use of this material. The proposed offence therefore positively engage Articles 19(1), 19(2) and 34 of the CRC.

Forced marriage and restricting the defence of valid and genuine marriage

88. The Bill expands the definition of forced marriage to explicitly capture all marriages involving children under 16 years of age. This positively engages Article 19 of the CRC as it combats the practice of forced marriage, which places victims at increased risk of early sexualisation, physical, sexual, psychological and financial abuse, and self-harm. It can also result in diminished autonomy, restrictions on freedom of movement, isolation and denial of access to education and employment. The perpetrators of forced marriage are commonly individuals who have care of the child, including the victims’ parents, close relatives and/or religious and community leaders.

89. The Bill also engages positively with Article 19 by restricting the defence of valid and genuine marriage, increasing the general and specific deterrence for committing sex offences against children outside Australia.

90. These measures also positively engage Article 34 as forced marriage is often, if not always, followed by sexual abuse. In addition, the repeal of the defence of valid and genuine marriage also engages positively with Article 34 by removing a legal vulnerability that allowed individuals to escape criminal liability for engaging in the sexual abuse of children under 16 years of age overseas.

91. The Bill positively engages with Article 36 by protecting children against exploitation prejudicial to their welfare, including forced marriage and the abuse that it entails.

92. These proposed amendments therefore positively engage Articles 19(1), 19(2) 34, and 36 of the CRC.

Requirement to abolish traditional practices prejudicial to the health of children (Article 24(3) of the CRC)

93. Article 24(3) of the CRC provides that each State Party ‘shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children’.

Forced marriage and the repeal of the defence of valid and genuine marriage

94. Forced marriage is a harmful practice that disproportionately affects young women and girls, globally and domestically. Forced marriages involving children are often accompanied by early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates. In addition to the impacts on sexual and reproductive health, forced marriage also exposes victims to increased risk of physical, sexual, psychological and financial abuse, as well as self-harm and suicide.

95. The Bill further fulfils Australia’s obligations under Article 24(3) by strengthening the existing forced marriage offences to ensure they explicitly capture all marriages involving

children under 16 years of age, and by restricting the defence of valid and genuine marriage. This will protect children's health by increasing community awareness and understanding of forced marriage as a harmful practice, which may impact on a child's sexual and reproductive health and which should be abolished.

Right of the child not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37 of the CRC)

96. Article 37 of the CRC provides that States Parties shall ensure '[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.

97. The new offence at section 474.22A positively engages this Article by criminalising the possession of 'child abuse material' in the form of data held in a computer or contained in a data storage device. Specifically, the offence applies where it is presumed the material was accessed or obtained by a carriage service. 'Child abuse material' includes material that depicts a child who is a victim of torture, cruelty or physical abuse and is done in a way that reasonable persons would regard as being offensive. Criminalising this behaviour at the Commonwealth level contributes to the protection of children from torture or other cruel, inhuman or degrading treatment or punishment as required under the CRC.

Right to freedom from slavery (Article 8(1) of the ICCPR)

98. The right to freedom from slavery set out in Article 8(1) of the ICCPR provides that no one shall be held in slavery, and that slavery and the slave-trade in all their forms shall be prohibited.

99. The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery expands the definition of slavery in the 1926 International Convention to Suppress the Slave Trade and Slavery to encompass slavery-like practices including forced marriage and certain instances of child exploitation.

100. The Bill engages positively with Article 8(1) by expanding the definition of forced marriage to explicitly capture all marriages involving children under 16 years.

Right to the presumption of innocence (Article 14(2) of the ICCPR)

101. Article 14(2) of the ICCPR states that those charged with criminal offences have the right to be presumed innocent until proved guilty according to law. The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

Possession of child abuse material

102. The new offence at section 474.22A engages this Article by applying the presumption set out in section 475.1B to the new 474.22A(3) of the Criminal Code. The presumption in section 475.1B of the Criminal Code provides that it is presumed—unless the person proves to the contrary—that the person used a carriage service to engage in that conduct if:

- a physical element of the offence consists of a person using a carriage service to engage in particular conduct, and
- the prosecution proves beyond reasonable doubt that the person engaged in the relevant criminal conduct.

103. The purpose of this presumption is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct. Often, evidence that a carriage service was used to

engage in the relevant criminal conduct is highly technical. Such evidence can be circumstantial, including for example that the defendant's computer had chat logs saved on the hard drive, the computer was connected to the internet, and records show the computer accessed particular websites that suggest an association with the material saved on the hard drive.

104. The presumption in subsection 474.22A(3) will have the effect that if the prosecution proves beyond reasonable doubt the elements at subsections 474.22A(1)(a), (b), and (d) of the Criminal Code, it is presumed that material was obtained by the defendant by the use of a carriage service. The presumptions will stand unless the defendant proves a carriage service was not used.

105. The offences in Schedule 3 rely on the Commonwealth's telecommunications power under the Australian Constitution at section 51(v). Therefore, the requirement in the offence that the relevant criminal conduct be engaged in using a carriage service is a jurisdictional requirement. A jurisdictional element of the offence is an element that does not relate to the substance of the offence or the defendant's culpability, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth and those that do not.

106. Given the objective of the presumptions in sections 475.1B and the new subsection 474.22A(3) of the Criminal Code, it is not unreasonable that the presumptions would be applied to the new carriage service offence. Accordingly, to the extent this measure limits the right to presumption of innocence, this is a permissible limitation.

Right to protection against arbitrary and unlawful interferences with privacy (Article 17(1) of the ICCPR)

107. Article 17(1) of the ICCPR recognises the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence, and to unlawful attacks on a person's reputation.

108. The term 'unlawful' in Article 17 means no interference can take place except in cases authorised by law. 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.

Failure to report offence

109. The Bill engages the right to protection against arbitrary or unlawful interference with privacy to the extent that the failure to report offence criminalises a Commonwealth officer who fails to disclose information about a child when such information is founded on a reasonable belief or suspicion that the child has been, or will be, the victim of sexual abuse.

110. The offence limits the right in Article 17 by requiring reporting. However, this limitation is lawful as it is clearly prescribed by law. Further, the limitation is not arbitrary, as it is reasonable, necessary and proportionate to achieving the legitimate objectives of preserving public order and protecting the rights and freedoms of children.

111. The Royal Commission found that an offence to this effect is necessary to achieve these objectives as members of institutions were found to have repeatedly failed to report child sexual abuse, due to motivations such as avoiding reputational damage to the institution. Criminalising a failure to report would thereby incentivise these persons to report

suspected or believed abuse, as the liability to criminal conviction compels the person to place the interests of the child above a desire to preserve institutional reputation or other motivations.

112. Further, there are a range of factors that contribute to the underreporting of child sexual abuse, including the immaturity and vulnerability of the victim as well as the power imbalance that often exists between the perpetrator and victim. Unlike offences where the victim is an adult and capable of reporting the criminal conduct directly to police, the circumstances that frequently surround child sexual abuse necessitate an obligation being placed on persons charged with the care or supervision of children to ensure that this abuse is brought to the attention of appropriate authorities. This obligation helps ensure that children are afforded protection from violence, sexual abuse and other forms of harm and exploitation consistent with Articles 19 and 34 of the CRC.

113. This limitation is also reasonable and proportionate, as a person will only be required to report to relevant Australian police services, which are bound by their own privacy obligations in handling the information.

114. A person is also only obliged to report where they are a Commonwealth officer, the risk arises in relation to a child within their care or under their supervision, and they know of information that would lead a reasonable person to suspect or believe that the child was, or will be, subject to a child sexual abuse offence. The information that could come within the scope of this requirement will be directly related to the individual's employment as a Commonwealth officer. The reference to a 'reasonable person' ensures that officers are only obliged to report information that would objectively indicate a child sexual abuse offence has or will occur.

115. There are also defences at subsection 273B.4(3) which ensure that a person will not be liable for the offence in particular situations where the information is already known to authorities, in the public domain or the disclosure could put another person (other than the offender) at risk.

116. To the extent that this offence limits the right to privacy, this limitation is reasonable, necessary and proportionate to achieve the legitimate objectives of preserving public order and protecting the rights and freedoms of children.

Possession of child abuse material

117. The Bill creates a new offence of possessing or controlling child abuse material that has been obtained or accessed using a carriage service.

118. This measure engages the right to privacy as it interferes with a person's personal property, including what may be contained within a family home.

119. This measure is clearly lawful (as it is prescribed by law) and it is not arbitrary, as it is reasonable, necessary and proportionate to achieve the legitimate objectives of protecting public morals, public order and protecting the rights and freedoms of children.

120. This measure is necessary to achieve these objectives as such material victimises and abuses the subject of the material, being an actual child.

121. This measure is also reasonable and proportionate in achieving these objectives. In determining whether material is 'child abuse material', a factor for consideration is whether a reasonable person would regard the depiction as offensive, taking into account the considerations outlined at section 473.4 of the Criminal Code. These include the standards of morality decency and propriety generally accepted by reasonable adults, the literary, artistic

or educational merit (if any) of the material, and the general character of the material (including whether it is of a medical, legal or scientific character).

122. Where the measure limits the right to privacy, it therefore does so to achieve legitimate objectives in a necessary, reasonable and proportionate manner.

Possession of and prevention of other dealings with child-like sex dolls

123. The Bill creates an offence of possessing a child-like sex doll, as well as criminalising other dealings with child-like sex dolls, such as importing, ordering or posting a child-like sex doll. The Bill also allows for officers to seize child-like sex dolls under Part IE of the Crimes Act and under the Customs Act.

124. These measures engage the right to privacy as they interfere with a person's personal property, including what may be contained within a family home.

125. These measures are clearly lawful (as they are prescribed by law) and they are not arbitrary, as they are reasonable, necessary and proportionate to achieve the legitimate objectives of protecting public morals, public order and protecting the rights and freedoms of children.

126. These measures are also necessary to achieve the above objectives as the use of child-like sex dolls increases the chance that an offender will engage in the contact abuse of children and often tacitly supports an industry that profits from, and perpetrates, the abuse of children.

127. These measures are also reasonable and proportionate in achieving these objectives. In determining whether an object is a child-like sex doll, a primary consideration is whether a reasonable person would consider it likely that the doll is intended to be used for the purpose of simulating sexual intercourse. This ensures that children's toys are not covered by the offences. In addition, it is a defence to the possession of child-like sex dolls offence that the possession is for a legitimate purpose, such as law enforcement, the administration of justice or scientific, medical or educational research approved by the Minister.

128. Where the measures limit the right to privacy, they do so to achieve legitimate objectives in a necessary, reasonable and proportionate manner.

Consequential amendments to the TIA Act

129. The TIA Act provides an investigatory powers framework in which law enforcement and national security agencies can intercept communications, or access stored communications and telecommunications data, for the purposes of investigating offences. The Bill amends the TIA Act to allow for interception and access to stored communications to be used as part of investigating the new possession of child-like sex dolls offence. Section 5D of the TIA Act will be amended to include the possession of child-like sex dolls as a 'serious offence' for the purposes of the TIA Act.

130. Interception powers under the TIA Act can only be authorised if the investigation relates to an offence punishable by a maximum penalty of imprisonment for seven years or more (unless specifically provided for otherwise). As the possession of child-like sex dolls is punishable by a maximum period of imprisonment of 15 years, the seriousness of the offence will permit access to interception powers.

131. The TIA Act will also permit access to stored communications by coming under the definition of a 'serious contravention', and access to telecommunications data by virtue of being for the 'enforcement of the criminal law'.

132. The exercise of these investigatory powers will engage the right to privacy, as it will allow certain law enforcement agencies to access private information. However, where this measure limits this right, it is reasonable, necessary and proportionate to achieve the legitimate objective of defending public morals, public order and protecting the rights and freedoms of children.

133. The TIA Act contains various safeguards and oversight mechanisms to ensure that where these investigatory powers are used to investigate and prosecute the possession of child-like sex doll offence, they are reasonable and proportionate. Safeguards include:

- judicial oversight when issuing telecommunications interception and stored communications warrants
- strict use and disclosure frameworks for information obtained pursuant to a warrant or authorisation, and information relating to a warrant or authorisation (including strict rules on how that information may be used in court proceedings), and
- oversight by Commonwealth, State and Territory oversight agencies to ensure that powers are exercised in line with the legislative framework.

134. The use of the telecommunications network, services and devices can be necessary for sourcing child-like sex dolls and any ancillary actions in order for the person to obtain them. Accordingly, the use of interception, access to stored communications, and telecommunications data, will be critical to the investigation of these offences.

135. Accordingly, where these amendments authorise the use of intrusive powers such as the use of interception, access to stored communications and access to telecommunications data, and subsequently impact the right to privacy, any limitations on this right are authorised by law and are not arbitrary.

Consequential amendments to the SD Act

136. Similar to the TIA Act, the Bill will allow for certain law enforcement agencies to seek emergency authorisation for the use of a surveillance device warrant for an investigation into a possession of child-like sex doll offence.

137. However, these emergency authorisations are clearly lawful (as they are prescribed by law) and they are not arbitrary, as they are reasonable, necessary and proportionate to achieve the legitimate objectives of protecting public morals, public order and protecting the rights and freedoms of children.

138. These emergency authorisations can only be used in circumstances where strictly necessary under paragraph 30(1)(b), being issued where:

- the use of the surveillance device is immediately necessary to prevent the loss of any evidence related to an investigation into a possession of child-like sex doll offence
- the circumstances are so serious and the matter is of such urgency that the use of the surveillance device is warranted, and
- it is not practicable in the circumstances to apply for a surveillance device warrant.

139. The SD Act is subject to safeguards and oversight mechanisms to ensure that where the use of these investigatory powers are used to investigate and prosecute this offence, they are reasonable and proportionate. Safeguards include:

- judicial oversight and issuing of warrants

- strict use and disclosure frameworks for information obtained pursuant to a warrant, and information relating to a warrant (including strict rules on how that information may be used in court proceedings), and
- oversight by Commonwealth, State and Territory oversight agencies to ensure that powers are exercised in line with the legislative framework.

140. Accordingly, where these amendments authorise the use of intrusive powers such as the use of surveillance devices and computer access warrants it will subsequently interact with the right to privacy. However, any limitations on this right are authorised by law and are not arbitrary.

Freedom of thought, conscience and religion (Article 18(1) of the ICCPR)

141. Article 18(1) of the ICCPR provides that everyone shall have the right to freedom of thought, conscience and religion, including to have or to adopt a religion or belief of their choice, and to worship, observe, practice and teach that religion in public or private.

142. Article 18(3) of the ICCPR provides that freedom to manifest one's religion or beliefs may be subject only to limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The limitation must be necessary to achieve the desired purpose, and must be proportionate to the need on which the limitation is predicated.

143. The Bill engages the right to freedom of religion to the extent the failure to report offence mandates that all Commonwealth officers, which may include members of the clergy, who exercise care or supervision over children must report child sexual abuse. The offence contains no limitations in relation to information that is obtained during confession.

144. The offence is necessary to respond to recommendations 33, 34(b) and 35 of the Royal Commission and to address the historic systemic failure to report information relating to child sexual abuse. While instances where members of the clergy are both Commonwealth officers engaging in the care or supervision of children and taking religious confession are undoubtedly limited, this limitation on the right contained in Article 18(1) is reasonable, proportionate and necessary.

145. The offence is reasonable and proportionate as it applies equally to all Commonwealth officers, and is necessary noting the objective is to bring information relating to the sexual abuse of children to the attention of the authorities. Further, it is not a general abrogation of this right, but a limited and proportionate encroachment in circumstances where information is known to the person that would lead a reasonable person to suspect or believe that a person has engaged, or will engage, in child sexual abuse. Any legal protections or privileges that currently exist, or may exist in the future, in relation to the religious confession will be unaffected by this offence. For example, members of the clergy are still protected from giving evidence that a religious confession was made, or the contents of a religious confession, before a court through section 127 of the *Evidence Act 1995*.

Freedom of expression (Article 19(2) of the ICCPR)

146. Article 19(2) of the ICCPR provides that everyone shall have the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, through any media of a person's choice. Article 19(3) provides that the right to freedom of expression may be subject to restrictions for specified purposes provided in the right, including the protection of national security or public order (which includes prevention

of disorder and crime). Restrictions must be provided by law and be necessary for attaining one of these purposes.

147. The requirement of necessity implies that any restriction must be proportional in severity and intensity to the purpose sought to be achieved. In order for a proposed law to be considered a necessary restriction on freedom of expression on the grounds of public order (which includes crime prevention), the restriction must be clearly defined.

Possession of child abuse material

148. The offence created at section 474.22A engages the right to freedom of expression under Article 19 to the extent that it criminalises the possession of ‘child abuse material’ in the form of data that has been accessed via a carriage service. It therefore may have a chilling effect on the use of carriage services to seek, receive and impart information.

149. Per Article 19(3), the restriction on freedom of expression and the prospective chilling effect is reasonable to meet the outcome of preventing the possession of and access to ‘child abuse material’. In determining whether material is ‘child abuse material’, a factor for consideration is whether a reasonable person would regard the depiction as offensive, taking into account the considerations outlined at section 473.4 of the Criminal Code. These include the standards of morality decency and propriety generally accepted by reasonable adults, the literary, artistic or educational merit (if any) of the material, and the general character of the material (including whether it is of a medical, legal or scientific character).

150. Further, the amendment positively engages with a child’s right to freedom of expression by protecting children’s right to seek, receive and impart information using a carriage service, free from the threat of physical or mental violence (including sexual abuse).

151. The Bill aims to prevent criminal activity by targeting conduct that victimises and results in the sexual abuse of children. To the extent that the right to freedom of expression in Article 19 is limited, these limitations are provided by law and for a specified purpose of preventing serious crimes against children.

Right to enjoy and benefit from culture (Article 27 of the ICCPR)

152. Article 27 of the ICCPR protects the rights of individuals belonging to ethnic, religious and linguistic minorities within a country to enjoy their own culture, practise their own religion and use their own language.

Forced marriage and restricting the defence based on valid and genuine marriage

153. To the extent that the marriage of children may be seen to reflect a cultural or religious practice, the Bill may limit the right of minorities to enjoy their own culture under Article 27 of the ICCPR.

154. In addition to marriages recognised under law, existing subsection 270.7A(2) of the Criminal Code provides that forced marriage offences can apply to registered relationships as well as marriages that are void, invalid or not recognised by law for any reason, including those formed by cultural and religious ceremonies.

155. The United Nations Human Rights Committee has made it clear that ‘none of the rights protected under [A]rticle 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant’ (Human Rights Committee, General Comment 23 paragraph 8).

156. The marriage of children is directly inconsistent with the requirement that no marriage shall be entered into without the free and full consent of the intending spouses, which is

enshrined in Article 23(3) of the ICCPR, Article 10(1) of the ICESCR and Article 16(1)(b) of the CEDAW. This is because minors lack capacity to consent.

157. The Bill seeks to protect children against serious forms of exploitation by ensuring the existing forced marriages explicitly capture all marriages involving children under 16 years. The Bill also repeals the defence to overseas child sex offences in section 272.17 to ensure Australian offenders are no longer permitted to escape culpability by relying on a marriage to a vulnerable child under 16 years. The Bill ensures a restricted defence based on a valid and genuine marriage remains available for defendants in positions of trust or authority who engage in sexual activity with young persons (at least 16 but under 18 years) outside Australia, provided the young person was at least 16 years old at the time the marriage was entered into.

158. To the extent that the right in Article 27 is restricted, this restriction is reasonable and necessary in the circumstances.

Requirement that no marriage shall be entered into without the free and full consent of the intending spouses (Article 23(3) of the ICCPR, Article 10(1) of the ICESCR and Article 16(1)(b) of the CEDAW)

159. The Bill positively engages with the requirement that no marriage shall be entered into without the free and full consent of the intending spouses, which is enshrined in Article 23(3) of the ICCPR, Article 10(1) of the ICESCR and Article 16(1)(b) of the CEDAW.

160. The text of the relevant treaty articles relating to the right to marry make it clear that limitations based on age are permissible and, indeed, required in order to protect those—including children—who do not have the capacity to consent to marriage.

161. Article 16(2) of the CEDAW further provides that the betrothal and marriage of a child shall have no legal effect. This reflects the fact that girls are disproportionately affected by this harmful practice, both globally and domestically.

162. The Bill advances Article 16 by expanding the forced marriage offences to explicitly criminalise all marriages involving children under 16, including those formed by cultural and religious ceremonies. This clarifies that any marriages involving children under the age of 16 have no legal effect.

Conclusion

163. The Bill is compatible with human rights as set out above: it promotes the protection of human rights related to the protection of children and to the extent that it may limit other human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

1. This clause provides for the short title of the Act to be the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (the Act).

Clause 2 – Commencement

2. Subclause 2(1) provides for the commencement of each provision in the Act, as set out in the table contained in the subclause.

3. Item 1 of the table provides that sections 1 to 3 and anything in this Act not elsewhere covered by this table commence the day the Act receives Royal Assent.

4. Item 2 of the table provides that Schedule 1 to the Act commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives Royal Assent, they commence on the day after the end of that period.

5. Item 3 of the table provides that Schedule 2 to the Act commences immediately after the commencement of the Schedules 3 to 7 to the Act, as covered by table item 4.

6. Item 4 of the table provides that Schedules 3 to 7 to the Act commence the day after the Act receives the Royal Assent.

7. A note to the table establishes that this table relates only to the provisions of this Act as originally enacted. This table will not be amended to deal with any later amendments of this Act.

8. Subclause 2(2) clarifies that any information in column 3 of the table is not part of this Act. This subclause sets out that information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Clause 3 – Schedules

9. This clause provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule and that any other item in the Schedule has effect according to its terms.

Schedule 1 – Failing to protect children from, or report, child sexual abuse offences

Crimes Act 1914

Item 1 – After paragraph 15Y(1)(cac)

10. This item includes Division 273B as a Division to which Part IAD of the *Crimes Act 1914* (Crimes Act) applies. This will ensure the special rules for children involved in proceedings will be extended to any child witness involved in legal proceedings for the failure to protect and failure to report offences. These protections recognise the vulnerability of child victims and child witnesses in proceedings relating to sexual offences. Noting the nature of the conduct to be captured by the failure to protect and failure to report offences, it is important to extend the application of the protections to Division 273B.

Criminal Code Act 1995

Item 2 – Before paragraph 5(2)(m)

11. This item inserts Division 273B into subsection 5(2) of the *Criminal Code Act 1995* (Criminal Code). This insertion means the Minister administering the *Australian Federal Police Act 1979* is the rule-maker for any regulations made for the purposes of Division 273B.

Item 3 – Before Division 274 of the *Criminal Code*

12. Item 3 inserts a new ‘Division 273B – Protection of children’ into the Criminal Code.

Subdivision A—Preliminary

Section 273B.1 – Definitions

13. Section 273B.1 inserts definitions for ‘child sexual abuse offence’, ‘Commonwealth officer’ and ‘State or Territory registrable child sex offence’ for the purpose of Division 273B.

‘Child sexual abuse offence’

14. ‘Child sexual abuse offence’ is defined to mean:

- a Commonwealth child sex offence within the meaning of the Crimes Act, or
- a State or Territory registrable child sex offence.

15. A Commonwealth child sex offence is currently defined in section 3 of the Crimes Act. A ‘State or Territory registrable child sex offence’ is further defined (refer to paragraph 19) for the purposes of section 273B.1.

16. The definition of ‘child sexual abuse offence’ is used in the new offence provisions at section 273B.4 and section 273B.5 to limit the circumstances in which an act or omission is criminalised to situations where conduct amounts to a Commonwealth, State or Territory child sex offence. It is important to allow the conduct captured to vary from jurisdiction to

jurisdiction to ensure a person is only required to report or protect against conduct that is criminal in that jurisdiction.

‘Commonwealth officer’

17. The definition of Commonwealth officer defines the classes of persons to whom the offences in Division 273B apply. The definition is intended to bring persons who work for, or on behalf of, the Commonwealth within the scope of the failure to protect and failure to report offences.

18. Paragraphs (j) and (k) bring an individual who is, or an officer or employee of, a contractor or subcontractor of the Commonwealth or a Commonwealth authority within the definition of Commonwealth officer. The definition does not capture grant recipients.

‘State or Territory registrable child sex offence’

19. ‘State or Territory registrable child sex offence’ is used as a component of the term ‘child sexual abuse offence’, which is defined above. The term is defined to mean an offence where a person becomes, or may at any time have become, a person whose name is entered on a child protection offender register (however described) of a State or Territory for committing, and in respect of which, a child was a victim, an intended victim, or the offending involved child pornography material or child abuse material.

Section 273B.2 – Geographical Jurisdiction

20. This Section will apply Category B geographical jurisdiction, as outlined in section 15.2 of the Criminal Code, to each offence within Division 273B.

Section 273B.3 – Double jeopardy

21. Section 273B.3 states that any person, convicted or acquitted in a country outside Australia of an offence against the law of that country in respect of any conduct, cannot be convicted of an offence against this Division in respect of that conduct.

Subdivision B—Offences relating to the protection of children

Section 273B.4 – Failing to protect child at risk of child sexual abuse offence

Failing to protect child at risk of child sexual abuse offence

22. Section 273B.4 introduces the new offence of failure to protect a child at risk of a child sexual abuse offence. A person (the defendant) commits an offence if:

- the defendant is a Commonwealth officer
- there is another person aged under 18 (the child) under the defendant’s care, supervision or authority, in the defendant’s capacity as a Commonwealth officer
- the defendant knows there is a substantial risk that a person (the potential offender) will engage in conduct in relation to the child under their care, supervision or authority

- such conduct, if engaged in, would constitute a child sexual abuse offence
- the defendant, because of the defendant's position as a Commonwealth officer, has the actual or effective responsibility to reduce or remove that risk, and
- the defendant negligently fails to reduce or remove that risk.

23. Paragraph 273B.4(1)(a) requires the prosecution to prove that the defendant knew or was reckless as to the fact that they were a Commonwealth officer. Commonwealth officer is defined at section 273B.1.

24. Paragraph 273B.4(1)(b) requires the prosecution to prove that there was another person, or persons, aged under 18 who were in the defendant's care, supervision or authority in their capacity as a Commonwealth officer. The defendant's care, supervision or authority exercised in relation to the child or children need not be the primary function of the Commonwealth officer's role, but it must form at least part of their official duties. The prosecution will have to prove that the defendant knew, or was reckless as to the fact, that a child or children were under their care, supervision or authority.

25. It will be for the trier of fact to determine in the specific circumstances of the case whether the child was under the care, supervision or authority of the person. Factors that may be considered in forming this view include whether the person, as part of their role, provides at least some of a child's daily needs, was responsible for a child overnight, or has the power to make decisions in relation to, and on behalf of, the child.

26. For example, a police officer who is in charge of a watchhouse where a child is being detained is likely to be regarded as exercising care, supervision or authority over a child. However, that same police officer is unlikely to be regarded as having care, supervision or authority over children generally in the community while on patrol. Another example would be a Commonwealth contractor who is engaged to run overnight camps for young athletes.

27. Paragraph 273B.4(1)(c) requires the prosecution to prove that the defendant knew of a substantial risk that a person will engage in conduct in relation to a child under the defendant's care, supervision or authority.

28. Paragraph 273B.4(1)(d) requires the prosecution to prove that, such conduct, if engaged in, would constitute a child sexual abuse offence. Child sexual abuse offence is defined at proposed section 273B.1.

29. Paragraph 273B.4(1)(e) requires the prosecution to prove that the defendant has the actual or effective responsibility, because of their position as a Commonwealth officer, to reduce or remove the risk of a child sexual abuse offence being committed in relation to a child or children under the care, supervision or authority of the defendant. While it could be said that everyone has some ability to reduce a risk to a child, this requirement is targeted at Commonwealth officers in positions of power or authority who have the actual or effective responsibility of reducing or removing the risk of harm for children under their care, supervision or authority. Responsibility to protect children from child sexual abuse may be explicit or implicit in their role as a Commonwealth officer.

30. Paragraph 273B.4(1)(f) requires the prosecution to prove that the defendant negligently failed to reduce or remove the substantial risk. To satisfy this element of the

offence, the Commonwealth officer's steps to reduce or remove the risk must involve such a great falling short of the standard that a reasonable person would exercise, and such a high risk that the risk to the child will not be reduced or removed, that in the circumstances their conduct merits criminal punishment. A Commonwealth officer is not required to eliminate all possible risks nor are they expected to take extraordinary measures – rather they are required to take the steps a reasonable person would be expected to in the circumstances. This limb of the offence may criminalise omissions as well as positive acts.

31. For example, depending on the circumstances, in order to reduce or remove the risk and avoid liability the Commonwealth officer may reasonably be expected to suspend an employee, provide online safety training to children or ensure an employee is not allowed unsupervised access to children.

32. The maximum penalty for the offence under subsection 273B.4(1) is five years' imprisonment. This maximum penalty reflects the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that an offence should have a 'maximum penalty that is adequate to deter and punish a worst case offence' (page 37). While the penalty is significantly lower than the penalties attracted by conduct that involves the direct sexual abuse of children, it is sufficiently high to reflect the seriousness of failure to protect children for whom a person is responsible from sexual abuse.

Absolute liability

33. Subsection 273B.4(2) provides that absolute liability applies to the circumstance that 'such conduct, if engaged in, would constitute a child sexual abuse offence' under paragraph 273B.4(1)(d).

34. This is appropriate as the question of whether particular conduct constitutes a 'child sexual abuse offence' as defined in section 273B.1 is a technical legal question, and a person's ignorance of the relevant law should not excuse culpability. This approach is consistent with the guidance on page 23 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It is also consistent with section 9.3 of the Criminal Code.

Certain matters not required to be proved

35. Paragraphs 273B.4(3)(a) and (b) clarify that subsection 273B.4(1) applies regardless of whether the prosecution can prove who the potential offender was, or which specific child was at risk. For example, a contractor providing educational services to children may observe obscene images being transmitted to a child in their care. While the contractor may not know the source of the images, they would be aware of the conduct, which would amount to a child sexual abuse offence.

36. Alternatively, a supervisor of children may observe a colleague who is responsible for providing health care services to children watching child sexual abuse material. In the circumstances, the supervisor may know there is a substantial risk that the person will commit a child sexual abuse offence in relation to a child in their care, but the supervisor does not know which child.

37. Paragraph 273B.4(3)(c) also clarifies that a person can be found guilty of an offence against subsection 273B.4(1) regardless of whether a child sexual abuse offence was actually committed in relation to a child under their care, supervision or authority.

Section 273B.5 – Failing to report child sexual abuse offence

38. Section 273B.5 introduces the new offences of failure to report child sexual abuse.

Offence based on reasonable belief

39. Subsection 273B.5(1) provides that a person (the defendant) commits an offence if:

- the defendant is a Commonwealth officer
- there is another person aged under 18 (the child) under the defendant’s care or supervision, in the defendant’s capacity as a Commonwealth officer
- the defendant knows of information that would lead a reasonable person to believe that a person (the potential offender) has engaged in, or will engage in, conduct in relation to a child
- such conduct, if engaged in, would constitute a child sexual abuse offence, and
- the defendant fails to disclose the information, as soon as practicable after coming to know it, to:
 - the police force or police service of a State or Territory, or
 - the Australian Federal Police.

40. Paragraph 273B.5(1)(a) requires the prosecution to prove that the defendant knew or was reckless as to the fact that they were a Commonwealth officer. Commonwealth officer is defined at section 273B.1.

41. Paragraph 273B.5(1)(b) requires the prosecution to prove that there was another person, or persons, aged under 18 who were in the defendant’s care or supervision in their capacity as a Commonwealth officer. The defendant’s care or supervision exercised in relation to the child or children need not be the primary function of the Commonwealth officer’s role, but it must form at least part of their official duties. The prosecution will have to prove that the defendant knew, or was reckless as to the fact, that a child or children were under their care or supervision.

42. It will be for the trier of fact to determine in the specific circumstances of the case whether the child was under the care or supervision of the person. Factors that may be considered in forming this view include whether the person, as part of their role, provides at least some of a child’s daily needs, was responsible for a child overnight, or has the power to make decisions in relation to, and on behalf of, the child.

43. Paragraph 273B.5(1)(c) requires the prosecution to prove that the defendant knew of information that would lead a reasonable person to believe that a person has or will engage in conduct in relation to a child. While the defendant needs to know of the information, it does not need to be proven that they personally had formed the belief that conduct has occurred or

will occur in relation to the child. That belief is objective and requires the prosecution to prove that a reasonable person, who had the same information, would have formed the belief. The mental threshold of belief is lower than knowledge as an individual can believe something but not know it.

44. Under paragraph 273B.5(1)(d) such conduct, if engaged in, must constitute a child sexual abuse offence. Child sexual abuse offence is defined at proposed section 273B.1.

45. Paragraph 273B.5(1)(e) requires the prosecution to prove that the defendant failed to disclose the information they had, as soon as practicable after coming to it, to the police force or police service of a State or Territory or the Australian Federal Police. This limb of the offence expressly applies to an omission.

46. The maximum penalty for the offence under subsection 273B.5(1) is three years' imprisonment. This maximum penalty reflects the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that an offence should have a 'maximum penalty that is adequate to deter and punish a worst case offence' (page 37). The penalty is lower than the penalty for failing to protect as the defendant had a lesser degree of responsibility for protecting the child at risk. The lower penalty also reflects the lower mental threshold, which triggers the offence.

Offence based on reasonable suspicion

47. Subsection 273B.5(2) provides that a person (the defendant) commits an offence if the prosecution proves all of the same elements as in subsection 273B.5(1), except that for this offence the defendant must know of information that would lead a reasonable person to suspect that the potential offender has or will engage in conduct in relation to the child. While the defendant needs to know of the information, it does not need to be proven that they personally had formed the suspicion that the conduct has occurred or will occur. That suspicion is objective and requires the prosecution to prove that a reasonable person, who had the same information, would have formed the suspicion.

48. A reasonable person may suspect that a potential offender will engage in conduct in relation to a child if the person imagines that the conduct is likely but no conclusion or belief has been reached.

49. Paragraph 273B.5(2)(d) separately requires that the conduct, if engaged in, must constitute a child sexual abuse offence.

50. The maximum penalty for the offence under subsection 273B.5(2) is two years' imprisonment. This maximum penalty reflects the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that an offence should have a 'maximum penalty that is adequate to deter and punish a worst case offence' (page 37). The penalty is lower than the penalty for failing to protect as the defendant had a lesser degree of responsibility for protecting the child at risk. The lower penalty relative to the offence in subsection 273B.3(1) also reflects the lower mental threshold, which triggers the offence.

Absolute liability

51. Subsection 273B.5(3) provides that absolute liability applies to the circumstance that ‘such conduct, if engaged in, would constitute a child sexual abuse offence’ under paragraphs 273B.5(1)(d) and (2)(d).

52. This is appropriate as the question of whether particular conduct constitutes a ‘child sexual abuse offence’ as defined in section 273B.1 is a technical legal question, and a person’s ignorance of the relevant law should not excuse culpability. This approach is consistent with the guidance on page 23 of the Attorney-General’s Department’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. It is also consistent with section 9.3 of the Criminal Code.

Defences

53. Subsection 273B.5(4) contains a range of defences for the two failure to report offences.

54. Paragraph 273B.5(4)(a) provides that a defendant will not be guilty of an offence against subsection (1) or (2) if the defendant reasonably believes that the information is already known to a police force or police service of a State or Territory, the Australian Federal Police or a person or body the defendant is statutorily required to report to. For example, this provision will protect a defendant who reasonably believed that a colleague who had witnessed the same conduct had reported the information to the police or an appropriate body under a mandatory reporting scheme.

55. Paragraph 273B.5(4)(b) provides that a defendant will not be guilty of an offence against subsection (1) or (2) if the defendant has already disclosed the information to a person or body for the purposes of a scheme mentioned in subparagraph (a)(iii). This defence ensures that Commonwealth officers who fall within a mandatory reporting or reportable conduct scheme are not required to dual report in order to comply with both obligations.

56. Paragraph 273B.5(4)(c) provides that a defendant will not be guilty of an offence against subsection (1) or (2) if the defendant reasonably believes that the disclosure of the information would put the safety of any person, other than the potential offender, at risk. For example, this provision will protect a defendant who is worried they themselves or the victim may be in danger if they report the sexual abuse of a child under their care. This defence is important to avoid the criminalisation of a failure of a person to take an action that they reasonably believed would risk their safety.

57. Paragraph 273B.5(4)(d) provides that a defendant will not be guilty of an offence against subsection (1) or (2) if the information known by the defendant is already in the public domain. For example, this provision will protect a Commonwealth officer who sees on the news that one of the children they supervise has been sexually abused. In this situation, it is not expected that the Commonwealth officer report the abuse as it is already known and in the public domain.

58. The defendant has an evidentiary burden in relation to making out a defence contained in subsection 273B.5(4). This is appropriate in this instance as the information to prove their existence would be peculiarly within the knowledge of the defendant and it would

be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

59. Subsection 273B.5(5) provides that it is not an excuse for an individual to fail to disclose information as mentioned in paragraph 273B.5(1)(e) or 273B.5(2)(e) on the ground that disclosing information might tend to incriminate the individual or otherwise expose the individual to a penalty or other liability. However, subsections 273B.9(9) and 273B.9(10) provide further clarification as to how the information can be used against the discloser.

60. Subsection 273B.5(5) explicitly abrogates the privilege against self-incrimination. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that the abrogation of this privilege may be justified where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.

61. The Royal Commission identified underreporting as a significant barrier to victims and survivors of child sexual abuse accessing justice. Children are likely to have fewer opportunities and less ability to report the abuse to police or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of persons charged with providing care, supervision or authority. The Royal Commission also identified that, perhaps more so than with other serious criminal offences, those who commit child sexual abuse offences may have multiple victims and may offend against particular victims repeatedly.

62. These unique circumstances justify overriding the privilege against self-incrimination to achieve the objective of encouraging all Commonwealth officers who provide care, supervision or exercise authority in relation to children to report abuse or take protective actions to protect against abuse. For example, a person should not be excused from this obligation if they are concerned that reporting that an employee was abusing a child will expose that they had not ensured that the employee held a valid working with children check card.

63. It is also pertinent to note that information disclosed pursuant to this offence is subject to a 'use immunity' under subsection 273B.9(10), preventing this information from being used in any 'relevant proceedings' against the discloser. This is in compliance with the principles at pages 96-97 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Certain matters not required to be proved

64. Subsection 273B.5(6) outlines the matters the prosecution is not required to prove for a proceeding under the failure to report offences. It states subsections 273B.5(1) and 273B.5(2) apply regardless of whether or not:

- the child can be identified as a specific person
- any person actually believes or suspects the matter mentioned in paragraphs 273B.5(1)(c) or 273B.5(2)(c)
- the potential offender can be identified as a specific person, and

- a child sexual abuse offence is or was actually committed in relation to a child.

65. Clarifying that a defendant does not need to know who the potential offender is ensures that they will report their suspicions or beliefs even if they do not know who the offender is. For example, if a Commonwealth officer sees marks on a child under their care that indicates the child may have been sexually abused, the intention is they would report that information without waiting to determine the identity of the offender. Similarly, if a Commonwealth officer who supervises children walks in on one of their colleagues watching child abuse material, the intention is for them to report that information rather than wait to determine which specific child their colleague might try to assault. The information will be valuable to police to investigate any potential offending or ensure protective actions are taken.

Alternative verdict

66. Subsection 273B.5(7) provides that a trier of fact, if not satisfied that the person is guilty of an offence against subsection (1), is however satisfied beyond reasonable doubt that the person is guilty of an offence against subsection (2), it may find the person guilty of the offence against subsection (2).

67. Subsection 273B.5(8) provides that subsection (7) only applies if the person has been accorded procedural fairness in relation to the finding of guilt for the offence against subsection (2).

Subdivision C – Rules about conduct of trials

Section 273B.6 – Consent to commence proceedings

68. This section requires the Attorney-General to consent to any proceeding for an offence against this Division. A person may be arrested, charged or remanded in connection with one or more of the offences, but the proceedings cannot commence until the consent has been given. The intention of this section is to ensure that a proposed prosecution is scrutinised and a judgement made about its appropriateness before it proceeds. This extra level of scrutiny is important to avoid unintended consequences, in particular, in light of the fact that the offences criminalise omissions to act.

Section 273B.7 – Evidence relating to a person’s age

69. This section outlines the evidence that is admissible for the purposes of determining the age of a person at a particular time. This ensures consistency with other similar provisions in the Criminal Code.

Subdivision D – Relationship with other laws

Section 273B.8 – Relationship with State and Territory laws

70. This section operates to exclude a law of a State or Territory that has the effect of making a Commonwealth officer liable to be prosecuted for an offence against any law for failing to:

- reduce or remove a risk of a child being subjected to conduct constituting a child sexual abuse offence, or

- disclose to a police force or police service, information relating to whether a person has engaged, or will engage, in conduct constituting a child sexual abuse offence.

71. This section ensures a Commonwealth officer will not need to comply with dual obligations across Australia. For example, if a Commonwealth officer is working in Victoria, they only have to comply with the Commonwealth criminal offences of failure to protect and report and not the Victorian equivalents. It will also ensure that Commonwealth officers working across multiple jurisdictions have clear and consistent obligations.

72. However, while this section prevents the operation of comparable failure to report and protect offences for Commonwealth officers, this section does not affect the operation of mandatory reporting or reportable conduct schemes as they may apply from time to time to Commonwealth officers. At present, these reporting schemes rarely contain criminal penalties for failing to comply with their respective obligations and where they do contain criminal penalties the person is required to report to a body other than a police force or service.

Section 273B.9 – Protection from other laws etc. for complying with this Division

73. This section sets out the protections that will be afforded to persons who protect children from sexual abuse and report instances of child sexual abuse in avoidance, or purported avoidance, of liability for an offence against this Division. These protections are crucial in reassuring and encouraging people to report as information provided to the Royal Commission showed that people are reluctant to report child sexual abuse due to a fear of dismissal or reprisal in the workplace.

Scope

74. Subsection 273B.9(1) sets out the meaning of ‘protected conduct’ for the purpose of the section. A person who believes themselves to be a Commonwealth officer and engages in conduct in an attempt to avoid liability for an offence will still be afforded protection if they were in fact not a Commonwealth officer, so long as their conduct was genuine and proportionate for the purpose of avoiding liability should they have been a Commonwealth officer.

75. In determining whether the conduct constituted a ‘genuine and proportionate’ attempt to avoid liability for the purpose of subsection 273B.9(1)(b), a court could take into account a range of factors, including (but not limited to) whether the person’s conduct was a grossly disproportionate response to avoid liability against this Division.

76. A person’s conduct may be a genuine and proportionate attempt to avoid liability under the Division even if they have an ulterior motive for engaging in the conduct. For example, a person may not be excluded from the scope of the protections offered by subsection 273B.9(1) if they report information that would lead a reasonable person to believe that a person will engage in a child sexual abuse offence but also held an ulterior motive for reporting, such as a personal dislike for the potential offender.

77. Additionally, a person may be within the scope of the protections offered by subsection 273B.9(1) if the person reasonably believes themselves to be a Commonwealth officer and under a requirement to report, even if the person is in fact not a Commonwealth officer.

78. Subsections 273B.9(2) and 273B.9(3) provide that the protections provided by the section do not apply in relation to proceedings for knowingly making a statement that is false or misleading.

79. Subsection 273B.9(4) provides that the section does not prevent a person from being liable in any relevant proceedings for conduct of the person that is revealed by a disclosure of information. This is distinct from the protections provided by the section in relation to the protected conduct.

Protection against liability for engaging in protected conduct

80. Subsection 273B.9(5) provides that a person who engages in protected conduct (as defined in subsection 272B.9(1)) is not subject to any liability for doing so, no contractual or other remedy may be enforced, or contractual or other right exercised, against the person on the basis of the conduct, and is not to be considered to have breached any professional ethics in respect of the conduct. Professional ethics are non-exhaustively defined at subsection 273B.9(6). While Division 273B does not override existing legal obligations of confidentiality, such as legal professional privilege, it does provide protection to people who breach those obligations in purported avoidance of liability for an offence against this Division.

81. For example, a person who reports abuse to police to avoid liability under section 273B.5(1) cannot have their employment contract terminated for a breach of confidentiality or be found by a professional ethics body to have breached legal professional privilege. This ensures that, for example, where information comes to a legal advisor under the protection of legal professional privilege, the advisor will still be able to rely on this privilege to resist disclosing the information to authorities, but will not be subject to liability or penalty if they do report to police as a result of subsection 273B.9(1).

82. Paragraph 273B.9(7)(a) provides that, without limiting subsection (5), if a person engages in protected conduct by disclosing information, the person has qualified privilege in proceedings for defamation relating to the disclosure and is not liable to an action for defamation at the suit of another person relating to the disclosure. Further, paragraph 273B.9(7)(b) provides that a contract to which the person is a party may not be terminated on the basis that the protected conduct constitutes a breach of the contract.

83. Subsection 273B.9(8) clarifies that paragraphs 273B.9(5)(a) and (7)(a) do not affect any other right, privilege or immunity the person has as a defendant in proceedings, or an action, for defamation.

84. Subsection 273B.7(9) provides remedies the court may order if satisfied that an employer has purported to terminate the contract of an employee who engaged in protected conduct on the basis of the person engaging in that conduct.

Admissibility of evidence

85. Subsection 273B.9(10) provides a use immunity for an individual engaging in protected conduct, by providing that information disclosed as part of the protected conduct is not admissible in evidence against the individual in relation to liability in any relevant proceedings. Subsection 273B.9(11) clarifies that any information obtained as an indirect

consequence of a disclosure of information that constitutes protected conduct is not excluded from being admissible by subsection 273B.9(10).

86. Applying a derivative use immunity would defeat the central purpose of the failure to report offence as, where a perpetrator of child sexual abuse discloses information to authorities, this would severely undermine the ability of law enforcement to investigate and subsequently prosecute this criminal conduct.

87. For example, where a person makes such a disclosure, an investigator in a criminal matter relating to the perpetrator of the conduct that was not reported may be required to prove the provenance of all subsequent evidentiary material before it can be admitted. This creates an unworkable position wherein pre-trial arguments could be used to inappropriately undermine and delay the resolution of charges against the accused.

88. It should be noted that a person will only be compelled to make a disclosure to the police, which are bound by extensive obligations under State, Territory and Commonwealth privacy law. It should also be noted that the offence will not affect the inherent power of the court to manage criminal prosecutions that are brought before it where it finds that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the accused.

Item 4 – At the end of section 279.1 of the *Criminal Code*

89. This item includes Division 273B as a proceeding to which Division 279 – Video link evidence in the Criminal Code applies.

Item 5 – Application

90. This item provides that subparagraphs 273B.5(1)(c)(i) and (2)(c)(i) only apply in relation to conduct engaged in on or after the commencement of this item. This ensures that Commonwealth officers are not liable for failing to report historic child sexual abuse offences.

Schedule 2— Possession of child-like sex dolls etc.

Crimes Act 1914

Item 1 - Subsection 3(1) (after subparagraph (a)(ii) of the definition of Commonwealth child sex offence)

91. This item amends subsection 3(1) of the Crimes Act to expand the definition of ‘Commonwealth child sex offence’ to include the new Division 273A of the Criminal Code. This definition is used in Part IE of the Crimes Act and the amendment will ensure, consistent with other forms of child abuse material, that dolls or other objects connected with the commission of an offence under Division 273A of the Criminal Code can be forfeited under Part IE of the Crimes Act.

Item 2 - After paragraph 15GE(3)(a)

92. This item amends paragraph 15GE(3)(a) to explicitly provide that an offence against the new Division 273A of the Criminal Code is a serious Commonwealth offence for the purposes of Part IAB of the Crimes Act.

Criminal Code Act 1995

Item 3 - After paragraph 5(2)(l)

93. Item 3 inserts Division 273A into subsection 5(2) of the Criminal Code to provide that the Minister administering the *Australian Federal Police Act 1979* is the rule-maker for regulations made for the purposes of Division 273A.

Item 4 - After Division 273 of the *Criminal Code*

94. Item 4 inserts new ‘Division 273A—Possession of child-like sex dolls etc.’ This Division includes new sections 273A.1 and 273A.2.

Section 273A.1 Possession of child-like sex dolls etc.

95. Section 273A.1 inserts a new offence into the Criminal Code of possessing a doll or other object that resembles a child or part of a child and a reasonable person would consider it likely that the doll or other object is intended to be used by a person to simulate sexual intercourse.

96. This offence will, in particular, target the possession of three-dimensional human-like dolls that resemble children and have imitation orifices that are intended to be used for the purpose of simulating sexual intercourse. This offence only applies to conduct in Australia.

97. Paragraph 273A.1(a) requires the person to intentionally possess a doll or other object. This paragraph is not limited to complete dolls and is intended to capture parts of dolls as well as similar objects that are developed using emerging technology such as child-like sex robots.

98. Paragraph 273A.1(b) provides that the doll or other object must resemble a person who is, or appears to be, under 18 years of age, or a part of the body of such a person. There is no requirement that the item resembles an actual child, or that the resemblance is based on

an actual child. Child-like sex dolls vary in facial appearance, proportions, height, size and functionality. A doll or other object may be captured by this paragraph despite possessing one or more adult features, for example developed breasts or make-up. Consideration should be given to the characteristics of the doll in its entirety, including its functionality, proportionality, physical features and anything else that provides context to the purpose and age resemblance of the doll.

99. Paragraph 273A.1(c) requires that a reasonable person would consider it likely that the doll or other object is intended to be used by a person to simulate sexual intercourse. This is an objective test focused on the function or capability of the doll or other object. The subjective intention of the person that possesses the doll is not a relevant consideration in proving this limb of the offence. Sexual intercourse is defined in section 272.4 of the Criminal Code. Simulating sexual intercourse involves a person engaging in the range of conduct outlined in section 272.4 in relation to the doll or other object in place of another person.

100. The penalty for the offence is a maximum of 15 years' imprisonment. This maximum penalty reflects the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that an offence should have a 'maximum penalty that is adequate to deter and punish a worst case offence' (page 37). This penalty appropriately reflects the seriousness of the misconduct captured by the offence and is equivalent to the penalties for offences such as possession, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service (section 471.17) or carriage service (section 474.20).

Section 273A.2 Defences

101. Section 273A.2 provides for a set of circumstances in which a person is not criminally responsible for an offence against section 273A.1. The defences are equivalent to the defences at section 471.18, which apply in relation to using a postal service for child abuse material and possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal service. The defences will protect people who have legitimate reasons for possessing child-like sex dolls or other similar objects.

102. Some of the defences in proposed section 273A.2 would be covered by the general defence of lawful authority in section 10.5 of the Criminal Code. However, that defence is not specific to the circumstances covered by these defences and does not sufficiently cover all the types of people that would be legitimately entitled to a defence for possession of child-like sex dolls etc., particularly as the lawful authority defence only applies to conduct justified or excused by or under Commonwealth law.

103. Subsection 273A.2(1) will provide a defence for persons who engage in particular conduct that is of public benefit and does not extend beyond what is of public benefit. The test is an objective one, meaning the motives or intentions of the person who engaged in the conduct are not relevant and would not be considered in determining whether the conduct is in fact of public benefit.

104. Subsection 273A.2(2) provides an exhaustive list of conduct that is of public benefit. If a person engages in conduct that meets one of the four criteria in subsection 273A.2(2) it will be considered to be 'of public benefit' for the purposes of subsection 273A.2(1). It will be a question of fact, to be determined by the trier of fact, as to whether the conduct meets

one of the four criteria and therefore is of public benefit. It will also be a question of fact as to whether the conduct extends beyond what is of public benefit.

105. Paragraph 273A.2(2)(a) covers conduct that is necessary for, or of assistance in, enforcing a law of the Commonwealth, a State or a Territory. This defence will have very limited application and will be targeted at persons who may be required to engage in the offending conduct as part of their duties in connection with law enforcement, but who are not covered by the defence for law enforcement officers in subsection 273A.2(2)(a). For example, this defence would apply where an expert is assisting a law enforcement agency to determine whether a doll resembles a child and the expert possesses the doll for the purposes of the examination.

106. Paragraph 273A.2(2)(b) covers conduct that is necessary for, or of assistance in, monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory. This defence will provide protection for officers of government agencies involved in monitoring and investigative activity related to regulatory schemes that they administer.

107. Paragraph 273A.2(2)(c) covers conduct that is necessary for, or of assistance in, the administration of justice. This defence is targeted at persons involved in, or persons who through their work are required to assist another person involved in, court proceedings brought to enforce criminal offences such as section 273A.1. The types of people covered by the defence will include judicial officers, or other officers of a court, hearing the proceedings, legal representatives of a party to the proceedings, and witnesses in the proceedings.

108. Paragraph 273A.2(2)(d) covers conduct that is necessary for, or of assistance in, conducting scientific, medical or educational research that has been approved by the Australian Federal Police Minister in writing for the purposes of this section. This defence will ensure that legitimate research dealing with forms of child abuse material such as child-like sex dolls can be undertaken.

109. Subsection 273A.2(3) provides a defence in relation to section 273A.1 for law enforcement officers, intelligence or security officers acting in the course of their duties where their conduct is reasonable in the circumstances for the purpose of performing that duty. 'Law enforcement officer' and 'intelligence or security officer' are defined in Part 10.6 of the Criminal Code.

110. This defence will apply in circumstances where, for example, a law enforcement officer has possession of a child-like sex doll having seized the doll during the execution of a search warrant. However, if the same officer intentionally took the doll home the officer may not be covered by this defence.

111. The defendant bears an evidential burden in relation to subsections 273A.2(1) and 273A.2(3). The use of the defence in subsection 471.18(1) is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The Guide refers to the principle that it is legitimate to cast a matter as a defence where a matter is peculiarly within the defendant's knowledge and is not available to the prosecution.

112. Subsection 273A.2(4) provides that the definitions in Part 10.6 of the Criminal Code, which relate to telecommunications offences, will also apply to this section.

Section 273A.3 Saving of other laws

113. Section 273A.3 provides that this Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

114. Section 273A.3 is intended to ensure that State and Territory offences criminalising dealings with child-like sex dolls operate concurrently alongside the offences in this Division. This will allow jurisdictions to continue to cater their laws to suit their particular environments.

Item 5 – Application provision

115. This item provides that section 273A.1 applies in relation to a doll or other object possessed on or after the commencement of this item, irrespective of whether the doll or other object was obtained by a person before, on or after that commencement.

Item 6 - Section 473.1 of the *Criminal Code* (at the end of the definition of *child abuse material*)

116. This item takes into account amendments made by Schedule 7, which replaces the term ‘child pornography material’ with ‘child abuse material’ in the Criminal Code.

117. This item amends the definition of ‘child abuse material’ in the Criminal Code in order to clearly capture child-like sex dolls and similar objects. These objects are used by people to simulate sexual intercourse with children and should be treated in the same manner by Commonwealth law as other types of child abuse material.

118. This item inserts an additional limb to the definition of child abuse material and is not intended to affect the existing aspects of the definition or limit in any way the types of material that can be captured by the existing limbs. New paragraph (g) is intended to be consistent with the language in the new offence in section 273A.1, as it is intended to capture the same dolls or other objects.

119. The new limb of the definition of child abuse material in section 473.1, in particular, targets the possession of three-dimensional material such as human-like dolls that resemble children and have imitation orifices that are intended to be used for the purpose of simulating sexual intercourse. The paragraph is not limited to complete dolls and is intended to capture parts of dolls as well as similar objects that are developed using emerging technology such as child-like sex robots.

120. Further, the new limb of the definition requires the doll or other object to resemble a person who is, or appears to be, under 18 years of age, or a part of the body of such a person. Child-like sex dolls vary in facial appearance, proportions, height, size and functionality. A doll or other object may be captured by this paragraph despite possessing one or more adult features, for example developed breasts or make-up. Consideration should be given to the characteristics of the doll in its entirety, including its functionality, proportionality, physical features and anything else that provides context to the purpose and age depiction of the doll.

121. Additionally, the new limb of the definition provides that a reasonable person would consider it likely that the doll or other object is intended to be used by a person to simulate sexual intercourse. This is an objective test focused on the function or capability of the doll or other object. Sexual intercourse is defined in section 272.4 of the Criminal Code. Simulating

sexual intercourse involves a person engaging in the range of conduct outlined in section 272.4 in relation to the doll or other object in place of another person.

122. The definition of ‘child abuse material’, as amended, will apply to Division 273, Division 471 and Division 474 of the Criminal Code.

Application of the amendment to Division 273

123. Subdivision B of Division 273 contains offences committed overseas involving child abuse material. Section 273.6 criminalises possessing, controlling, producing, distributing or obtaining child abuse material outside Australia. Amending the definition of child abuse material in order to capture child-like sex dolls and other similar objects has the effect of criminalising the possession, control, production, distribution or obtaining of such objects outside of Australia, where that conduct is engaged in by an Australian citizen, resident of Australia, body corporate under Australian law, or a body corporate that carries on its activities principally in Australia.

Many countries do not have effective laws against child abuse material, including for example child-like sex dolls, or are unwilling or unable to enforce them. This means for example, an Australian could travel overseas and possess a child-like sex doll, even though the very same behaviour, if committed in Australia, would be a serious criminal offence under the new section 273A.5.

Application of the amendment to Division 471 and Division 474

124. Subdivision B of Division 471 and Subdivision D of Division 474 provide offences relating to dealings with child abuse material in connection with a carriage service, postage service or similar service. The amendments to the definition of child abuse material in item 6 will ensure that, in addition to the other categories of child abuse material listed in the definition in section 473.1, these offence apply, where relevant, to child-like sex dolls and similar objects.

125. Under section 471.19 a person commits an offence if the person causes an article to be carried by a postal or similar service and the article is or contains child abuse material. It is also an offence to request another person cause such an article to be carried by a postal service. As a result of the Bill, these offences will apply to child-like sex dolls as well as more traditional types of child abuse material, for example, when a person orders a child-like sex doll from a company located overseas and that item is delivered via the post.

Customs Act 1901

Item 7 - At the end of subsection 233BAB(4)

126. This item takes into account amendments made by Schedule 7, which replaces the term ‘child pornography material’ with ‘child abuse material’ in the Customs Act. Schedule 7 also amends section 233BAB of the Customs Act.

127. This item amends subsection 233BAB(4) of the Customs Act in order to clearly capture child-like sex dolls and similar objects as items of child abuse for the purpose of subsection 233BAB(1). This will allow such objects to be constituted as tier 2 goods under

the *Customs Regulations 2015*. The prohibited import and export of tier 2 goods is an offence under subsection 233BAB(5) and subsection 233BAB(6) of the Customs Act.

128. This amendment will achieve consistency with the material captured by the definition of child abuse material in the Criminal Code, as amended by item 6 and ensure child-like sex dolls are treated consistently with other types of child abuse material at the border.

129. Item 7 inserts an additional paragraph to the list of items to be taken to be child abuse material and is not intended to affect the existing aspects of subsection 233BAB(4) or limit in any way the types of items that can be captured by the existing limbs. Paragraph (g), in particular, targets the possession of three-dimensional material such as human-like dolls that resemble children and have imitation orifices that are intended to be used for the purpose of simulating sexual intercourse. The paragraph is not limited to complete dolls and is intended to capture parts of dolls as well as similar objects that are developed using emerging technology such as child-like sex robots.

130. Further, paragraph (g) requires the doll or other object to resemble a person who is, or appears to be, under 18 years of age, or a part of the body of such a person. Child-like sex dolls vary in facial appearance, proportions, height, size and functionality. A doll or other object may be captured by this paragraph despite possessing one or more adult features, for example developed breasts or make-up. Consideration should be given to the characteristics of the doll in its entirety, including its functionality, proportionality, physical features and anything else that provides context to the purpose and age depiction of the doll.

131. Additionally, paragraph (g) provides that a reasonable person would consider it likely that the doll or other object is intended to be used by a person to simulate sexual intercourse. This is an objective test focused on the function or capability of the doll or other object. This use of the term ‘sexual intercourse’ in the Customs Act has the same meaning as it does in section 272.4 of the Criminal Code.

Surveillance Devices Act 2004

Item 8 – Subparagraphs 30(1)(a)(viii) and (1A)(a)(iv)

132. Under the *Surveillance Devices Act 2004* emergency authorisations for the use of a surveillance device may be provided if there is a risk of a loss of evidence. Item 8 updates the offences for which a law enforcement officer may apply to an appropriate authorising officer for an emergency authorisation for the use of a surveillance device to include an offence under Division 273A of the Criminal Code. This amendment recognises that the possession of child-like sex dolls or other objects is an offence that merits the emergency authorisation of the use of a surveillance device if there is a risk that evidence may be lost.

Telecommunications (Interception and Access) Act 1979

Item 9 - Paragraph 5D(3B)(a)

133. Under the *Telecommunications (Interception and Access) Act 1979* (TIA Act), telecommunications interception warrants may only be issued for the purpose of an investigation into a ‘serious offence’, as defined in section 5D of that Act. This item amends paragraph 5D(3B)(a) to provide that an offence against the new Division 273A is a serious

offence for the purposes of the TIA Act. This amendment achieves consistency with other relevant child abuse material offences that are included in subsection 5D(3B) of the TIA Act.

Schedule 3—Possessing or controlling child abuse material obtained or accessed using a carriage service

Criminal Code Act 1995

Item 1— After section 474.22 of the *Criminal Code*

Section 464.22A – Possessing or controlling child abuse material obtained or accessed using a carriage service

134. Item 1 of Schedule 3 inserts a new offence at section 474.22A of Division 474, Subdivision D of the Criminal Code. This item creates an offence for the possession or control of ‘child abuse material’ in the form of data held in a computer or on a data storage device, where the person used a carriage service to obtain or access the material. This new offence will criminalise possession or control of child abuse material where that possession does not also need to be accompanied by an intention to deal with the material through a carriage service or postal service, as is required by the offence set out at section 474.23 of the Criminal Code. The amendment will include the control of child abuse material in the form of data, including material stored in remote data storage that may be physically located in Australia or overseas.

135. To make out the offence, the prosecution must prove that:

- the person possesses or controls material
- the person intends to possess or control the material
- the material is in the form of data held in, or can be accessed using, a computer, or contained in a data storage device
- the person is reckless as to whether the material is in the form of data that is held in, or can be accessed using, a computer, or is contained in a data storage device
- the material is child abuse material, and
- the person is reckless as to whether the material is child abuse material.

136. The reference to ‘possession’ of material in paragraph 474.22A(1)(a) has the meaning given by section 473.2 of the Criminal Code. To determine whether the defendant had possession of the material, the trier of fact must prove:

- the person had possession of the material, and
- the person intended to possess the material.

137. There may be circumstances in which a person has possession of a computer or data storage device that contains offending material, but the person does not have possession of that material. For example, material may be stored on a user profile on a computer but that profile is not that of the computer’s owner and the computer’s owner does not have access to

that profile. In this circumstance, it would not necessarily follow that possession of the storage medium equates to ‘possession’ of the material.

138. Alternatively, a person may possess material saved to a user profile on a computer, where the computer is not in their possession. The possession of material is not necessarily equivalent with the possession of the computer or data storage device that holds or contains it.

139. The reference to ‘control’ of material in paragraph 474.22A(1)(a) has the meaning given by section 473.2 of the Criminal Code. This includes control of data that is located on a remote data storage device, which may be in the physical possession of another person. To determine whether the defendant had control of the material, the trier of fact must prove:

- the person had control of the material, and
- the person intended to have control of the material.

140. The Criminal Code does not define ‘computer’. References to ‘computer’ are intended to be broad enough to enable the offence to achieve and maintain technological neutrality, and to take into account technological advancements that could occur in the future.

141. The Criminal Code defines ‘data held in a computer’ as:

- data held in any removable storage device that is at the time being held in a computer, or
- data held in a data storage device on a computer network of which the computer forms a part.

142. References to ‘data held in a computer’ are intended to be broad enough to enable the offence to achieve and maintain technological neutrality, and to take into account technological advancements that could occur in the future.

143. The Criminal Code defines a ‘data storage device’ as a thing (e.g. a disk or file server) containing, or designed to contain, data for use by a computer. References to data held in a data storage device include where the storage device is physically located in or out of Australia.

144. Paragraph 474.22A(1)(c) will require that the child abuse material was obtained or accessed by the defendant by the use of a carriage service. The use of a carriage service provides the relevant connection to the legislative power under section 51(v) of the Australian Constitution. Consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, absolute liability as outlined in section 6.2 of the Criminal Code will apply to paragraph 474.22A(1)(c) as it is a particular physical element, being the jurisdictional element of the offence. The jurisdictional element of the offence is not central to the conduct or the culpability for the offence.

145. Subsection 474.22A(3) inserts a presumption that where a defendant possesses or controls child abuse material in the form of data held in a computer or contained in a data storage device, that material was obtained or accessed by the defendant by the use of a carriage service. Therefore, if the prosecution proves beyond reasonable doubt that the person

had possession or control of child abuse material in the form of data held in a computer or contained in a data storage device, it is presumed that the person engaged in that conduct using a carriage service. This presumption stands unless the defendant proves the material was not obtained by the use of a carriage service.

146. The purpose of this presumption is to address problems encountered by law enforcement agencies in proving beyond reasonable doubt that a carriage service was used to engage in the relevant criminal conduct. Often, evidence that a carriage service was used to engage in the relevant criminal conduct is highly technical. Such evidence can be circumstantial, including for example that the defendant's computer had chat logs saved on the hard drive, the computer was connected to the internet, and records show the computer accessed particular websites that suggest an association with the material saved on the hard drive. A presumption in this instance is appropriate, given it is not an element that goes to the substance of the offence or to the person's criminal culpability. Rather, it is a jurisdictional element; that is, an element marking a boundary between matters that fall within the legislative power of the Commonwealth, and those that do not.

147. The onus will be on the defendant to prove, on the balance of probabilities, that they used a method other than a carriage service to obtain or access the material. The prosecution does not need to prove that the person accessed or obtained the material using a carriage service unless the defendant discharges the burden to prove otherwise.

148. The defendant bears a legal burden of proof to rebut the presumption. In accordance with sections 13.4 and 13.5 of the Criminal Code, the defendant must discharge this burden on the balance of probabilities. The defendant can rebut the presumption by producing evidence demonstrating on the balance of probabilities they did not use a carriage service to obtain or access the material. For example, the defendant may produce evidence proving they obtained or accessed the material from a portable data storage device another person physically gave them. Section 13.4 of the Criminal Code outlines that a legal burden of proof applies where a legal burden has been specified expressly in the law, requires the defendant to prove the matter, or creates a presumption that the matter exists unless the contrary is proved.

149. The offence at section 474.22A will not be limited to the possession or control of child abuse material by persons aged 18 years and over. Accordingly, minors who possess or control child abuse material may be subject to prosecution for this offence.

150. Safeguards prevent the unnecessary prosecution of minors. This includes a provision at section 474.24C of the Criminal Code, which will require the Attorney-General to give their consent before proceedings for the offence being inserted at 474.22A can be commenced against a minor. This requirement applies to all Commonwealth offences for child abuse material and reflects a long-standing government policy to avoid over-criminalising minors' conduct.

151. Category A geographical jurisdiction, as outlined in section 15.1 of the Criminal Code, will apply to the offence at section 474.22A. It is applied under the operation of section 475.2, which states that section 15.1 applies to each offence in Part 10.6 of the Criminal Code. Category A geographical jurisdiction means that whether the conduct occurs in Australia or overseas, if the conduct constitutes an offence and the results of that conduct affect Australia, the person responsible is generally able to be prosecuted in Australia. Category A geographical jurisdiction will also cover instances where an Australian citizen in

another country engages in conduct that is an offence under the proposed amendments, even if that citizen's conduct does not constitute an offence in that country and the results of that conduct do not affect Australia.

152. This offence is not intended to exclude or limit the operation of any other law of the Commonwealth or any other law of a State or Territory, as per the operation of section 475.1 of the Criminal Code, including State and Territory child abuse material possession offences, which will continue to operate alongside the offence at section 474.22A. This approach is consistent with the approach taken in other areas of criminal law, such as terrorism, fraud, computer crime, money laundering, drug offences and sexual servitude. It is intended that the offence will continue to be investigated in accordance with the established division of responsibility between Commonwealth, State and Territory law enforcement agencies.

153. The presumption in section 473.5 will apply to this offence, so that a carriage service provider, internet service provider, or internet content host is not taken to have used a carriage service in the commission of this offence if they are acting solely in their capacity as a carriage service provider, internet service provider, or internet content host. This offence is not intended to criminalise a cloud or other remote storage provider for possessing child abuse material where another person has control of that material. For example, where a person has saved child abuse material on a remote storage application but the physical data is in a server in the possession of a cloud storage provider, that provider would not be held responsible for using a carriage service in the commission of the offence. The person who saved the child abuse material on the remote storage application will be liable for the offence, as they had control of the material. Relevantly, section 474.25 of the Criminal Code places obligations on internet content hosts and internet service providers to report child abuse material if they become aware their service can be used to access that material. The presumption is not designed to limit or inhibit current or future carriage service provider, internet service provider, or internet content host responsibilities and liabilities relating to the possession of, and access to, online child abuse material.

Item 2 – Subsections 474.24(1), (3) and (4) of the *Criminal Code*

154. Item 2 of Schedule 3 applies existing defences in section 474.24 of the Criminal Code to the new offence for possessing or controlling child abuse material obtained or accessed using a carriage service in section 474.22A, as described by Item 1 of Schedule 3 of the Bill. Defences at section 474.24 will apply to section 474.22A, including if the conduct is:

- necessary for enforcing or monitoring compliance with an Australian law
- for the administration of justice;
- for a scientific, medical or educational purpose that has been approved by the Minister, or
- for the purpose of assisting the eSafety Commissioner to detect prohibited or potentially prohibited content.

155. The defences at section 474.24 of the Criminal Code apply to existing child abuse material offences that are comparable to the new offence proposed at Item 1 of Schedule 3 of the Bill.

Item 3 – After subparagraph 474.24A(1)(a)(iii) of the *Criminal Code*

156. Item 3 of Schedule 3 amends section 474.24A of the Criminal Code to include the new offence at section 474.22A for possessing or controlling child abuse material obtained or accessed using a carriage service as an underlying offence to which the aggravated offence contained at section 474.24A can apply. The aggravated offence applies where conduct is committed on three or more occasions involving two or more people. The aggravated offence at section 474.24A applies a maximum penalty of 25 years' imprisonment.

Item 4 – Subsections 474.24A(2), (3), (5) and (7) of the *Criminal Code*

157. Item 4 of Schedule 3 clarifies that the aggravated offences created in item 3 of Schedule 3 are to include the same considerations as similar existing aggravated offences for dealings in child abuse material in the Criminal Code.

158. Subsection 474.24A(2) lists a number of aggravated offences in which there are no additional fault elements, aside from the fault elements contained in the offence. Item 4 of the Schedule 3 adds the new offence for possessing or controlling child abuse material obtained or accessed using a carriage service, at new section 474.22A, to this list.

159. A person does not commit an offence against the aggravated offence at section 474.24A if the person has a defence to an offence in the list at subsection 474.24A(3). Item 4 of Schedule 3 adds the new offence for possessing or controlling child abuse material obtained or accessed using a carriage service, at section 474.22A, to this list.

160. Subsection 474.24A(5) states that a person who has been convicted or acquitted of an aggravated offence may not then be convicted of a list of offences in relation to the conduct that constituted the aggravated offence. Item 4 of Schedule 3 adds the new offence possessing or controlling child abuse material obtained or accessed using a carriage service, at new section 474.22A to this list.

161. Subsection 474.24A(7) states that a person who has been convicted or acquitted of an underlying offence against a list of offences may not then be convicted of an aggravated offence in relation to the conduct that constituted the underlying offence. Item 4 of Schedule 3 adds the new offence for possessing or controlling child abuse material obtained or accessed using a carriage service at new section 474.22A to this list.

Item 5 – Paragraph 474.24B(b) of the *Criminal Code*

162. Item 5 of Schedule 3 allows for an alternative verdict to be given if the aggravated offence is not proven in relation to the aggravated offences created in item 3 of Schedule 3. If a court finds that an aggravated offence cannot be proven against a person but that one of the underlying offence in new section 474.22A can be proven, the court may find the person not guilty in relation to the aggravated offence, but guilty in relation to the underlying offence. This is consistent with the other aggravated offences created by section 474.24A for dealings in child abuse material.

Schedule 4—Persistent sexual abuse of a child outside Australia

Criminal Code Act 1995

Item 1 – Subsection 272.11(1) of the *Criminal Code*

163. Section 272.11 of the Criminal Code criminalises persistent child sexual abuse overseas. This item amends section 272.11(1) so that it is an offence for a person to commit two or more separate occasions of underlying child sex offences overseas, over any period of time. This item reduces the minimum number of separate occasions of underlying offences required to prove the offence, from three occasions to two. The offence carries a maximum penalty of 25 years' imprisonment.

164. The purpose of the offence of persistent child sexual abuse overseas is to enable the prosecution of repeated sexual abuse overseas over a period of time, where the victim faces difficulties distinguishing specific instances of offending. This item seeks to address these difficulties by reducing the minimum number of separate occasions of abuse required to prove the offence.

165. To establish the amended offence, the prosecution would need to prove beyond reasonable doubt that the person committed two or more separate occasions of any underlying offence against the same child under 16, during any period.

166. The underlying offences cover the following conduct:

- engaging in sexual intercourse with a child overseas (subsection 272.8(1)),
- engaging in sexual activity with a child overseas (subsection 272.9(1)),
- causing a child to engage in sexual intercourse overseas in the presence of the defendant (subsection 272.8(2)), and
- causing a child to engage in sexual activity overseas in the presence of the defendant (subsection 272.9(2)).

167. The underlying offences each carry a maximum penalty of 15 or 20 years' imprisonment. The maximum penalty of 25 years imprisonment for the offence of persistent child sexual abuse overseas remains unchanged, despite the reduction in the number of occasions of underlying offences from three occasions to two. This recognises the seriousness of the offence, which criminalises repeated and regular abuse, and requires at least two occasions of child sex offences overseas. The penalty also recognises the devastating and longstanding impact of repeated child sexual abuse and has a strong deterrent effect.

168. Similar amendments are made in items 2, 3 and 4.

Items 2, 3 and 4 – Paragraphs 272.11(7)(a), (b) and (c) of the *Criminal Code*

169. These items amend paragraphs 272.11(7)(a), (b) and (c) of the Criminal Code which specify the matters the trier of fact must be satisfied about in order to find a person guilty of persistent child sexual abuse overseas. These items are consistent with item 1 which reduces

the minimum number of separate occasions of underlying offences required to prove the offence, from three occasions to two.

170. To convict a person for persistent child sexual abuse overseas, item 2 requires the trier of fact to be satisfied beyond reasonable doubt that:

- the person committed two or more separate occasions of underlying offences
- the underlying offences were committed against the same child
- the underlying offences were committed during the same period of time, and
- the underlying offences were of a nature described in the charge.

171. Item 3 requires the trier of fact to also be satisfied beyond reasonable doubt about the material facts of each of the two occasions of underlying offences. However, the trier of fact does not need to be satisfied beyond reasonable doubt about the dates or order of the occasions of underlying offences.

172. For prosecutions where the trier of fact is a jury, and the prosecution relies on more than two occasions of underlying offences, item 4 requires the trier of fact to be satisfied beyond reasonable doubt about the same two occasions. This amendment means the jury must agree on the same two occasions of offending, at a minimum. These amendments are more compatible with the way in which child victims remember repeated and regular sexual abuse. This will enhance the ability to prosecute for repeated and regular child sexual abuse overseas, by reducing the requirements for victims to detail and distinguish specific occasions of abuse.

Item 5 – Application of amendments

173. This item clarifies the application of the amended offence of persistent child sexual abuse overseas under section 272.11.

174. For a prosecution under section 272.11 that covers conduct during a period of time which commences prior to commencement of this item, the prosecution would need to establish at least three occasions of underlying offences during that period. This applies even when the period of time covers underlying offences that occurred after commencement of this item. For a prosecution under section 272.11 that covers conduct during a period of time which commences after commencement of this item, the prosecution would need to establish at least two occasions of underlying offences during that period.

Schedule 5—Forced marriage

Criminal Code Act 1995

Item 1 – Subsection 270.7A(1) of the *Criminal Code*

175. Section 270.7A of the Criminal Code contains the definition of forced marriage. Under subsection 270.7A(1), a marriage is forced if the victim entered into the marriage without full and free consent:

- because of the use of coercion, threat or deception, or
- because of an incapacity to understand the nature and effect of the marriage ceremony (for reasons such as age and mental capacity).

176. Item 1 repeals existing subsection 270.7A(1) and substitutes a new subsection 270.7A(1), which retains these elements and inserts new subparagraph 270.7A(1)(b) that explicitly captures all marriages involving children under 16. As a result of this item, a marriage is considered to be a forced marriage if either party was under 16 at the time the marriage was entered into.

177. The age of 16 aligns with the marriageable age provisions in Part II of the Marriage Act. Under the Marriage Act, a person is of marriageable age if the person has attained the age of 18 years, or where an Australian court order is in force that permits a person who has attained the age of 16 years but not 18 years to marry a person aged over 18 in exceptional circumstances provided there is there required consent (usually parental).

178. This amendment is intended to ensure that where a victim is a child, there will not be a requirement for the prosecution to show that his or her lack of consent resulted from the use of coercion, threat or deception, or incapacity to understand the nature and effect of the marriage ceremony.

Item 2 – Subsection 270.7A(3) of the *Criminal Code*

179. This item omits ‘Paragraph (1)(a)’ from existing subsection 270.7A(3) and substitutes ‘Subparagraph (1)(a)(i)’.

180. Existing subsection 270.7A(3) provides that the coercion, threat or deception can be against a victim or any other person, such as a family member.

181. This item is a consequential amendment made necessary by Item 1. Item 1 repeals subsection 270.7A(1) and substitutes a new subsection 270.7A(1) with subparagraphs 1(a) and (b). It is therefore necessary to replace the cross-reference to existing paragraph (1)(a) with new subparagraph (1)(a)(i). This item has no substantive effect.

Item 3 – Subsection 270.7A(4) of the *Criminal Code*

182. Section 270.7A defines a forced marriage as one that is entered into without full and free consent because of the use of coercion, threat or deception, or an incapacity to understand the nature and effect of the marriage ceremony.

183. Subsection 270.7A(4) provides that, for the purpose of proving an offence under Division 270 or 271 of the Criminal Code, a person under 16 is presumed to be incapable of understanding the nature and effect of a marriage ceremony. The accompanying note provides that a defendant bears a legal burden in relation to proving the contrary in accordance with section 13.4 of the Criminal Code.

184. Item 3 repeals the rebuttable presumption in subsection 270.7A(4), including the note.

185. The intended effect of the introduction of the rebuttable presumption was to make the consent of a child irrelevant. In practice, however, it has equated a child's understanding of what a marriage is with their consent to that marriage. Operational experience to date has shown that the majority of child victims have, on their own evidence, clearly demonstrated that they understood the nature and effect of the marriage ceremony, which is commonly expressed as resulting in an exclusive commitment for life, a sexual relationship, co-habitation and children.

186. The repeal of the rebuttable presumption simplifies the prosecutorial burden by clarifying that a child's consent or apparent acquiescence is irrelevant for the purposes of proving a forced marriage offence.

Item 4 – At the end of section 270.7B of the *Criminal Code*

187. Existing section 270.7B contains two offences of causing a person to enter a forced marriage, and being a party to a forced marriage. These offences are punishable by up to seven years' imprisonment, or nine years' imprisonment in aggravating circumstances.

188. This item inserts a consent to prosecute provision at the end of section 270.7B. Subsection 270.7B(5) requires that the Attorney-General's consent be sought in order to commence proceedings for an offence against subsection 270.7B(1) or (2) in circumstances where the defendant was under 18 at the time of the offence.

189. While the Attorney-General's consent is required in order to commence proceedings, subsection 270.7B(6) provides that a person may be arrested for, charged with, or remanded in custody or on bail before the necessary consent has been given.

190. This is intended to act as a safeguard for young people who are charged with forced marriage offences, in particular for being party to a forced marriage pursuant to subsection 270.7B(2). This recognises that in some instances, both young parties may have been forced into the marriage.

Item 5 – At the end of section 270.8(1) of the *Criminal Code*

191. Existing section 270.8(1) sets out the circumstances in which the slavery-like offences in Division 270 may be charged as aggravated offences. The applicable aggravating factors are:

- the victim is under 18
- the offender subjects the victim to cruel, inhuman or degrading treatment, and
- the offender engages in conduct that gives rise to a danger of death or serious harm to the victim or another person; and is reckless as to that danger.

192. Item 5 inserts a note at the end of subsection 270.8(1) to clarify that a forced marriage offence under section 270.7B which involves a party that was under 16 at the time the marriage was entered into will be considered an aggravated offence by virtue of the fact that the victim is under 18.

193. Forced marriage offences involving a child under 16 will automatically attract the aggravated maximum penalty of nine years' imprisonment, reflecting the gravity of the offence and damaging long-term consequences.

194. This item is a consequential amendment to Item 1, which expands the definition of forced marriage in subsection 270.7A(1) to capture marriages that involve a child who was under 16 at the time the marriage was entered into.

Schedule 6—Restricted defence of marriage for child sex offences

Criminal Code Act 1995

Item 1 – Section 272.17 of the *Criminal Code*

195. Division 272 of the Criminal Code criminalises sexual offences committed against children under 16 outside Australia.

196. Division 272 also criminalises sexual offences committed against young people (aged between 16 and 18 years) overseas, where the offender is in a position of trust or authority (as defined in section 272.3). While the age of consent under Commonwealth law is 16 years, there are certain relationships where the potential for imbalance of power is so significant that a higher age of consent should apply to sexual contact between persons within those relationships. This rationale is reflected in the existing position of authority offences in sections 272.12 and 272.13 of the Criminal Code, and in comparable offences under State and Territory law.

197. Section 272.17 provides a defence to offences involving engaging in sexual intercourse or other sexual activity with child or young person outside Australia, and procuring or ‘grooming’ a child for sexual activity outside Australia.

198. Currently, it is a defence to these offences if, at the time the conduct constituting the offence was committed, a valid and genuine marriage existed between the defendant and the child or young person. The defendant bears a legal burden to prove that:

- the marriage was recognisable as valid under the law of the country:
 - where the marriage was solemnised
 - where the offence was committed, or
 - where the defendant resides, and
- that the marriage was genuine at the time it was entered into.

199. Item 1 of Schedule 6 repeals section 272.17 of the Criminal Code and substitutes it with a new, narrower defence.

200. The new defence is only applicable to offences relating to engaging in sexual intercourse or sexual activity with young people aged at least 16 years but under 18 years outside Australia where the defendant is in a position of trust or authority (subsections 272.12(1) and 272.13(1) respectively).

201. To establish the defence, the defendant must prove that, at the time of the alleged offence, they were in a valid and genuine marriage with the young person, and that the young person was at least aged 16 at the time that marriage was entered into.

202. Paragraph 272.17(a) retains the requirement that the marriage be valid, or recognised as valid, under the law of the country where the marriage was solemnised, the offence was committed, or the defendant resides or is domiciled.

203. In addition to the requirement that the marriage was genuine, subparagraph 272.17(b)(ii) requires that the young person was at least 16 years old when the marriage was entered into.

204. This is consistent with the legal marriageable age under the Marriage Act. Under the Marriage Act, a person is of marriageable age if the person has attained the age of 18 years, or where an Australian court order is in force that permits a person who has attained the age of 16 years but not 18 years to marry a person aged over 18 years in exceptional circumstances, provided there is the required consent.

205. This is intended to prevent Australians in positions of trust or authority from escaping culpability for sexual offences committed against young people (at least 16 years but under 18 years) overseas, in circumstances where the valid and genuine marriage constituting this defence was solemnised while the victim under 16.

206. The defendant will continue to bear a legal burden in establishing the defence and, accordingly, must establish the elements of the defence on the balance of probabilities (see section 16.4 and 16.5 of the Criminal Code). A legal burden is appropriate because the defence relates to a matter that is peculiarly within the defendant's knowledge and not available to the prosecution.

Item 2 – Saving provision

207. This item is a saving provision that clarifies that the repealed defence in section 272.17 will continue to be available to defendants, after the commencement of Schedule 6, in circumstances where the offences were allegedly committed prior to this Schedule coming into force.

Schedule 7—Expanding the meaning of child abuse material

208. The Criminal Code and other Commonwealth legislation currently distinguish between ‘child abuse material’ and ‘child pornography material’. However, the term ‘child pornography material’ is no longer considered appropriate or accepted terminology. Attaching the term ‘pornography’ to this material is a barrier to conveying the seriousness and gravity of the offences depicted, the inherently abusive nature of the material, and the harm faced by the children. Further, labelling content as ‘child pornography material’ may inadvertently legitimise that material by associating it with legal forms of (adult) pornography. The inference that ‘pornography’ is associated with consenting subjects participating in legal behaviour is entirely inappropriate where the behaviour depicted involves the abuse of children.

209. Accordingly, this Schedule repeals references to ‘child pornography material’ and reconstitutes the current definitions of ‘child abuse material’ and ‘child pornography material’ into a single definition of ‘child abuse material’.

Part 1—Amendments

Crimes Act 1914

Item 1 – Subsection 3(1) (definition of *child pornography material*)

210. This item amends subsection 3(1) to remove the words ‘*child pornography material has the same meaning as in Part 10.6 of the Criminal Code*’. This amendment is consequential to items 29 and 30 which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 2 – Subsection 3(1) (subparagraph (a)(ii) of the definition of *Commonwealth child sex offence*)

211. This item amends subsection 3(1) to remove references to ‘child pornography material’ in the definition of ‘Commonwealth child sex offence’. This amendment is consequential to items 29 and 30 which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 3 – Subsection 3(1) (subparagraphs (a)(iii) and (iv) of the definition of *Commonwealth child sex offence*)

212. This item amends subsection 3(1) to remove references to ‘child pornography material’ in the definition of ‘Commonwealth child sex offence’. This amendment is consequential to items 29 and 30 which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously covered by this definition to the definition of ‘child abuse material’.

Item 4 – Subsection 3(1) (note to the definition of *Commonwealth child sex offence*)

213. This item amends subsection 3(1) to remove the note to the definition of Commonwealth child sex offence, which was relevant at the time that the forfeiture provisions in the Crimes Act were introduced but is no longer used in relation to offences that were committed before the commencement of the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*.

Item 5 – Paragraph 15GE(2)(w)

214. This item amends paragraph 15GE(2)(w) to remove references to ‘child pornography material’ and substitutes it with ‘child abuse material’ to ensure that the paragraph is consistent with the terms used and defined in the Criminal Code. It is intended that this amended paragraph will operate to ensure that all offences relating to child abuse material in the Criminal Code that are punishable for a maximum penalty of imprisonment for 3 years or more are classified as ‘serious Commonwealth offences’ for the purposes of the Crimes Act. Offences in the Criminal Code that were captured by this paragraph prior to this amendment will continue to be captured by the amended paragraph.

Item 6 – Paragraph 15GE(3)(b) and (d)

215. This item amends paragraphs 15GE(3)(b) and (d) to remove references to ‘child pornography material’. This amendment is consequential to item 23, which amends the heading of Subdivision B of Division 471 of the Criminal Code to remove reference to ‘child pornography material’. It is also consequential to item 32, which amends the heading of Subdivision D of Division 474 of the Criminal Code to remove reference to ‘child pornography material’.

Item 7 – Paragraph 15Y(1)(cac)

216. This item amends paragraph 15Y(1)(cac) to remove references to ‘child pornography material’. This amendment is consequential to item 13 which, amends the heading of Division 273 of the Criminal Code to remove reference to ‘child pornography material’.

Item 8 – Part IE (heading)

217. This item amends the heading of Part IE to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 9 – Paragraph 23ZA(b)

218. This item amends paragraph 23ZA(b) to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 10 – Paragraph 23ZA(c)

219. This item amends paragraph 23ZA(c) to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition

of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 11 – Paragraph 23ZC(1)(c)(ii)

220. This item amends paragraph 23ZC(1)(c)(ii) to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Criminal Code Act 1995

Item 12 – Paragraph 5(2)(l)

221. This item amends paragraph 5(2)(l) to remove reference to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 13 – Division 273 of the *Criminal Code* (heading)

222. This item amends the heading of Division 273 to remove reference to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 14 – Subsection 273.1(1) of the *Criminal Code* (note)

223. This item amends the note under subsection 273.1(1) to remove reference to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 15 – Subdivision B of Division 273 of the *Criminal Code* (heading)

224. This item amends the heading of Subdivision B of Division 273 to remove reference to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 16 – Section 273.5 of the *Criminal Code*

225. This item repeals the offence relating to ‘child pornography material’ under section 273.5. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

226. Behaviour previously captured by the repealed offence under section 273.5 will now be captured by the offence in section 273.6.

Item 17 – Paragraph 273.7(1)(a) of the *Criminal Code*

227. This item amends paragraph 273.7(1)(a) that refers to the repealed offence detailed in item 16. This item is consequential to item 16, which repeals the offences relating to ‘child pornography material’ under section 273.5 and defences related to these offences in section 273.9.

228. Behaviour previously captured by the repealed offence under section 273.5 will now be captured by the offence in section 273.6.

Item 18 – Subsections 273.7(2), (3), (5) and (7) of the *Criminal Code*

229. This item repeals subsections that refer to the repealed offence detailed in item 16. This item is consequential to item 16, which repeals offences relating to ‘child pornography material’ under section 273.5.

Item 19 – Section 273.8 of the *Criminal Code*

230. This item repeals references to the repealed offence detailed in item 16. This item is consequential to item 16, which repeals offences relating to ‘child pornography material’ under section 273.5.

Item 20 – Subsections 273.9(1), (4) and (5) of the *Criminal Code*

231. This item repeals references to the repealed offence detailed in item 16. This item is consequential to item 16, which repeals offences relating to ‘child pornography material’ under section 273.5.

Item 21 – Paragraph 279.1(d) of the *Criminal Code*

232. This item repeals references to the repealed offence detailed in item 16. This item is consequential to item 16, which repeals offences relating to ‘child pornography material’ under section 273.5.

Item 22 – Subsection 470.4(1) of the *Criminal Code* (note)

233. This item amends the note under subsection 470.4(1) to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 23 – Subdivision B of Division 471 of the *Criminal Code* (heading)

234. This item amends the heading of Subdivision B of Division 471 to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 24 – Sections 471.16, 471.17 and 471.18 of the *Criminal Code*

235. This item repeals offences relating to ‘child pornography material’ under sections 471.16 and 471.17 and defences related to these offences under section 471.18. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

236. Behaviour previously captured by the repealed offences under section 471.16 and 471.17 will now be captured by the offences in sections 471.19 and 471.20 respectively. The defence relating to this behaviour that was previously provided for in section 471.18 will now be provided for in section 471.21.

Items 25 to 27 – Section 471.22 of the *Criminal Code*

237. These items repeal subparagraphs that refer to the repealed offences detailed in item 24. These items are consequential to item 24, which repeals offences relating to ‘child pornography material’ under sections 471.16 and 471.17 and defences related to these offences in section 471.18.

Item 28 – Paragraph 471.23(b) of the *Criminal Code*

238. This item repeals references to the repealed offences detailed in item 24. These items are consequential to item 24, which repeals offences relating to ‘child pornography material’ under sections 471.16 and 471.17 and defences related to these offences in section 471.18.

Item 29 – Section 473.1 of the *Criminal Code* (definition of *child abuse material*)

239. This item expands the definition of ‘child abuse material’ to include the material previously covered by the definition of ‘child pornography material’ (this definition is repealed in item 30). Expanding the definition of ‘child abuse material’ to include all the material covered by ‘child pornography material’ will ensure a single definition captures the sexual abuse and the depictions or representation of the sexual abuse of children. This item makes changes to terminology but does not have any net effect on the scope of material or conduct criminalised under the Criminal Code.

Item 30 – Section 473.1 of the *Criminal Code* (definition of *child pornography material*)

240. This item repeals the definition of ‘child pornography material’. The material covered by the definition of ‘child pornography material’ will be amalgamated into the definition of ‘child abuse material’ in item 29. Amalgamating the two definitions will remove the current distinction in the Criminal Code between ‘child abuse material’ and ‘child pornography material’.

241. This amendment updates Commonwealth legislation to reflect changes to international language norms and the seriousness of harm associated with material that depicts child sexual abuse. The use of the word ‘pornography’ does not convey the gravity of the criminal activity that is depicted in materials comprising child sexual abuse. Nor does the word convey the harm inflicted on the children involved. The increase in the availability of legal adult pornography online has also resulted in the reduction of the social stigma that was previously associated with the term ‘pornography’. ‘Pornography’ is often associated with

consenting subjects, which is inappropriate given that this behaviour involves the abuse of children who cannot provide consent.

Item 31 – Section 473.1 of the *Criminal Code* (note to the definition of *private sexual matter*)

242. This item amends the note under section 473.1 to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 32 – Subdivision D of Division 474 of the *Criminal Code* (heading)

243. This item amends the heading of Subdivision D to remove references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

Item 33 – Sections 474.19, 474.20 and 474.21 of the *Criminal Code*

244. This item repeals sections 474.19, 474.20 and 474.21 in the Criminal Code. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’. These sections will be repealed to ensure that all references to ‘child pornography material’ in the Criminal Code are removed.

245. Behaviour previously captured by the repealed offences under sections 474.19 and 474.20 will now be captured by the offences for ‘child abuse material’ in sections 474.22 and 474.23 respectively. The defences relating to this behaviour that were previously provided for in section 474.21 will now be provided for in section 474.24.

Item 34 – Subparagraphs 474.24A(1)(a)(i) and (ii) of the *Criminal Code*

246. This item repeals subparagraphs 474.24A(1)(a)(i) and (ii) to remove the subparagraphs that reference sections 474.19 and 474.20 that reference ‘child pornography material’. This amendment is consequential to item 33 which repeals sections 474.19 and 474.20 of the Criminal Code.

Item 35 – Subsections 474.24A(2), (3), (5) and (7) of the *Criminal Code*

247. This item omits references to ‘474.19’ and ‘474.20’ in subsections 474.24A(2), (3), (5) and (7) of the Criminal Code. This amendment is consequential to item 33, which repeals sections 474.19 and 474.20 of the Criminal Code.

Item 36 – Paragraph 474.24B(b) of the *Criminal Code*

248. This item omits references to ‘474.19’ and ‘474.20’ in paragraph 474.24B(b) of the Criminal Code. This amendment is consequential to item 33, which repeals sections 474.19 and 474.20 of the Criminal Code.

Item 37 – Paragraph 474.25(b) of the *Criminal Code*

249. This item repeals paragraph 474.25(b) of the Criminal Code and substitutes it with a paragraph without references to ‘child pornography material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in section 473.1 of the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’ in section 473.1 of the Criminal Code.

Customs Act 1901

Item 38 – Paragraph 233BAB(1)(h)

250. This item amends paragraph 233BAB(1)(h) to remove the reference to ‘child pornography’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’. While the Customs Act does not rely on the definitions in the Criminal Code, this amendment ensures consistency across Commonwealth legislation to references of this type of material.

251. Given the amendment of subsection 233BAB(4) of the Customs Act by item 40, this amendment will ensure that the amended paragraph 233BAB(1)(h) will continue to capture the same goods that were previously captured under the definition of ‘child pornography’.

Item 39 – Subsection 233BAB(3)

252. This item repeals subsection 233BAB(3) which defines ‘child pornography’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

253. The repeal of subsection 233BAB(3) will require consequential amendments to be made to the *Customs Regulations 2015* to remove obsolete reference to ‘child pornography’.

Item 40 – Subsection 233BAB(4)

254. This item amends subsection 233BAB(4) to add those materials that were covered by the definition of ‘child pornography’ to the definition of ‘child abuse material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’.

255. This amendment will ensure that the amended paragraph 233BAB(1)(h) will continue to capture the same goods that were previously captured under the definition of ‘child pornography’ which is repealed by item 30 above.

256. The change in definition will not impact ongoing prosecutions instituted before the commencement of the Bill. Further explanation of this issue is set out in item 48 below.

Item 41 – Subsection 233BAB(4A)

257. This item is consequential to item 39, which repeals subsection 233BAB(3) and removes a redundant reference to subsection (3).

Telecommunications (Interception and Access) Act 1979

Item 42 – Subsection 5D(3B) (heading)

258. This item amends the heading of Subsection 5D(3B) to remove references to ‘child pornography’ and substitutes it with ‘child abuse material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’. While the TIA Act does not currently rely on the definitions in the Criminal Code, this amendment ensures consistency across Commonwealth legislation with references to this type of material.

Item 43 – Subparagraph 5D(3B)(b)(i)

259. This item amends paragraphs 5D(3B)(b)(i) to remove references to ‘child pornography’ and substitute it with ‘child abuse material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’. This amendment will ensure consistency across Commonwealth legislation to references of this type of material

Item 44 – Subparagraph 5D(3B)(b)(ii)

260. This item amends paragraphs 5D(3B)(b)(ii) to remove references to ‘child pornography’ and substitute it with ‘such material’. This amendment is consequential to items 29 and 30, which repeal the definition of ‘child pornography material’ in the Criminal Code and add material previously captured in the definition of ‘child pornography material’ to the definition of ‘child abuse material’. This amendment will ensure consistency across Commonwealth legislation to references of this type of material.

Part 2 – Application and transitional provisions

Item 45 – Controlled operations

261. This item inserts an application provision for amendments made under this Bill to paragraph 15GE(2)(w) of the Crimes Act, ensuring that the Bill only affects controlled operations authorised on or after the commencement date. This amendment is consequential to item 5 in Part 1 of Schedule 7, which removes references to ‘child pornography material’ in paragraph 15GE(2)(w) ensuring that the paragraph is consistent with the terms used and defined in the Criminal Code.

Item 46 – Serious Offences—*Telecommunications (Interception and Access) Act 1979*

262. This item inserts an application provision for amendments made under this Bill to subsection 5D(3B) of the *Telecommunications (Interception and Access) Act 1979* ensuring that the amendments effect offences committed on or after the commencement date. This

amendment is consequential to items 43 and 44, which remove references to ‘child pornography’ in paragraph 5D(3B)(b) ensuring that the paragraph is consistent with the terms used and defined in the Criminal Code.

Item 47 – Aggravated offences involving conduct on 3 or more occasions and 2 or more people

263. Item 47 is a table that sets out the transitional effects of amalgamating the definitions of ‘child abuse material’ and ‘child pornography material’ in the aggravated offences involving conduct on 3 or more occasions and 2 or more people (sections 273.7, 471.22 and 474.24A) and the alternative verdict provisions (sections 273.8, 471.23 and 474.24B).

264. This item ensures that conduct which would have constituted an offence before the commencement of this Bill can still be considered for the aggravated offences relating to child abuse material.

Item 48 – Section 7 of the *Acts Interpretation Act 1901* not limited

265. This Schedule does not limit section 7 of the *Acts Interpretation Act 1901*, which is concerned with the effect of repeal, or amendment, of an Act as it applies to the definitional and consequential changes.

266. This item will clarify that, despite the repeal of the reference to ‘child pornography material’ in Schedule 7, a person can still be criminally responsible for an offence committed against the repealed offences where that conduct occurred before the commencement of the Bill.

267. This item also ensures that definitional changes do not affect prosecutions commenced before the commencement of the Bill. For example, the repeal of the existing definition of child pornography in the Customs Act and its reconstitution in a single definition will not affect the ongoing conduct of prosecutions in relation to the importation of child pornography instituted before the commencement of the Bill.