



## SUMMARY & COMMENTARY

### Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020

Since 2017, International Justice Mission Australia has been advocating for legislative amendments to improve Australia's response to the online sexual exploitation of children (OSEC). We welcome the passage of the [\*Crimes Legislation Amendment \(Sexual Crimes Against Children and Community Protection Measures\) Act 2020 \(No. 70, 2020\)\*](#) as an important step in addressing demand for OSEC in Australia.

The Act entered into force on 22 June 2020, with the various provisions to commence, as per the details set out in a section 2. The following is a summary of the main amendments as it relates to IJM's casework and is not intended to be a comprehensive analysis of the Act.

#### I. OUTLINE OF ACT

The *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2020* amends the *Crimes Act 1914* and the *Criminal Code Act 1995* (Cth) and contains 15 schedules. In general, the Act strengthens Commonwealth laws against child sexual abuse, seeks to ensure that sentencing is commensurate to the seriousness of child sex offences and the harm caused to victims, and addresses the increasing use of the internet and new technologies to facilitate the online sexual abuse of children.

The main aspects of the Act are:

- Introduction of new offences related to grooming activities, which includes websites and platforms designed to host child abuse material.
- Increased penalties for a range of child sexual abuse offences.
- New aggravated offences for the most horrific types of child abuse committed, including when a child is subjected to cruel, inhumane or degrading treatment.
- Mandatory minimum sentences for the most serious child sex offences and for those who are likely to be repeat offenders.
- Introduction of presumption against bail, presumption in favour of cumulative sentences and presumption in favour of actual terms of imprisonment.
- Protection for vulnerable witnesses, including automatic right to provide testimony via recorded video interview, and a prohibition of cross-examination of vulnerable witnesses during committal hearings.

The amendments deal with child sex offences outside of Australia or offences that are Commonwealth offences, since most criminal law is under the jurisdiction of the States or Territories. Note that provisions relating to parole orders are not discussed in this document.

## II. AMENDMENTS RELEVANT TO OSEC CASEWORK

### 1. Clarifying the definition of “engaging in sexual activity”

Clarifying notes have been added to several provisions to capture within the offences typical OSEC scenarios where a person is seeing or hearing (via electronic communication) someone engage in sexual activity with a child.

A note is added to **section 272.9(1)** (Engaging in sexual activity (other than sexual intercourse) with a child outside Australia) and **section 272.13(1)** Engaging in sexual activity (other than sexual intercourse) with young person – defendant in position of trust or authority:

Note: A person is taken to engage in sexual activity if the person is in the presence of another person (including by means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity: see the definition of *engage in sexual activity* in the Dictionary.

This clarifies that Person A would be committing an offence under these sections if he/she is in the presence of Person B (including via electronic communication) while Person B engages in sexual activities with a minor. This makes it abundantly clear that if, for example, a person in Australia commissions the live sexual abuse of an overseas child online, that act would be caught by s. 272.9.

The amendments also add a note after **section 474.25A(1) and (2)** – Using a carriage service for sexual activity with person under 16 years of age:

Note: Because of the definition of *engage in sexual activity* in the Dictionary, this offence covers (for example) causing a person under 16:

- (a) to engage in sexual activity that is seen or heard, in real time, by another person using a carriage service; or
- (b) to use a carriage service to see or hear, in real time, another person engage in sexual activity

This makes clear that the scope of the conduct captured by the offence includes live-streamed child abuse and conveys the message that engaging in sexual activity with a child online is comparable to engaging in sexual activity with a child in real life.

### 2. New grooming offences: sections 272.15A & 471.25A, 474.27AA

Section of Criminal Code	Offence	Penalty	Mandatory minimum – applies for 2 <sup>nd</sup> or subsequent offence
272.15A	“Grooming” person to make it easier to engage in sexual activity with a child outside of Australia	15 years	4 years
471.25A	Using a postal or similar service to “groom” another person to make it easier to procure persons under 16	15 years	4 years
474.27AA	Using a carriage service to “groom” another person to make it easier to procure persons under 16 years of age	15 years	4 years

These sections criminalise grooming of third parties to make it easier to engage in sexual activity with a child.

**Section 272.15A** contemplates a scenario where the perpetrator grooms a third party in order to facilitate the perpetrator being able to procure a child to engage in sexual activity.

**Sections 471.25A and 474.27AA** contemplates the scenarios where the sender sends communication via postal or similar means and electronic/digital means to a third party. It captures situations where the sender intends (1) to engage in sexual activity himself/herself with a child; (2) for another adult to engage in sexual activity with a child; or (3) for a child to engage in sexual activity with another child in the presence of himself/herself or another adult. For both of these offences, it does not matter whether the child is a fictitious person represented to the sender as a real person: new subsections 474.28(2A), 474.28(9A)

These provisions (in particular s. 474.27AA) capture the typical OSEC scenario where the perpetrator engages with a third party (the online trafficker), perhaps sending money for food, education, medical supplies etc. in order to make it easier for the perpetrator to engage in sexual activity with children, or to direct sexual activity in his presence (via livestream) involving children.

### 3. Other new offences

Section of Criminal Code	Offence	Penalty	Mandatory minimum penalty
474.23A	Conduct for the purposes of electronic service used for child abuse material  (i.e. creating, controlling, advertising, assisting an electronic service with the intent that it be used for child abuse material)	20 years	5 years
474.25B(1)(b)	Introduces additional aggravated circumstances for: Aggravated offence – using a carriage service for sexual activity with person under 16 years of age -the child is subjected to cruel, inhuman or degrading treatment; -the child dies as a result of physical harm suffered	30 years  (w/o aggravation – ie for underlying offence: 20 years)	7 years
272.10(1)(b)	Introduces additional aggravated circumstances for: Aggravated offence – sexual intercourse or other sexual activity with child outside Australia -the child is subjected to cruel, inhuman or degrading treatment; -the child dies as a result of physical harm suffered	Imprisonment for life  (w/o aggravation – ie for underlying offence: 25 years)	7 years

#### ***Criminalising administration of networks:***

Section 474.23A criminalises the provision of electronic services with the intention that the service will facilitate child abuse material (CAM) offences. Conduct captured by this provision includes creating, developing, altering or maintaining, controlling or moderating, making available, advertising, promoting, and assisting with an electronic service, with the intention that the electronic service be used for CAM.

This amendment targets websites and networks that distribute CAM, often to extremely large and sophisticated international networks. An example is the case of Australia perpetrator, Ruecha Tokputza, who co-administered a darkweb child abuse site that had nearly 63,000 subscribers worldwide, and for years had published new images weekly. Section 474.23A also enables prosecution of offenders who provides electronic services to facilitate dealing with

CAM, even where it cannot be proven that they are also accessing CAM themselves or encouraging others to do so.

The section also defines “electronic service” to mean a service which allows persons to access, or deliver, material using a carriage service. This definition is sufficiently broad to capture a range of technologies, such as websites, chat fora, cloud and web hosting services, peer-to-peer sharing platforms, email distribution lists, as well as future technologies.

This provision allows law enforcement the ability to intervene at an early stage in the offending timeline. The offence does not require that the conduct in relation to the electronic service to have taken place; instead, the issue is whether the offender intends that the electronic service be used to access or deliver CAM by means of a carriage service. The service does not need to be operation or “live” at the time the offending takes place. Further, an offender may be found guilty of the offence even if committing an offence against sections 474.22 or 474.23 is impossible.

### **Additional aggravating circumstances**

The two additional aggravating circumstances added in subparagraphs 272.10(1)(b)(iii) and 272.10(1)(b)(iv) and subparagraphs 474.25B(1)(b)(iii) and 474.25B(1)(b)(iv) target the disturbing trend that increasingly includes severe levels of violence inflicted on the child victim alongside sexual activity. These aggravating circumstances, where a child is subjected to cruel, degrading or inhuman treatment, or a child dies as a result of the physical harm suffered from the offending, sends the message that these offences are so grave as to warrant specific aggravated offences with a sentence of up to life imprisonment in the offence under section 272.10(1) and a 30-year maximum penalty in the offence under section 474.25B(1), reflecting a higher level of culpability.

## **4. Increased penalties and mandatory minimum penalties**

Schedule 5 amends the *Criminal Code Act 1995* to increase the maximum penalties for certain offences, as set out in column 4 of chart below. Note that the new maximum penalty for the aggravated offence in section 272.10(1) is imprisonment for life.

Schedule 6 amends the *Criminal Code Act 1995* to stipulate minimum sentences of imprisonment that the court must impose on a person convicted of an offence, as set out in column 5 of the chart below.

<b>Section of Criminal Code</b>	<b>Offence</b>	<b>Existing penalty</b>	<b>New maximum penalty</b>	<b>New mandatory minimum</b>
272.8(1)	Engaging in sexual intercourse with a child outside Australia	20 years	25 years	6 years
272.8(2)	Causing a child to engage in sexual intercourse in the presence of defendant	20 years	25 years	6 years
272.9(1)	Sexual activity (other than sexual intercourse) with a child outside Australia	15 years	20 years	5 years
272.9(2)	Causing another person to have sexual activity (other than sexual intercourse) with a child outside Australia	15 years	20 years	5 years
272.10(1)	Aggravated offence (re s. 272.8 & 272.9)– sexual intercourse or other sexual activity with a child outside Australia	25 years	Imprisonment for life	7 years

272.11(1)	Persistent sexual abuse of a child (on 2 or more separate occasions of same child) outside Australia	25 years	30 years	7 years
272.15(1)	“Grooming” child to engage in sexual activity outside Australia	12 years	15 years	4 years (2 <sup>nd</sup> or subsequent offence)
272.15A	Grooming person to make it easier to engage in sexual activity with a child outside of Australia	-- (New Offence)	15 years	4 years (2 <sup>nd</sup> or subsequent offence)
272.18(1)	Benefiting from sexual offences against children outside Australia	20 years	25 years	6 years
272.19(1)	Encouraging sexual offences against children outside Australia	20 years	25 years	6 years
273.7(1)	Aggravated offence – offence against s. 273.6 (CAM) on 3 or more occasions and involves 2 or more people	25 years	30 years	7 years
471.22(1)	Using a carriage service for child abuse material	15 years	30 years	7 years
471.25(1)	Using a postal service to “groom” persons under 16	12 years	15 years	4 years (2 <sup>nd</sup> or subsequent offence)
471.25(2)	Using a postal service to “groom” persons under 16 years to engage in sexual activity with another person	12 years	15 years	4 years (2 <sup>nd</sup> or subsequent offence)
471.25A	Using a postal or similar service to “groom” another person to make it easier to procure persons under 16	-- (New offence)	15 years	4 years (2 <sup>nd</sup> or subsequent offence)
471.26(1)	Using a postal service to send indecent material to person under 16	7 years	10 years	3 years (2 <sup>nd</sup> or subsequent offence)
474.22(1)	Using a carriage service for child abuse material	15 years	(No change)	4 years (2 <sup>nd</sup> or subsequent offence)
474.23(1)	Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service	15 years	(No change)	4 years (2 <sup>nd</sup> or subsequent offence)

474.23A	Conduct for the purposes of electronic service used for child abuse material”  (i.e. creating, controlling, advertising, assisting an electronic service with the intent that it be used for child abuse material)	--  (New offence)	20 years	5 years
474.24A(1)	Aggravated offence (re s. 474.22, 474.22A, 474.23 – use of carriage service for CAM) on 3 or more occasions and 2 or more people	25 years	30 years	7 years
474.25A(1)	Engaging in sexual activity with a child using a carriage service	15 years	20 years	5 years
474.25A(2)	Causing a child to engage in sexual activity with another person	15 years	20 years	5 years
474.25B(1)	Aggravated offence (re s. 474.25A) – child with mental impairment or under care, supervision or of authority of defendant	25 years	30 years	7 years
474.26(1), (2), & (3)	Using a carriage service to procure persons under 16 years of age	15 years	(No change)	4 years (2 <sup>nd</sup> or subsequent offence)
474.27(1)	Using carriage service to groom persons under 16 years of age	12 years	15 years	4 years (2 <sup>nd</sup> or subsequent offence)
474.27(2)	Using carriage service to groom persons under 16 years of age	12 years	15 years	4 years (2 <sup>nd</sup> or subsequent offence)
474.27(3)	Using carriage service to groom persons under 16 years of age	15 years	(No change)	4 years (2 <sup>nd</sup> or subsequent offence)
474.27A(1)	Using a carriage service to transmit indecent communication to person under 16 years of age	7 years	10 years	3 years (2 <sup>nd</sup> or subsequent offence)
474.27AA	Using a carriage service to “groom” another person to make it easier to procure persons under 16	--  (New offence)	15 years	4 years (2 <sup>nd</sup> or subsequent offence)

\* Note: other sexual offences not related to OSEC that have mandatory minimums for 2<sup>nd</sup> or subsequent offences are not listed in above chart

The provisions on mandatory minimum sentencing are set out in s. 16AAA, 16AAB and 16AAC of the *Crimes Act 1914*. The prescribed minimum penalties are balanced by provision made for judicial discretion. Section 16AAC allows the court to depart from the prescribed minimum penalty where the offender has pleaded guilty or cooperated with law enforcement in the investigation of the offence, and can contemplate up to a 25% reduction in the mandatory

sentence, and where the offender has pleaded guilty *and* cooperated with law enforcement, the reduction can be up to 50% of the prescribed minimum penalty. Further, for some Commonwealth child sexual abuse offences (other than the most serious offences), the mandatory minimums do not apply until a second or subsequent offence, and provision is made for judicial discretion to reduce the sentence where the offender pleads guilty or cooperates with the investigation.

## 5. Protection of vulnerable witnesses

The amendments implement recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse to protect vulnerable witnesses.

**Section 15YM(1)** allows a witness to automatically give evidence via a video recorded interview, rather than needing to seek leave from the court to do so.

**Section 15YHA** prohibits cross-examination of a child witness, vulnerable adult complainant, and special witnesses during committal hearings. By prohibiting cross-examination at committal proceedings, vulnerable witnesses will be spared an additional risk of re-traumatisation. Presently, vulnerable witnesses may have to give evidence twice and often in distressing, combative environments.

## 6. Sentencing factors

### A. Very young victim as aggravating factor & the number of people involved in offence

The amendments also introduce two additional factors to be taken into consideration in sentencing for certain offences against Subdivision F of Division 474 (offences relating to use of carriage service involving sexual activity with person under 16): section 474.29AA(1). (The same factors are also to be considered in offences in Subdivision B of Division 272 and Subdivision C of Division 471.)

- The seriousness of the offending will be aggravated where the victim or intended victim was under 10 years of age at the time of the offending.
- The court must also take into account the number of people involved in the commission of the offence.

These factors recognise that children are more vulnerable the younger they are, and thus a proportionate increase to the severity of offending against particularly young children should be factored into sentencing. Further, in certain instances, the offences are potentially more serious and harmful to the victim if multiple people are involved.

### B. Presumptions

The following are all rebuttable presumptions introduced by the amendments.

#### ***Bail not to be granted:***

The new section 15AAA introduces a presumption against bail for persons charged with or convicted of certain Commonwealth child sex offences – those offences that have a mandatory minimum sentence and all offences subject to a mandatory minimum penalty on a second or subsequent offences (see chart above). Bail can be granted, however, if the bail authority is satisfied that circumstances exist to grant bail. Reasons for granting bail must be entered into the court's records.

#### ***Cumulative sentences:***

Under section 19, courts must not impose sentencing orders that are partly cumulative or concurrent for Commonwealth child sex offences, or in a situation with both Commonwealth and registrable State sex offences. The presumption for imposing cumulative sentences is rebuttable - courts are able to impose sentences in a different manner, if the resulting sentence is of a severity appropriate in all the circumstances. In such a case, reasons must be stated and entered into court records.

### ***Serving an actual term of imprisonment:***

Section 20(1)(b)(ii) and 20(1)(b)(iii) sets out a presumption in favour of actual terms of imprisonment for offenders convicted of Commonwealth child sex offences. Currently, child sex offenders who are sentenced to three years or less imprisonment are sentenced to recognizance release orders, meaning they are released into the community immediately or after serving a period of imprisonment. Many such offenders receive wholly suspended sentences, which means that they are immediately released without serving any period of time in custody, and often without any supervision conditions. [[Explanatory Memorandum](#), para. 290]

The new amendments provide that the court can only release a person convicted of a Commonwealth child sex offence on a recognizance release order immediately (without serving any period of imprisonment) if the court is satisfied that there are exceptional circumstances. Otherwise the child sex offender will have to serve an actual term of imprisonment before being released into the community on recognizance.

### ***Comment:***

Each of the above presumptions is aimed at contributing to stronger sentences for those who commit Commonwealth child sexual abuse offences, by making it more difficult to be granted bail, and more likely that the offender will actually serve a term of imprisonment and serve a longer sentence. The presumptions are rebuttable, allowing for judicial discretion to determine, for instance, whether a person's risk on bail can be mitigated through appropriate conditions which would make the granting of bail appropriate in the circumstances. The presumption in favour of cumulative sentences recognise that concurrent and partly cumulative sentencing practices result in lower sentences, but the provision allows discretion to the courts to impose a sentence other than a cumulative sentence, if the result is a sentence of a severity appropriate in all circumstances. The presumption in favour of an actual term of imprisonment also provides the courts "with enough discretion in setting the pre-release period under a recognizance release order to enable individual circumstances to be taken into account while ensuring that child sex offenders receive sentences that reflect the exceptionally serious nature of their crimes." [[Explanatory Memorandum](#), para. 291]

## **7. Three-year review**

Schedule 15 requires the Attorney General to conduct a review of the sentencing provisions relating to Commonwealth child sex offences, after 3 years of the operation of the amendments. A written report must be submitted to the Attorney General within 12 months of the 3-year review period, to be tabled in Parliament.

### III. CONCLUDING SUMMARY

The long-awaited passage and coming into force of the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* puts into place measures that will strengthen the laws against child sexual crimes committed by Australians, and is particularly relevant to IJM's OSEC casework.

Provisions specifically addressing OSEC-type offending:

- The note added to the definition of “engaging in sexual activity” makes clear that a person who watches a live-stream of child sexual exploitation is treated the same as if he/she is engaging in sexual activity with a child in real life.
- New offences criminalising grooming of third parties address the typical scenario of a demand-side perpetrator engaging with a third party (the trafficker) to make it easier to engage in sexual activity with children and captures the exploitative nature and role of the demand-side offender.
- There is a new offence that criminalises administration of electronic services used for child abuse material.

Recognition of the increasingly younger age of victims, their vulnerability, and the extreme severity of the abuse:

- The amendments recognise that very young children are often involved in these offences and elevate the seriousness of particular offences by including as an aggravating factor where the victim is under 10 years of age.
- Protections for child victims have been added to reduce risk of retraumatisation: child witnesses can give evidence by video-recorded interviews without leave of the court and cross-examination of child witnesses is prohibited during committal hearings.
- Two aggravating circumstances were added recognising the severe level of violence and abuse inflicted on children in some situations. Where a carriage service is used for sexual activity with a child and the child is subject to cruel, inhuman or degrading treatment, or if the child dies as a result of physical harm suffered, the penalty is significantly increased (30 years). Similarly, where an offender engages in sexual intercourse or other sexual activity with a child, and where such aggravating circumstances exist, the maximum penalty has been raised to life imprisonment.

Measures to strengthen sentencing:

- Increased penalties send a clear message that OSEC is among the most heinous and serious of crimes.
- Mandatory minimum sentences for specific serious offences also send a message about the gravity of these offences, as well as mandatory minimums for 2<sup>nd</sup> and subsequent offences target repeat offenders. The mandatory sentencing regime is balanced by incorporating provisions that still allow for judicial discretion, as well a three-year review mandated for all of the sentencing provisions.
- The presumption against bail, presumption for cumulative sentences, and the presumption in favour of actual terms of imprisonment all make it more likely that an offender will be refused bail, actually serve a term of imprisonment, and for a longer period.