Aboriginal & Torres Strait Islander
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Research Director
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

BY EMAIL: lapcsesc@parliament.qld.gov.au

Dear Colleagues,

**RE: CRIMINAL AND OTHER LEGISLATION AMENDMENT BILL 2011**

We thank you for the opportunity to provide a submission on the abovementioned Bill. We have focussed our submission upon those amendments which are most closely aligned with our areas of practice and thus expertise.

**SUMMARY OF OUR RECOMMENDATIONS**

**Criminal Code:**

1. Section 207A: we support the proposal to clarify the definition of "child exploitation material", However we submit that a separate definition should apply to section 228D (Possessing child exploitation material) which does not include "representations" of a person as falling within the definition under that section.
2. We support the various proposals re increased penalty provisions save for section 228D (increasing possession of materials from 5 to 14 years imprisonment) which we feel is disproportionate and could also prove counter-productive. Further, we would raise for consideration whether a child who if fully compos mentis has the potential to suffer greater psychological harm than a child who is non compos mentis or of "impaired mind" – and thus there is a basis for increased penalties across the board.

3. Further, whilst deterrent and punitive values are important – this is an area where addressing recidivism is of particular importance to the community – making rehabilitative/behavioural programs for perpetrators a key priority.
4. Sections 218A and B: after "12 years" we suggest inserting "of age" throughout the sections.
5. Section 218B: the current definition of "procure" from section 218A has been utilised. However, section 218B (unlike section 218A) uses the term "procurement" – we suggest the definition in 218B be redrafted accordingly. Also suggest the word "Grooming" in the title be substituted (e.g. with "Facilitating procurement of").
6. Section 228D: we do not support increasing the penalty for possession of materials from 5 to 14 years as aside from proportionality, we believe such could be counter-productive inasmuch as it could act as a disincentive to perpetrators to not engage with actual children (the same rationale applies to not including "representations" of people within the definition of "materials" under this section).
7. Section 242 (cruelty to animals): we support.
8. Section 568 (joinder): confined as it is to sections 228A to D – we do not oppose this proposal.
9. Section 669A (double jeopardy): we do not support any proposal which interferes with the discretion of an appeal court or cuts across the potential injustice of being sentenced twice for the same offence.

**Drugs Misuse Act:**

10. Section 4 definition "dangerous drug": we support "4 (c) (i)" but do <u>not</u> support "4 (c) (ii)" – the latter spreading the net of criminal behaviour far too wide.
11. Section 9A: we support the proposed amendment.
12. Section 9D (trafficking): we support the proposed amendment.
13. Section 10 (4AA): we support the proposed amendment.
14. Section 129A: we do not support this section (given that we are opposed to the insertion of section 4 (c) (ii) – to which it relates.

**Background – preliminary consideration**

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for almost four decades has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely

academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

**Sentence Length – Child Exploitation Material – Section 228D in particular**

Child exploitation in all of its various forms is abhorrent to any civilized society – all the more so when such involves "sexual" conduct. Recognizing the deterrent and punitive value of penalties - we support the proposed increases (with one exception) on principle. However, we do not support increasing the penalty for the possession of child exploitation materials (section 228D). Firstly, we submit that irrespective of any other considerations, an increase from 5 to 14 years is too great and disproportionate to other criminal offences.

What particularly concerns us is that such a significant sentencing range in relation to section 228D might act as a disincentive to those who otherwise would have restricted their activities to the personal viewing of such material – to so restrict themselves. In other words, if a perpetrator is potentially looking at a 14 year period of imprisonment for the "mere" possession of such materials (i.e. without any aggravating circumstances), then he or she might be more inclined to engage in behaviour which involves actual dealings with children (acknowledging that the "materials" themselves initially involved the direct exploitation of a child/ren – albeit by a third party).

We also submit that a separate definition of "child exploitation material" apply to section 228D – one which does not include "representations" of people as falling within the definition. Individuals who have an inclination (however abhorrent such might be to the norm of society) to view such materials – are, we would submit, better off restricting such behaviour to the viewing of "representations" – as such (presumably) did not involve the exploitation of an actual child at any stage. Including "representations" into the definition of section 228D might encourage such individuals to view "actual" children – on the basis that they are involving themselves in criminal behaviour even if they restrict themselves to "representations". Representations which are shown to a child – would still constitute criminal behaviour.

Disincentive issues aside - it also seems absurd that the maximum penalty for a person who is found to be in possession of animated, virtual or fictitious images is the same as that for a person who is found to have involved a child in the making of child exploitation material and even the other offences relating to the making of child exploitation material which involves real children. It is our view that the inclusion of animated, virtual or fictitious images is at an oddity with the arguments used to support the harmonisation of maximum penalties for child exploitation material offences. One of the arguments that was offered is that the child "is often subject to appalling physical and sexual abuse." Clearly, in the case of animated, virtual or fictitious images there is no victim of exploitation, making it difficult to see or understand the harm and in turn, the crime. It is our view that there is no justification for the inclusion of animated, virtual or fictitious images in child exploitation material offences (where such is not shown etc to a child).

It is also suggested that the primary focus should be on rehabilitation and behavior change therapy of prisoners convicted of child exploitation material offences (indeed, of all such offences). Quality training and access by prisoners to training are more likely to be successful in reducing reoffending, rather than longer sentences. It is also unlikely that longer sentences will deter people from committing these particular offences – but the punitive component in this specific area of sentencing is acknowledged as a justification for increased penalties.

Further, we would raise for consideration whether a child who if fully compos mentis has the potential to suffer greater psychological harm than a child who is non compos mentis or of "impaired mind" – and thus there is a basis for increased penalties across the board.

**The New Offence of "Grooming" (Section 218B)**

The new offence of grooming raises a number of considerations. Firstly, like its counter-part in section 218A – the definition of "procure" (although it is noted that unlike section 218A – the term "procurement" is used but not defined) is somewhat amorphous. Further, whilst the explanatory notes describe an offense of "grooming" as referring to "wide-ranging behaviour that is designed to facilitate, or make easier,

the later procurement of a child for sexual activity (for example, an offender might build a relationship of trust with a child, and then seek to sexualise that relationship)".[1] It is difficult to comprehend how this definition could be met unless, either a person is charged or convicted of a further offence, or similar fact evidence is relied upon to inform or infer the nature of the person's actions – and clearly, such evidence should not be admitted automatically, due to its potential unfair prejudicial effects.

At this stage, "grooming" as an offence appears to be underdeveloped and it could be dangerous to introduce it as this early stage. Our concern is that this offence could capture people who have no criminal intention, or that the offence will not be utilised, excepting in combination with other charges, because it is ill defined. As mentioned above, the success of a "grooming" charge might also require the use of similar fact evidence. Clearly we are concerned with the likely prejudicial effect of reliance upon evidence of other other offences or other similar behaviours.

If the section is to stand – we also suggest changing the title of this section – the term "grooming" has an uneasy feel to it in this context.

**Joinder of charges (Section 568)**

Whilst our Organisation would have grave concerns about any expansion of section 567 (the joinder of multiple charges upon a single indictment) – we note that the proposed changes to section 568 (separate acts distilled into a single charge) is confined to sections 228A-D. On that basis, our Organisation does not oppose the proposed amendment.

**Sentencing Double Jeopardy – Removal of the Principles of Sentencing Double Jeopardy (Section 669A)**

[1] The new section (s 218B) requires evidence of an adult engaging in conduct in relation to a person under the age of 16 years, or a person they believe to be under 16 years, "with intent to facilitate the procurement of the person to engage in a sexual act, either in Queensland or elsewhere; or expose, without legitimate reason, the person to any indecent manner, either in Queensland or elsewhere."

The sentencing principles of double jeopardy include the inherent injustice in being sentenced again for the same offence and the requirement because of this for a proportionate discount in sentence for the accused. It is well understood that matters being reopened when a person has thought that the matter had been resolved, create a great deal of uncertainty, resulting in high levels of distress for the accused and their family. We acknowledge that although appeals against sentence by the Attorney-General ought to be rare and for the purpose of maintaining consistency in sentencing/punishment standards for crime, this cannot be viewed as sufficient to usurp the existing principles and an individual's rights. Other than this line of argument, there appears, both at the Queensland and Council of Australian Governments (COAG) level to be no other reasons to sever these principles.

The principles of double jeopardy are included in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) to which Australia is a party. Given the importance of these principles, the depth at which these principles are entrenched in the law and that Australia is a party to the ICCPR, it is our view that they should remain.

In the ACT in response to the then proposed reforms by COAG, the then Chief Minister, John Stanhope, criticised the recommendation made to reform double jeopardy principles, saying:

> It is tempting for politicians to make legal reforms in response to high-profile, emotional cases, but it doesn't always make for good law. The need for such a fundamental reform should be demonstrable, evidence-based and proportionate. That is why I have asked that the issue be referred to the Law Reform Commission for detailed exploration.[2]

[2] Stanhope, J., Media Release, 12 April 2007, *Proposed changes to double jeopardy rule should be referred to Law Reform Commission*, <http://www.chiefminister.act.gov.au/media.php?v=5506&m=51&s=87>.

We suggest that any fetter on the discretion of an appellate court in terms of the sentencing principles of double jeopardy contradict the fundamental legislative principle for legislation to have sufficient regard to rights and liberties of individuals.[3] For these reasons we do not agree with the proposed amendment.

**Drugs Misuse Act**

We simply rely upon our comments as outlined in our summary.

We wish you well in your deliberations and trust that our submission is of assistance – again thanking you for the opportunity for imput. On a personal note I also take this opportunity to thank Ms Fiona Campbell from our Cairns office for her assistance with the initial draft.

Yours faithfully,

Shane Duffy

Chief Executive Officer

[3] *Legislative Standards Act 1992* (QLD ), s 4 (1)–(3)