



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

G P O B o x 2 2 8 1 B r i s b a n e 4 0 0 1

visit us at www.qccl.org.au

Research Director
Legal Affairs and Community Safety Committee

Criminal Law (Child Exploitation
& Dangerous Drugs)
Submission 004

By Email: lacsc@parliament.qld.gov.au

Dear Madam/Sir

Please accept this submission on behalf of the QCCL in relation to the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012*.

The QCCL is a purely voluntary organisation established in 1967 which has, as its principle purpose, the implementation in Queensland and Australia of Human Rights.

The following articles of the Universal Declaration require consideration in the context of this submission:

Article 3.

Everyone has the right to life, liberty and security of person.

Article 11.

(1) *Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*

Article 25.

(1) *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services*

The Bill

Section 207A is to be amended to make it an offence to possess animated or virtual images of child exploitation. There is no reason suggested for this. The previously stated rationale for protecting children is to reduce the demand for child exploitation material to be manufactured in the first place. Where no actual child is used in the production of, for example, a computer generated or hand drawn cartoon, there is no child being exploited. It is unclear whether making the offence the same as that for actual images of actual children will either protect any actual child or in fact remove a legal alternative by making it punishable to the same extent. Furthermore, freedom of speech is implicated.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 the Supreme Court of the United States struck down such a law as violating freedom of speech commenting that the visual depiction of teenagers engaged in sexual activity, is a "fact of modern society and has been a theme in art and literature throughout the ages." Such depictions include performances of *Romeo and Juliet*. The Court said "If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene."

To the argument that such material could be used to seduce children the Court said, "there are many things innocent in themselves, however, such as toys, movies, games, video games, candy, money etc. that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused." For these reasons the QCCL opposes this measure.

The new offence of grooming under s218B must be carefully crafted to ensure it doesn't criminalise the ordinary friendly reactions between adults and children. The key element is the intention to facilitate the procurement for a sexual act and it may be simpler to leave such conduct to the law of attempt by charging grooming as an attempt to commit the more serious offences. Where it is merely preparatory it would not be an offence but the new law would apparently criminalise someone who had formed but not yet manifested an intention sufficient for an attempt. The fact that there is no limit to the intent being imminent in s.5(c) would seem to mean 'grooming' a 15 year old girl with a view to propositioning her sexually only once she had become 16 would nonetheless be an offence under the new law. Police who suspect grooming can still intervene to protect any child at risk including by informing them of the risks, with or without informing the suspect.

The proposed section 318B (6) states that it does not matter that the person represented as under 16 is actually fictitious and an adult posing as a child.

It is presumed that this section would be employed in situations where the police would pose as a child in order to entrap a person into committing a sexual procurement offence. Entrapment is a breach of a person's liberty and is also an extension of existing police powers which should not be affected.

As in any case, the onus should be on the police to investigate and provide solid evidence against a person without impeaching on his/her freedom of conduct, communication and association.

The proposed amendment to the Drug Misuse Act section 4AA states that a person can be charged with possession if s/he has in his/her possession any hypodermic syringe regardless of whether it is used to administer a dangerous drug or otherwise. This seems to create a situation whereby a person who possesses a syringe to administer legal substances for medical purposes may still be charged with possession which does not align with the purpose of the Act and therefore should not be included.

The amendment to widen the provision that allows drug analogues to be treated as if they are dangerous drugs is opposed. Any citizen should be entitled to know if what they are doing is lawful or not. The ability to refer to a Schedule in the DMA provides

that. Where Clause 40 makes anything that gives 'substantially similar effects' to a scheduled drug, a dangerous drug then virtually every current legal drug become potentially unlawful without having a chemical similarity to an illegal one. For some people, alcohol is not unlike marijuana, coffee is not unlike speed. At the very least, one would expect the section to prescribe the effects of the dangerous drugs so citizens could be aware of what it is about them that has to be avoided if trying other substances.

Worse still are the aspects of Clause 40 that makes it an offence to possess something of a chemically similar structure to a dangerous drug alone. No ordinary person can know what the chemical make up of the goods they obtain is. This includes prescription drugs which have almost identical effects to illegal ones - for example codeine.

We thank Tina Riveros for her contribution to this submission.

We trust that this is of assistance to you in your deliberations.

Yours Faithfully,



Andrew Sinclair
President
Queensland Council for Civil Liberties
1 February 2013