



Law Council
OF AUSTRALIA

Office of the President

18 March 2019

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Combating Child Sexual Exploitation Legislation Amendment Bill 2019

The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) inquiry into the Combating Child Sexual Exploitation Legislation Amendment Bill 2019 (**the Bill**).

The Law Council welcomes the Bill as an important part of implementing recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**).

The Law Council acknowledges that it is critical that survivors of sexual abuse are able to seek and obtain a criminal justice response to child sexual abuse. It is also vital that the criminal justice response adheres to fundamental rule of law and criminal justice principles. The Law Council's submission is based on these principles.

In the timeframe within which to make submissions, the Law Council makes the following key recommendations aimed at the improvement of the Bill:

- the proposed measures in the Bill should not incur a potential mandatory minimum sentence;
- the possession offences, and perhaps offences of accessing such material, should be prosecuted summarily with the consent of the prosecutor and the defendant;
- should proposed section 273A.1 (possession) proceed: (a) the alleged offender should know that the child-like doll or object is a sex object; and (b) the use of the word 'likely' should be adequately justified given its potential to cause confusion and unintended consequences in the intersection with the fault element of the offence. This problematic term is also used in the proposed amendments to section 473.1 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) and subsection 233BAB(4) of the *Customs Act 1901* (Cth);

- proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) and (2)(c) should relate to the knowledge of the defendant and that proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) and (2)(d) should be amended. In each case, the conduct should be ‘sexual conduct’ and the prosecution should be required to prove that the accused knew the facts which would amount to a child sexual abuse offence. It should not be an offence if, for example, the accused wrongly believed that the sexual conduct was consensual between two 17 year olds but in fact the potential offender was 22 years old;
- in the absence of justification in the Explanatory Memorandum, proposed section 273B.5 (failing to report child sexual abuse offence) should require that the child be ‘under the defendant’s care, supervision or authority, in the defendant’s capacity as a Commonwealth officer’;
- to avoid casting an obligation on a person to self-report conduct that is allegedly criminal under the proposed sections, which is contrary to fundamental canons of the criminal and common law in this country, the words ‘a third person (the *potential offender*)’ should be substituted for the words ‘a person (the *potential offender*)’ in proposed paragraph 273B.5(2)(c). Alternatively, paragraph (b) could simply read ‘there is a person aged under 18...’ and then paragraph (c) could read ‘another person (the *potential offender*)’;
- a witness should be entitled to both direct use and derivative use immunity with respect to any evidence or information that is provided in response to the application of questioning by law enforcement pursuant to proposed subsection 273B.5(5) (failing to report child sexual abuse offence); and
- the Bill should be amended to clearly state that it is not an offence under the relevant provisions for a lawyer to fail to disclose information the subject of legal professional privilege.

Mandatory minimum sentencing

The Law Council opposes creating mandatory minimum sentences of four years imprisonment for the proposed offences at section 273A.1 and subsection 474.22A(1) of the Criminal Code, which relate to the possession of a child-like sex doll and the possession or control of ‘child abuse material’ sourced using a carriage service respectively.

The Law Council acknowledges the potential for serious social and systemic harms associated with child sex offences. These are serious offences which harm the most vulnerable members of our society. However, the Law Council opposes the use of mandatory minimum sentences as a penalty for any type of criminal offences. The Law Council’s *Mandatory Sentencing Policy and Discussion Paper* (released in June 2014 – see attached) describes in detail a number of concerns expressed by the Law Council’s Constituent Bodies, the judiciary, other legal organisations and individuals regarding mandatory sentencing.

A fundamental concern expressed in the policy is that the imposition of mandatory minimum sentences upon conviction for criminal offences imposes unacceptable restrictions on judicial discretion and independence, and undermines fundamental rule of law principles and human rights obligations.

In addition, the Law Council's *Mandatory Sentencing Policy* notes that mandatory sentencing in relation to any criminal offence:

- potentially results in unjust, harsh and disproportionate sentences because it is not possible for Parliament to know in advance whether a minimum mandatory penalty would be just and appropriate across the full range of circumstances in which an offence might be committed;
- has a disproportionate impact on Aboriginal and Torres Strait Islander peoples and those with a cognitive or intellectual disability; unjust outcomes, particularly for vulnerable groups within society: indigenous peoples, young adults, juveniles, persons with a mental illness or cognitive impairment and the impoverished;
- when adopted, has failed to produce convincing evidence which demonstrated that mandatory minimum penalties deterred crime;
- potentially increases the likelihood of recidivism because prisoners are placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
- provides short-to-medium-term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;
- can undermine the community's confidence in the judiciary and the criminal justice system as a whole. In-depth research has demonstrated that when members of the public were fully informed about the particular circumstances of the case and the offender, 90 per cent viewed judges' sentences as appropriate;
- displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;
- results in significant economic costs to the community, both in terms of increasing incarceration rates, and increases the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and
- could be inconsistent with Australia's international obligations, including the prohibition against arbitrary detention as contained in Article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*¹; the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR.

Further, it should be noted that the Tasmanian Sentencing Council in September 2016 in considering whether mandatory sentencing should be introduced for sexual offences in Tasmania concluded that 'mandatory sentencing is inherently flawed' and that it had 'grave concerns that the introduction of mandatory minimum sentencing for sexual offences in Tasmania will create injustice by unduly fettering judicial discretion'.² These conclusions

¹ *International Covenant on Civil and Political Rights*, opened for signature, 999 UNTS 171 (entered into force 23 March 1976).

² Sentencing Advisory Council, *Mandatory Sentencing for Serious Sex Offences against Children* (2016), p. vi.

were reached while the Tasmanian Sentencing Council was required by the terms of reference for the inquiry to consider offences that a mandatory minimum scheme should be limited to and the structure of such a scheme.

The Law Council opposes mandatory sentencing for the reasons outlined in its policy and discussion paper and recommends that those measures be removed from the Bill.

In addition, the Law Council notes that, while juveniles are proposed to be exempt, the proposed measures would apply to persons with 'significant cognitive impairment'. This is inconsistent with other mandatory minimum legislation such as the 'one punch' laws in sections 25A and 25B of the *Crimes Act 1900* (NSW). Excluding sentencing discretion in such cases is manifestly unjust.

The Law Council recommends that the proposed measures in the Bill do not incur a potential mandatory minimum sentence.

Possession offences

Option for summary prosecution

The Law Council submits that, in line with possession offences in many state and territory jurisdictions, the offences should be capable of summary prosecution in appropriate cases. The maximum penalty of 15 years imprisonment for a doll possession offence based on negligence is excessive and would mean that possession of a single image would need to be prosecuted on indictment.³ It is also a greater maximum penalty than in state and territory jurisdictions.⁴ The Law Council recommends that the possession offences, and perhaps offences of accessing such material, should be prosecuted summarily with the consent of the prosecutor and the defendant.

Fault element

The Law Council notes that proposed section 273A.1 requires that the person intended to possess a doll or other object. However, it does not require that the person knew that the doll or object was a child-like sex doll or other sex object. Proposed paragraph 273A.1(c) would appear to displace the ordinary fault elements for criminal offences under section 5.6 of the Criminal Code by requiring 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 would appear to require an objective test.

The Law Council recommends that, should this offence proceed, subjective awareness of the sexual nature of the child-like doll or other sex object that resembles a child is a key component of the proposed criminal culpability. Accordingly, the Law Council recommends that the person should know that the child-like doll or object is a sex object.

Further, the Law Council notes the use of the term 'likely' in proposed paragraph 273A.1(c). The Commonwealth's *Guide to Framing Commonwealth Offences* states that the word

³ *Crimes Act 1900* (NSW) s 4J(1).

⁴ Section 91H of the *Crimes Act 1900* (NSW) carries a maximum penalty of 10 years imprisonment, as does s 51G of the *Crimes Act 1958* (Vic), 125B(1) of the *Criminal Code Act 1983* (NT) and 130C of the *Criminal Code 1924* (Tas) is a summary offence. Only an aggravated offence carries a maximum penalty of 10 years under s 63A of the *Criminal Law Consolidation Act 1935* (SA). Section 220 of the *Criminal Code Compilation Act 1913* (WA) carries a maximum penalty of 7 years as does s 65 of the *Crimes Act 1900* (ACT). Section 288D *Criminal Code Act 1899* (Qld), carries a maximum penalty of 14 years imprisonment for the non-aggravated offence.

'likely' should 'generally not be used' as it 'may result in unintentionally creating a fault element'.⁵ The Law Council recommends that the use of the word 'likely' should be adequately justified given its potential to cause confusion and unintended consequences in the intersection with the fault element of the offence. This problematic term is also used in the proposed amendments to section 473.1 of the Criminal Code and subsection 233BAB(4) of the *Customs Act 1901* (Cth).

Failure to protect child at risk of child sexual abuse offence and failure to report child sexual abuse offence

Absolute liability

In relation to proposed sections 273B.4 and 273B.5, there are difficulties with both the drafting of proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) and the breadth of the proposed application of absolute liability (proposed subsections 273B.4(2) and 273B.5(2)). The difficulties include that the provisions relate to conduct alone whereas many child sexual abuse offences, and particularly more serious offences, have a requirement of knowledge or intention prior to the matter constituting a child sexual abuse offence. Further, the use of the word 'such conduct' refers back to proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) which provides that the 'defendant knows there is a substantial risk that a person (the potential offender) will engage in conduct in relation to the child. The Law Council suggests that proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) and (2)(c) should relate to the knowledge of the defendant and that proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) and (2)(d) should be amended. In each case, the conduct should be 'sexual conduct' and the prosecution should be required to prove that the accused knew the facts which would amount to a child sexual abuse offence. It should not be an offence if, for example, the accused wrongly believed that the sexual conduct was consensual between two 17 year olds but in fact the potential offender was 22 years old.

Definition of responsible person

The Law Council notes that proposed section 273B.4 (failing to protect child at risk of child sexual abuse offence) includes a requirement that the child be 'under the defendant's care, supervision **or authority**, in the defendant's capacity as a Commonwealth officer' (emphasis added). However, proposed section 273B.5 (failing to report child sexual abuse offence) only requires that the child be 'under the defendant's care or supervision, in the defendant's capacity as a Commonwealth officer'. This inconsistency does not appear to have been explained in the Explanatory Memorandum. In the absence of justification in the Explanatory Memorandum, proposed section 273B.5 (failing to report child sexual abuse offence) should require that the child be 'under the defendant's care, supervision or authority, in the defendant's capacity as a Commonwealth officer'.

⁵ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, 31.

Self-incrimination

Proposed subsection 273B.5(5) would explicitly abrogate the privilege against self-incrimination. The privilege against self-incrimination is recognised as a fundamental human right. Indeed, Article 14(3) of the ICCPR provides that in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.⁶ The rule against self-incrimination is a substantive common law right⁷ available to an accused in criminal proceedings as well as persons suspected of crime.⁸ The privilege against self-incrimination is based on the desire to protect personal freedom and dignity.⁹

To avoid casting an obligation on a person to self-report conduct that is allegedly criminal under the proposed sections, in defiance of fundamental canons of the criminal and common law in this country, the Law Council suggests that the words 'a third person (the *potential offender*)' should be substituted for the words 'a person (the *potential offender*)' in proposed paragraph 273B.5(2)(c). Alternatively, paragraph (b) could simply read 'there is a person aged under 18...' and then paragraph (c) could read 'another person (the *potential offender*)'. This would avoid any confusion or attacks on the validity of the provision as presently drafted.

The Law Council notes that a direct use immunity is to apply under proposed subsection 273B.9(10), preventing this information from being used in any 'relevant proceedings' against the discloser. However, the Law Council is also concerned that as currently drafted the information obtained should a person be compelled to disclose information despite it being self-incriminating, may still be admissible where there is information obtained as an indirect consequence of the disclosure. Derivative use material is permitted to be used in subsequent criminal proceedings. The proposed subsection 273B.9(11) states that subsection 273B.9(10) does not 'affect the admissibility of evidence in any relevant proceedings of any information obtained as an indirect consequence of a disclosure of information that constitutes protected conduct'.

The Law Council considers that should the offence be retained in its current form, the protection for the privilege against self-incrimination should be extended to cover the derivative use of material obtained as a result of answers given in accordance with questioning under proposed subsection 273B.5(5).

The Law Council considers that should the offence in its current proposed form be retained, a witness should be entitled to both direct use and derivative use immunity with respect to any evidence or information that is provided in response to the application of questioning by law enforcement pursuant to proposed subsection 273B.5(5). Such an approach enables useful information to be obtained, indeed encouraging witnesses to provide full and frank disclosure while preserving the rights of witnesses to be treated the same as any other witness when it comes to protecting their right to a fair trial.

⁶See also United Nations Human Rights Committee, *CCPR General Comment No 13 on Article 14* (Administration of Justice), 21st sess (13 April 1984). Article 14 of the ICCPR provides for a number of fundamental rights including the right to a fair and public hearing, the presumption of innocence, legal representation as well as the privilege against self-incrimination.

⁷ *Reid v Howard* (1995) 184 CLR 1, [8] (Toohey, Gaudron, McHugh and Gummow JJ). See [15] in relation to persons being questioned in civil proceedings.

⁸ *Petty & Maiden v R* (1991) 173 CLR 95.

⁹ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR, [7] (Murphy J).

Protection from other laws

The Law Council is concerned with the current proposal under s 273B.9 which refers to “protected conduct” but also provides in subsection (4) that the section does not prevent a person from being liable in any relevant proceedings for conduct that is revealed by disclosure of information. This provision creates uncertainty in the scope and application of the protections said to be afforded by the provision. The combination of the offence under s 273B.5, given s 273B.5 (c)(i) and this provision do not make clear for instance whether it is proposed that legal professional privilege or client legal privilege is abrogated. It appears that the offence may unwittingly capture privileged communications between, for example, a child and a lawyer in circumstances where subsections (a) and (b) are satisfied and the child is seeking legal advice as to past conduct committed on themselves and does not wish for there to be disclosure. It is vitally important that persons, especially children, be able to obtain legal advice and that lawyers do not become liable to report their clients in breach of legal professional privilege or client legal privilege. While the example given would be rare, the legislation should clearly state that it is not an offence under the relevant provisions for a lawyer to fail to disclose information the subject of legal professional privilege.

Thank you again for the opportunity to provide this submission.

Please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au in the first instance should you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President