



# Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017

Senate Legal and Constitutional Affairs Committee

6 October 2017

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee in the preparation of this submission.

## Executive Summary

1. The Law Council is pleased to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) inquiry into the Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill (**the Bill**).
2. The Bill seeks to better protect the community from the dangers of child sexual abuse by addressing perceived inadequacies in the criminal justice system that result in outcomes that insufficiently punish, deter or rehabilitate offenders. The Bill targets all aspects of the child sex offender cycle from the commission of an offence, to bail, sentencing and post-imprisonment.
3. The Law Council recognises that sexual offences against children are serious and sex offenders ought to receive appropriate sentences that reflect the severity of the conduct for the protection of the community.
4. Due to the timeframe for response for the inquiry, the Law Council has not been able to undertake as comprehensive assessment of the Bill as it would have liked. Some of the views expressed in this submission are therefore preliminary only.
5. However, the Law Council is concerned that the Bill has been introduced in the absence of consideration as to how the measures may fit with the Royal Commission into Institutional Responses to Child Sexual Abuse's (**Royal Commission**) *Criminal Justice Report*<sup>1</sup> and prior to the release of the Royal Commission's *Final Report*. The Royal Commission's reports and inquiry are not referred to in the Explanatory Memorandum to the Bill and hence it is unclear the extent to which the measures will be consistent with the findings of the Royal Commission. Similarly, the Law Council is concerned that the Bill has been introduced prior to the Australian Law Reform Commission's (**ALRC**) inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander peoples. If enacted, the Bill has the potential to impact on Aboriginal and Torres Strait Islander incarceration rates, particularly given the mandatory minimum penalties and presumption against bail.
6. The Bill should not be enacted prior to consideration of the Australian Government and Parliament of these reports.
7. Further, the Law Council has several concerns with the Bill, including the:
  - mandatory minimum penalty measures which may apply to conduct between youths that may be common and normally permitted under State law. That is, normal young adult behaviours are criminalised. The age of consent also varies and so the conduct may be strictly unlawful and subject to statutory absence of consent provisions, however, that does not make it a case for the imposition of mandatory sentences. This has the potential to create significant unjustified unfairness without achieving the stated aims of deterring offenders or instituting appropriate penalty regimes. If they are to proceed, the Bill should be amended to allow the court full discretion in cases of individuals with significant cognitive impairment;

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<sup>1</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice report* (2017).

- range of measures in the Bill which would place additional strain on the criminal justice system without a commitment of additional resources for the courts and the criminal justice system to properly fulfil the proposed new functions;
  - presumption against bail is inconsistent with the presumption of innocence and established criminal law principles;
  - the presumption in favour of cumulative sentences unless exceptional circumstances apply and presumption in favour of an actual sentence being served;
  - the ability of a court to practically comply with the requirement to consider whether the sentencing or non-parole period provides sufficient time for the person to undertake rehabilitation given potential deficiencies in resourcing for rehabilitation options for offenders; and
  - removing the requirement for the Attorney-General to give notice to revoke the parole order or licence for all Commonwealth crime is objectionable on procedural fairness grounds.
8. For these reasons the Law Council's primary recommendation is that the Bill not be passed in its current form.
9. In the alternative, should the Bill proceed, the Law Council recommends:
- Subsection 272.8 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) be amended to reflect the proposed definition of 'engage in sexual activity' to ensure that a person is taken to engage in sexual activity if the person is in the presence of another person (including by a means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity.
  - The mandatory minimum penalties should be removed from the Bill.
  - There should be a review of the proposed three year increase in maximum penalties, and if justified, the Explanatory Memorandum should more clearly state why a three year increase in maximum penalties has been chosen.
  - The presumption against bail, the presumption in favour of cumulative sentences and the presumption in favour of an actual term of imprisonment for certain Commonwealth child sex offenders should be removed from the Bill.
  - Additional resourcing should be made available to ameliorate the further burden on the courts and criminal justice system.
  - The proposed new sentencing consideration of whether the person's standing in the community was used to aid in the commission of the offence (proposed paragraph 16A(2)(ma)) should be limited to child sex offences to accord with the stated intent of the Bill.
  - The requirement for a court to consider whether the sentence or non-parole period set provides sufficient time for the person to undertake rehabilitation (proposed paragraph 16A(2AAA)(b)) should be removed from the Bill.
  - Proposed paragraph 19AU(3)(ba) of the Bill removing the requirement for the Attorney-General to give note prior to revoking parole or a licence should be removed. Alternatively, an independent parole authority should have the ability to revoke the parole or licence without giving notice to the person in the interests of

ensuring the safety and protection of the community or of another person subject to the ability for the person to contest the revocation.

- Schedule 11 of the Bill imposing requirements for a recognizance order should be removed.
- The proposed ban on cross-examination of vulnerable witnesses should be removed from the Bill and replaced by an approach which prevents cross-examination of vulnerable witnesses unless 'exceptional circumstances' can be demonstrated and for a defined set of offences only (e.g. child sex offences).
- The residential treatment order regime should be implemented subject to additional funding being provided and an assessment by the Parliamentary Joint Committee on Human Rights that such a scheme would be consistent with Australia's international human rights obligations.
- In national security sensitive cases, the subject should be provided sufficient information about the allegations against them to enable effective instructions to be given in relation to those allegations. A special advocate should also be appointed in such cases that can be privy to such sensitive information.
- Consideration be given as to whether the term 'child exploitation materials' would be more appropriate for particular offences rather than the more narrow 'child abuse materials'.
- The Commonwealth Criminal Code should be consistent with the age of consent in Australian jurisdictions so as not to criminalise behaviour that would otherwise be lawful.
- The Bill should be expanded to remove the defence of valid and genuine marriage in section 272.17 of the Criminal Code.

## Broad child sexual abuse offences

10. Child sexual abuse offences in the Criminal Code are currently already broadly framed. The Bill would increase the breadth of the offences by introducing the following new criminal offences into the Criminal Code:
  - Section 471.25A Using a postal or similar service to “groom” another person to make it easier to procure persons under 16. The proposed section contains three separate offences for the ‘grooming’ of third parties.
  - Section 474.27AA Using a carriage service to “groom” another person to make it easier to procure persons under 16 years of age. The proposed section also contains three separate offences for the ‘grooming’ of third parties.
  - Section 474.23A Conduct for the purposes of electronic service used for child abuse material.
11. The Explanatory Memorandum states the new offences are designed to ‘criminalise emerging forms of child sexual abuse’.<sup>2</sup>
12. The proposed new offences of using a postal or similar service and using a carriage service to groom another person to make it easier to procure persons under 16 are, like existing grooming offences, designed to capture situations where a person’s intention is not to directly procure a child, but where a person’s intention is to make it easier to procure a child. The new offences are designed to complement existing procurement and grooming offences set out in sections 471.24, 474.25, 474.26, 474.27 and 474.25C of the Criminal Code. For both the proposed and existing offences, the evidence of a person’s intention might not necessarily be very strong and only needs to be evidence that the accused intended to make it easier to procure a child. The existing and new proposed offences are designed to cover a broad range of situations, for example, where an offender builds a relationship of trust with the child and then over time seeks to sexualise that relationship.<sup>3</sup> These proposed new offences, like existing grooming offences, therefore cover a broader range of situations than where a person intended to directly procure a child.
13. The reference ‘engage in sexual activity’ as used in the proposed new offences and existing procurement and grooming offences is defined very broadly in the Criminal Code’s Dictionary. Indeed, item 1 of Schedule 4 inserts a note, for the avoidance of doubt, clarifying that the definition of engage in sexual activity in the Dictionary includes being 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. This covers a situation where for example sexual activity is engaged in via webcam. This is designed to clarify the broad scope of the definition of engage in sexual activity and reflects the wide range of situations that the existing and proposed child sex offences in the bill are intended to cover.
14. The Law Council suggests that to ensure consistency subsection 272.8 of the Criminal Code be amended to reflect the proposed definition of ‘engage in sexual activity’ to ensure that a person is taken to engage in sexual activity if the person is in the presence of another person (including by a means of communication that allows the

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<sup>2</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill*, pp. 6-7.

<sup>3</sup> Attorney-General’s Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences* (2010) p. 7.



person to see or hear the other person) while the other person engages in sexual activity.

15. The new offence for facilitating online dealing in child abuse material is also designed to be 'purposefully broad'.<sup>4</sup> It is designed to cover 'a broad range of scenarios in the timeline of offending, ranging from the creation of an electronic service that has not gone live yet to the maintenance of an established website with a global following'.<sup>5</sup> The physical and mental elements of the proposed offence are also very broad:

*The range of conduct criminalised by [sic] this offence includes when the offender creates, develops, alters, maintains, controls, moderates, makes available, advertises or promotes an electronic service with the intention of facilitating dealings with child abuse material online. Examples of this conduct may include writing computer code, providing infrastructure to enable hosting of websites or moderating the content or use of a chat forum for the creation and sharing of child abuse material.*<sup>6</sup>

16. The mental element of this offence requires the offender to 'undertake the requisite conduct in relation to the electronic service with the intention that the service will be used in committing, or facilitating the commission of, an offence against sections 474.22 or 474.23. The offence does not require the prosecution to prove that a person (being the offender or someone else) actually used the requisite electronic service to commit an offence contrary to sections 474.22 or 474.23'.<sup>7</sup>
17. In addition, section 11.1 of the Criminal Code does not apply to this offence, meaning that a person cannot attempt to commit an offence against section 474.23A.<sup>8</sup>
18. The Bill would also amend the Criminal Code to insert a range of new aggravated offences for child sexual abuse. Sections 272.10 and s 474.25B criminalise a range of activities that aggravate the offence of having sexual intercourse or other sexual activity with a child outside Australia and the offence of using a carriage service for sexual activity with a person under 16 years of age. It will be an aggravated offence for a person to commit an offence where:
- the child has a mental impairment;
  - the person is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the person;
  - the child is subjected to cruel, inhuman or degrading treatment in connection with the sexual activity; and
  - the child dies as a result of physical harm suffered in connection with the sexual activity.
19. The Law Council does not object in-principle to this amendment in reflecting the higher level of culpability. However, the practical utility may not be as intended given that most of these factors can already be taken into account as aggravating factors in sentencing in a federal context.

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<sup>4</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill*, pp. 6-7.

<sup>5</sup> *Ibid.*, pp. 27-28.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, pp. 27-28.

20. Nonetheless, given that proposed and existing child sex offences are so broadly framed with potential aggravating factors, retaining judicial discretion in this area is critical to ensure appropriate sentences are issued that reflect the culpability of the conduct in question.

**Recommendation:**

- **Subsection 272.8 of the Criminal Code be amended to reflect the proposed definition of 'engage in sexual activity' to ensure that a person is taken to engage in sexual activity if the person is in the presence of another person (including by a means of communication that allows the person to see or hear the other person) while the other person engages in sexual activity.**

## Mandatory minimum sentences

21. Mandatory minimum penalties are proposed to apply in two circumstances: firstly, for offences classified as the most serious Commonwealth child sex offences (proposed section 16AAA); secondly, to all Commonwealth child sex offences (excluding section 474.25C of the *Criminal Code*) where the Commonwealth child sex offence(s) are a second or subsequent offence (section 16AAB).
22. The Law Council acknowledges the potential for serious social and systemic harms associated with child sex offences. It notes that the inclusion of a mandatory minimum penalty for these offences are aimed at the objective of ensuring offenders receive sentences that reflect the seriousness of their offending.
23. However, the Law Council strongly opposes the use of mandatory minimum sentences as a penalty for criminal offences, particularly where those offences are broadly framed as is the case with child sexual offences. The Law Council's Mandatory Sentencing Policy and Discussion Paper (released in June 2014) 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.
24. 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.
25. In addition, the Law Council's Mandatory Sentencing Policy considers that mandatory sentencing:
- potentially results in unjust, harsh and disproportionate sentences where the punishment did not fit the crime because it was 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;
  - wrongly undermines 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 (**the ICCPR**); 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.
26. In addition, 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'.<sup>9</sup> These conclusions were reached while the 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.
27. The Law Council notes that the mandatory minimum penalties in the Bill do not apply to children (those under the age of 18). They also do not impose a minimum non-parole period on offenders. This aspect is said in the Bill's Explanatory Memorandum to preserve a court's discretion in sentencing.<sup>10</sup>
28. However, 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.
29. In addition, while the Bill does not specify a fixed minimum non-parole period it does not provide the court with the full discretion to determine an appropriate and proportionate head sentence that reflects the criminal culpability in the particular circumstances of the case. There may be instances where a person's culpability is worth less than the mandatory minimum term of imprisonment or an alternative form of punishment is better suited to the offence and offender for the protection of the

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<sup>9</sup> Sentencing Advisory Council, *Mandatory Sentencing for Serious Sex Offences Against Children* (2016), p. vi.

<sup>10</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill*, p. 10.

community. A mandatory sentence will inevitably mean that despite a person's level of culpability he or she will be ordered to serve a portion of the head sentence in custody.

30. While juveniles are exempt, nothing is said as to persons with 'significant cognitive impairment' (as has happened in other legislation, for example, in sections 25A and 25B of the *Crimes Act 1900* (NSW) – the 'one punch' laws and latest mandatory minimum sentencing legislation in NSW). Excluding sentencing discretion in such cases is manifestly unjust.
31. The Law Council also notes in this context that the imposition of mandatory sentencing is likely to reduce the propensity of accused persons to plead guilty, produce more contested cases and hence court delays. Proposed subsection 16AAC(2) which permits a court to impose a sentence of imprisonment of less than the minimum penalties for early guilty pleas and co-operating with police (a reduction of 25% for both factors and up to 50% for both) may not adequately encourage guilty pleas particularly where the conduct involved may not be on the serious end of the culpability spectrum.
32. In the current context, the mandatory minimum penalties have the potential to create unjust outcomes, particularly given that they are framed around broad criminal offences. There is scope for ordinary teenage behaviour to be caught by the mandatory minimum penalty regime. Potential examples of the unjust application in the current Bill are set out below.

<b>Bill Item</b>	<b>Criminal Code offence</b>	<b>Example of potential conduct caught by the offence</b>	<b>Mandatory minimum penalty</b>
<b>First time offences – section 16AAA</b>			
1	Subsection 272.8(1) – sexual intercourse with child outside Australia	On a scout's trip to New Zealand, a 18 year old student has sex with his 15 year old Year 10 girlfriend	5 years
3	Subsection 272.9(1) – sexual activity (other than sexual intercourse) with child outside Australia	On a holiday overseas between two families, an 18 year old and 15 year old commence a romantic relationship and they touch each other.	5 years
13	Subsection 474.25A(1) – using a carriage service for sexual activity with person under 16 years of age – engaging in sexual activity with child	An 18 year old and a 15 year old exchange images and sexual stories on Snapchat.  An 18 year old and a 15 year old engage	5 years

	using a carriage service	in sexual activity using FaceTime.	
14	Subsection 474.25A(2) – using a carriage service for sexual activity with person under – causing child to engage in sexual activity with another person	An 18 year old text messages her 15 year old friend encouraging him to send an intimate image to his 18 year old girlfriend.	5 years
<b>Second or subsequent offence – section 16AAB</b>			
34	Subsection 474.27A – Using a carriage service to transmit indecent communication to person under 16 years of age	An 18 year old boy and a 15 year old girl in a relationship and constantly exchange intimate images. The boy has previously been convicted for a child sexual abuse offence.	3 years

33. The legal age for consensual sex and the age for ‘children’ also varies across Australian state and territory jurisdictions. The age of consent is, for example, 16 years of age in the Australian Capital Territory, New South Wales, Northern Territory, Queensland, Victoria and Western Australia. In Tasmania and South Australia the age of consent is 17 years of age.<sup>11</sup> The mandatory minimum penalties may therefore apply in circumstances where sexual conduct may otherwise be lawful in for example Tasmania and South Australia.
34. The potential for unfairness to arise in the context of the above child sex offences when combined with mandatory minimum penalties highlights the importance of retaining judicial discretion in such cases rather than referring such discretion to law enforcement and the prosecutorial authorities.
35. Constitutional issues may also arise relating to for example the implied right of legal equality in the Australian Constitution.<sup>12</sup>

**Recommendation:**

- **The mandatory minimum penalties should be removed from the Bill. If they are to proceed, the Bill should be amended to allow the court full discretion in cases of individuals with significant cognitive impairment.**

<sup>11</sup> Australian Institute of Family Studies, *Age of Consent Laws* (July 2017) Child Family Community Australia <<https://aifs.gov.au/cfca/publications/age-consent-laws>>.

<sup>12</sup> *Leeth v Commonwealth* (1992) 174 CLR 455.

## Increased maximum penalties

36. The Bill would increase the maximum penalties for certain Commonwealth child sex offences and breaches of reporting requirements (see attached table for further information). It proposes to increase the maximum penalties for a range of child sex offences by 3 years. This is to increase the penalty to be more significant than recent preparatory sex offences.
37. While the Law Council supports a penalty system that reflects the seriousness of the conduct concerned, further information is required to demonstrate that the increase in these maximum sentences has been done in a principled and not arbitrary manner. It is not clear for example why the three year increase has been chosen.

### Recommendation:

- **There should be a review of the proposed three year increase in maximum penalties, and if justified, the Explanatory Memorandum should more clearly state why a three year increase in maximum penalties has been chosen.**

## Additional burden on courts and criminal justice system without resourcing commitment

38. The Explanatory Memorandum notes that:

*The financial impact of this Bill is largely limited to the costs associated with housing federal prisoners on remand and sentence.<sup>13</sup>*

*The Commonwealth does not own or operate any prisons and federal prisoners are currently housed in state and territory prisons. Convicted federal offenders comprise approximately 3 percent of Australia's total prison population while convicted federal sex offenders comprise only 0.4 percent of that population. As such, the overall financial impact on states and territories will be negligible. There will be some increase in costs borne by state and Commonwealth agencies for investigating and prosecuting new offences, these costs will be absorbed.<sup>14</sup>*

39. Nonetheless, the measures in the Bill which may impact on the 3 percent of Australia's federal offenders have the potential to create an additional burden on the criminal justice system without a commensurate resourcing commitment being made. The financial impact statement does not address allocation of funding to the courts or legal assistance services. The criminal justice system is already over-stretched<sup>15</sup> and it is critical that additional resourcing be provided if the measures in the Bill proceed.

<sup>13</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017*, p. 3.

<sup>14</sup> *Ibid*, p. 3-4.

<sup>15</sup> According to the most recent Australian Bureau of Statistics data, in the June quarter 2017, the average daily number of full-time prisoners in Australia was 41,204. This represents an increase of 6.5 per cent in the last year (from June quarter 2016 to June quarter 2017) and a 40 per cent increase over the past five years (from June quarter 2012 to June quarter 2017). The average daily number of full-time prisoners who were unsentenced were 13,503 or 33 per cent of all prisoners – an increase of 11 per cent over the year: Australian



## Presumptive measures

40. The Bill would for certain Commonwealth child sex offenders insert presumptions:

- against bail;
- in favour of cumulative sentences; and
- actual terms of imprisonment.

41. The Law Council supports an approach which allows a court the discretion to award an appropriate sentence to reflect the severity of the conduct and to grant bail or suspended sentences in appropriate cases. However, the Law Council is concerned that these presumptions may create additional burdens on court process and may produce additional delay and cost to the criminal justice system. It is also concerned about the possible impact these measures may have on Aboriginal and Torres Strait Islander incarceration rates.

42. For these reasons, the presumptions in the Bill for certain Commonwealth child sex offenders should be removed.

### Presumption against bail

43. Schedule 7 would insert a presumption against bail in the *Crimes Act 1914* (Cth) (**Crimes Act**) for certain Commonwealth child sex offenders.

44. A 'bail authority' is defined as a court or a person authorised to grant bail under a law of the Commonwealth, a State or Territory.

45. Therefore, proposed section 15AAA applies not only to court bail, but also to police bail.

46. The Law Council is of the view that section 15AAA runs counter to the long held presumption in Australian criminal law in favour of bail.<sup>16</sup> In respect of most criminal charges, the person charged is entitled to be released on bail unless the police demonstrate to the court particular grounds on which bail should be refused.<sup>17</sup>

47. The presumption against bail is inconsistent with the presumption of innocence. It presumes that defendants in certain Commonwealth child sex offences cases, regardless of their individual circumstances, must be, because of the nature of the accusation against them, likely to re-offend, likely to interfere with witnesses or other evidence, a threat to the community or a flight risk.

48. This may be in conflict with Australia's obligations under Article 9(3) of the ICCPR, which provides that it shall not be the general rule that persons awaiting trial should be detained in custody.

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Bureau of Statistics, *Corrective Services, Australia, June quarter 2017 cat no 4512.0* (2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>>.

<sup>16</sup> See *R v Light* [1954] VLR 152; *R v Wakefield* (1969) 89 WN Pt 1 (NSW).

<sup>17</sup> For example, the *Bail Act 1978* (NSW) prescribes a general rule that persons have a right to release on bail for minor offences (see s 8) and are entitled to a presumption in favour of bail for most offences (see s 9). Generally, the court retains the discretion to refuse bail where the court is satisfied that detention of the accused is necessary to protect witnesses or preserve evidence, to protect the community from the commission of further offences or to ensure that the accused does not abscond prior to trial. See for example, *Bail Act 1978* (NSW) s32.

49. However, the proposed presumption against bail appears to leave a broad discretion to the bail authority by noting that bail must not be granted ‘unless the bail authority is satisfied by the person that circumstances exist to grant bail’. While subsection 15AAA(2) sets out factors that must be taken into account these are not limiting factors as indicated by the words ‘In addition to any other matters’ at the beginning of the subsection. The factors which must be taken into account do not appear to be remarkable although the Law Council queries the extent to which these may already be captured by bail procedures.
50. Section 15AB already provides a range of matters which can be considered in bail applications when a person is charged or convicted of, a Commonwealth offence, such as the impact upon any witness or any person whom it is alleged that the offence was committed against. Furthermore, subsection 68(1) of the *Judiciary Act 1903* (Cth) provides that the bail laws of the relevant State or Territory are to be applied in respect of Commonwealth offences tried in those jurisdictions.<sup>18</sup>
51. The Law Council supports the proposed amendments which provide a right of appeal to both the prosecution and the defendant against the grant or refusal of bail under proposed section 15AAA of the Crimes Act.

### **Presumption in favour of cumulative sentences**

52. Schedule 10 would amend the Crimes Act to insert a presumption in favour of cumulative sentences.

53. The Explanatory Memorandum states:

*The presumption in favour of cumulative sentences only operates where a person is being sentenced for multiple Commonwealth child sex offences or Commonwealth child sex offences in addition to a state or territory registrable child sex offence.*

*The objective of the presumption is to act as a yardstick against which to examine a proposed sentence of an offender for multiple child sex offences to ensure that the effective sentence represents a tougher response to the objective seriousness of the sexual abuse of children. It benefits circumstances such as where offences are committed against separate victims over an extended period of time. The proposed subsection 19(6) provides an exception to this rule where the court is satisfied that imposing a sentence in a different manner (such as partly cumulatively or concurrently) would be of a severity appropriate in all the circumstances.*

*The proposed subsection 19(6) recognises there will be circumstances where the application of this presumption would result in an unacceptable outcome. Accordingly, discretion is retained for the court to consider the outcome for all the offences in totality and, if appropriately satisfied, order the sentence in a different manner provided that the sentence overall is still of a severity appropriate in all the circumstances.<sup>19</sup>*

54. A concern arises with the proposed subsection 19(5) that it may restrict judicial discretion to some extent. However, proposed subsection 19(6) retains this discretion and enables a court to consider the outcome for all the offences in totality and, if

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<sup>18</sup> See for example: ss 16A-17 *Bail Act 2013* (NSW) and s 4 *Bail Act 1977* (Vic) for the factors the Court must take into account when determining whether to release an accused on bail.

<sup>19</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017*, p. 48.



appropriately satisfied, order the sentence in a different manner provided that the sentence overall is still of a severity appropriate in all the circumstances. This presumption is therefore somewhat paradoxical and its purpose unclear.

55. Nonetheless, there are so many different variations and combinations of sentences for what often results in both State/Territory and Commonwealth convictions such that the Law Council is concerned that the presumption will lead to unjust and unfair outcomes. This is particularly so given that there is significant overlap in the both State/Territory and Commonwealth charges being laid in child sexual abuse cases where offences will often have different maximum penalties. The presumption is likely to lead to significant legal challenges and delays in the courts.

### Conditional release of offenders after conviction

56. Schedule 11 would require that a child sex offender serve an actual term of imprisonment unless there are exceptional circumstances that justify the offender being released immediately on a recognizance order. This measure is likely to place additional strain on the criminal justice system particularly given that the 'exceptional circumstances' threshold is a very high bar<sup>20</sup> and may result in inordinate pressure on the remand population.

57. The Explanatory Memorandum states:

*This amendment is intended to ensure that all offenders convicted of Commonwealth child sex offences serve a period of imprisonment that is not suspended. Commonwealth child sex offence is defined: see items 3 – 6 in Schedule 15 of the Bill and Explanatory Memorandum.*

*Subparagraph 20(1)(b)(i) applies to people convicted of a Commonwealth offence that is not a Commonwealth child sex offence. It preserves the current position and provides that the court can order that the offender be released either immediately or after serving only a portion of the sentence of imprisonment.*

*Subparagraphs 20(1)(b)(ii) and 20(1)(b)(iii) apply to people convicted of a Commonwealth child sex offence and provide that the court can only release a person on a recognizance 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.<sup>21</sup>*

58. At present, where Commonwealth sex offences have been committed, the usual course of action is for the prosecutor to submit at sentence that substantial penalties, namely terms of imprisonment are generally appropriate, with general deterrence and denunciation being paramount considerations.<sup>22</sup> As a result, in child sex offence cases more generally, the key issue arising at sentencing will generally be how a term of imprisonment should best be served and releasing an offender forthwith is at present an important option at the disposal of a sentencing judge. At present a judge may for example decide that the offence is serious enough for a jail term, but that in the particular circumstances of the case the offender can be released immediately. If the

<sup>20</sup> The phrase 'exceptional circumstances' has been interpreted in other contexts as imposing a heavy onus on an accused. See for example *Re Pickersgill* [2013] VSC 715 where the court commented that the hurdle was a high one.

<sup>21</sup> *Ibid* p. 49

<sup>22</sup> See *R v Porte* [2015] NSWCCA 174, [60]. In *R v Porte*, for example, where the Court recently reviewed the authorities in this area of law, the Prosecution submitted that a term of imprisonment was appropriate.

offender breaches the terms of the recognizance, they are liable to go to prison to serve the term of imprisonment. There are many reasons why releasing an offender forthwith, may be an important and serious sentencing option at the disposal of sentencing judges:

- it is an effective deterrent. Research has shown that suspended sentences appear to perform better than actual custodial sentences in preventing recidivism;
- it enables people who have committed crimes to avoid short prison sentences, thereby protecting them from the corrupting influences of prison;
- it has a symbolic effect, allowing the seriousness of the offence to be recognised and denunciation of the person's criminal behaviour through the formal imposition of a prison sentence, while allowing the court to deal with that person in a merciful way;
- it assists to reduce the size of the prison population as short prison sentences significantly increase the prison population, potentially leading to prison overcrowding;
- it provides a protective effect against re-offending by maintaining a person's links with their community, as well as minimising the disruption to that person's family, accommodation and employment.<sup>23</sup>

59. Given the importance and frequency of this issue, and given the above reasons, maintaining unfettered judicial discretion as to how a term of imprisonment should best be served is of paramount importance in these types of cases. It is suggested that sentencing judges are well equipped and in the best position to determine whether releasing an offender forthwith is appropriate in the particular circumstances of an individual case.

**Recommendation:**

- **The presumptions against bail and in favour of cumulative sentences and an actual term of imprisonment for certain Commonwealth child sex offenders should be removed from the Bill.**

## Other measures

### Record of reasons for granting bail and concurrent sentence

60. Proposed subsection 15AA(3AA) of the Bill would amend the Crimes Act to require a court to state and record the reasons for granting bail for federal offenders. Similarly, proposed subsection 19(7) requires that where a court under subsection 19(6) is satisfied that the sentences do not need to be served cumulatively, the court must explain the reasons for doing so and ensure that the reasons are entered in the records of the court.

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<sup>23</sup> See Balanced Justice, *Suspended sentences: should they be abolished* (5 October 2017) <<http://www.balancedjustice.org/suspended-sentences-should-they-be-abolished.html>>.

61. These amendments appear to be designed to facilitate providing a right of appeal to both the prosecution and defence. Appropriate additional court resourcing should be provided to assist the court in recording its reasons in such cases.

### Period of time to be served in custody where federal offender's parole order revoked

62. Item 5 of Schedule 14 of the Bill would amend the Crimes Act to require a period of time to be served in custody if a federal offender's parole order is revoked.

63. Currently, a court retains a discretion as to whether to require a period of time to be served in custody. The Explanatory Memorandum states that if a person's parole order or licence has been revoked, 'they no longer have legal authority to be in the community and must be returned to prison to continue serving their sentence'.<sup>24</sup> However, the practical effect of the amendment is likely to mean that more individuals are held within corrective service facilities increasing demand and cost which under current resourcing constraints cannot be sustained.

#### **Recommendation:**

- **If the Bill is to proceed, additional resourcing should be to ameliorate the further burden on the courts and criminal justice system.**

### Matters court has regard to when passing sentence

#### *Federal offenders*

64. Schedule 8 would amend the Crimes Act to require the court to have regard to certain considerations when passing a sentence.

65. The Explanatory Memorandum states:

*These items introduce additional general sentencing factors to which the court must have regard when sentencing a federal offender. The existing paragraph 16A(2)(g) is expanded upon so that in addition to considering the fact that the person pleaded guilty to the charge in respect of the offence, regard is also to be had to the timing of that plea and the degree to which these factors resulted in any benefit to the community or to any victim of or witness to the offence.*

*The amendment to paragraph 16A(2)(g) is an acknowledgement that it is appropriate for offenders to be offered a reduction in their sentence as early guilty pleas reduce the costs associated with prosecuting offenders and save victims and witnesses from the often harrowing experience of giving evidence and being cross-examined in open court.<sup>25</sup>*

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<sup>24</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017* p. 55.

<sup>25</sup> *Ibid* p. 43.

66. The Law Council supports these amendments, which would clarify any confusion in this area of law.<sup>26</sup>

67. The Explanatory Memorandum states:

*Proposed paragraph 16A(2)(ma) introduces as a new sentencing consideration whether the person's standing in the community was used to aid in the commission of the offence. Where this is the case it is to be taken as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates.*

*It is intended that this will capture scenarios where a person's professional or community standing is used as an opportunity for the offender to abuse children. For example, this would cover a medical professional using their professional standing as a "medical practitioner" or a person using "celebrity" status to create opportunities to sexually abuse children.<sup>27</sup>*

68. This suggested amendment does not expressly state that it is confined to sexual offences or situations where children might be abused. The provision should expressly state that this amendment relates to child sex offences, in order to give effect to the stated aims of the amendment and to highlight its intended purpose.

**Recommendation:**

- **The proposed new sentencing consideration of whether the person's standing in the community was used to aid in the commission of the offence (proposed paragraph 16A(2)(ma)) should be limited to child sex offences to accord with the stated intent of the Bill.**

*Child sex offenders*

69. Schedule 8 would amend the Crimes Act to require the court to have regard to certain rehabilitation considerations when sentencing Commonwealth child sex offenders.

70. Paragraph 16A(2)(n) of the Crimes Act currently requires a court to take into account various factors personal to the offender including their prospects of rehabilitation. A primary objective of the criminal justice system is the rehabilitation and reintegration of offenders into society.<sup>28</sup>

71. Proposed subsection 16A(2AAA) would require the court to have regard to the objective of rehabilitation when determining the sentence to be passed or order to be made. Under subsection 16A(2AAA) the court will also have to consider if it would be appropriate to make orders imposing conditions about rehabilitation or treatment options.

<sup>26</sup> *R v Thomas* [2016] VCC 141, cf *Cameron v R* (2002) 209 CLR 339. There has been a controversy as to whether a person who pleads guilty to a Commonwealth offence should be entitled to a discount for a utilitarian benefit of plea. This appears to be one of the main reasons why the existing paragraph 16A(2)(g) is proposed to be amended.

<sup>27</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017*, p. 44.

<sup>28</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) p. 133.

72. The Law Council does not oppose such amendments as they would appear to be consistent with a key purpose of sentencing, namely, rehabilitation.

73. However, proposed paragraph 16A(2AAA)(b) requires consideration of whether the sentence or non-parole period set provides sufficient time for the person to undertake rehabilitation. The Explanatory Memorandum to the Bill notes that:

*For example, generally a non-parole period of at least 18 months is required for offenders to complete a sex offender rehabilitation program while in prison.<sup>29</sup>*

74. In taking these matters into consideration the court is only required to have regard to what they consider appropriate, taking into account such matters as are relevant and known to the court. There is no requirement for the courts to conduct independent enquiries into rehabilitation options for a particular offender.<sup>30</sup>

75. However, it is not clear how a court will practically be able to comply with the new requirement unless it conducts inquiries into rehabilitation options for a particular offender. Further, the Law Council is concerned that there are currently not enough rehabilitation places due to resourcing constraints. There are often rehabilitation waiting lists for people to undertake programs. For less serious offences and where there is overcrowding in prisons, offenders may be released on parole and await the opportunity to undertake a rehabilitation program. This amendment has not taken into account the reality that there may be no access to such programs or that the offender may not in fact be eligible for programs. There may also not be juvenile sex offender programs in place so there may be a risk that a child does an adult program in jail. This may impact on the ability of this measure to be effectively implemented and may also result in disproportionate sentences. That is, sentences that are longer than necessary to address the conduct and the objective of protecting the community.

#### **Recommendation**

- **The requirement for a court to consider whether the sentence or non-parole period set provides sufficient time for the person to undertake rehabilitation (proposed paragraph 16A(2AAA)(b)) should be removed from the Bill.**

## Additional sentencing factors for certain offences

76. Schedule 9 of the Bill would amend the Crimes Act to insert new additional factors for mandatory consideration at sentencing. When sentencing a person convicted of an offence in Subdivision B of Division 272, the court would be required take into account as an aggravating factor if the person in relation to whom the offence was committed was under 10 years of age at the time of offending.

77. The Law Council does not oppose this amendment.

78. Schedule 9 of the Bill would also amend the Crimes Act such that when sentencing a person for an offence against Subdivision C of Division 471 (Offences relating to use of postal or similar service involving sexual activity with person under 16), and when sentencing a person for an offence against Subdivision F of Division 474 (Offences

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

relating to use of carriage service involving sexual activity with person under 16), the court must consider:

- (a) the age and maturity of the victim or intended victim of the offence, and
- (b) if the victim or intended victim of the offence was under 10 when the offence was committed – that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates, and
- (c) the number of people involved in the commission of the offence.

79. In other words, the seriousness of the offending behaviour will be aggravated where the victim or intended victim was under 10 years of age at the time of the offending.

80. The Law Council does not oppose these amendments.

## Removing the requirement for the Attorney-General to give notice to revoke the parole order or licence

81. Proposed paragraph 19AU(3)(ba) of the Bill would amend the Crimes Act to insert 'in the opinion of the Attorney-General it is necessary to revoke the parole order or licence without giving notice to the person in the interests of ensuring the safety and protection of the community or of another person'.

82. Such an amendment is objectionable on procedural fairness grounds notwithstanding the applicability of section 19AX of the Crimes Act which would allow a person while detained in custody to make a written submission to the Attorney-General as to why the parole order should not be revoked. The provision would apply to Commonwealth criminal offences generally. The Explanatory Memorandum justifies this on the basis that:

*Including this in the current list of exceptions will ensure that if the Attorney-General or their delegate becomes aware that a person who has been released into the community on parole or licence poses a threat to the safety of the community or to another person, that person can be taken into custody immediately.<sup>31</sup>*

83. However, the proposed provision is not defined and may be interpreted broadly and subjectively by the Attorney-General the day with a potential to create unfairness. It is concerning that the Attorney-General rather than an independent body has this power.

84. In this context, the Law Council supports the ALRC's previous recommendation in its report *Same Crime, Same Time: Sentencing of Federal Offenders* that:

*The ALRC also recommends the establishment of a federal parole authority to make parole-related decisions about federal offenders. Federal offenders are unique in Australia in having their parole decisions determined by a ministerial delegate within a government department rather than by an independent authority with broad-based expert and community membership. In the course of the Inquiry there was strong support for the principle that decisions in relation to parole should be made by a body independent of the political arm of government. This was on*

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<sup>31</sup> Ibid, p. 17.



*the basis that, because such decisions affect an individual's liberty, they should be made, and be seen to be made, through an independent, transparent and accountable process and in accordance with high standards of procedural fairness.*<sup>32</sup>

**Recommendations:**

- **Proposed paragraph 19AU(3)(ba) of the Bill removing the requirement for the Attorney-General to give notice prior to revoking parole or a licence should be removed.**
- **Alternatively, an independent parole authority should have the ability to revoke the parole or licence without giving notice to the person in the interests of ensuring the safety and protection of the community or of another person subject to the ability for the person to contest the revocation.**

## Requirements under a recognizance order

85. Schedule 11 would amend the Crimes Act to impose certain requirements on Commonwealth child sex offenders under a recognizance release order. The conditions that apply to child sex offenders under 20(1A) are that the person will, during the specified period:

- be subject to the supervision of a probation officer;
- obey all reasonable directions of the probation officer;
- not travel interstate or overseas without the written permission of the probation officer; and
- undertake such treatment or rehabilitation programs that the probation officer reasonably directs.

86. The Explanatory Memorandum states:

*This item inserts a new subsection after subsection 20(1A) to require that a court making a recognizance release order for a child sex offender must attach certain conditions to the order. This differs from the requirements for other federal offenders who, although they must comply with the general condition to be of good behaviour, may or may not be subject to other conditions.*

*Importantly, the directions of the probation officer must be reasonable. For example, a direction to attend a rehabilitation program in a different city to which the person lives would not be reasonable as it may be impossible to fulfil.*<sup>33</sup>

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<sup>32</sup> Australian Law Report Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) p. 24.

<sup>33</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017*, pp. 49-50.

87. The level of supervision permitted by the probation officer does not appear to be set out and is unclear. It is also not clear why this factor is needed.

**Recommendation:**

- **Schedule 11 of the Bill imposing requirements for a recognizance order should be removed.**

## Vulnerable witnesses

### Removal of requirement to seek leave for a recorded interview of a vulnerable witness

88. Schedule 2 of the Bill would amend section 15YM of the Crimes Act to remove the requirement to seek leave before a recorded interview of a vulnerable witness can be admitted as evidence in chief.
89. Subsection 15YM(2) provides at present that the Court must not give leave under subsection 15YM(1) if satisfied that it is not in the interests of justice for the person's evidence in chief to be given by video recording, where the interview is of a child witness, a vulnerable adult complainant or a special witness for whom an order under subsection 15YAB(3) is in force.
90. The Explanatory Memorandum to the Bill explains that the amendment is designed to:

*... strengthen the protections in Part IAD of the Crimes Act for vulnerable witnesses (such as children) who give evidence in particular criminal proceedings, including for Commonwealth offences and human trafficking and slavery offences.<sup>34</sup>*

91. The Explanatory Memorandum to the amendment further explains that:

*If contested by the defence, the requirement to seek leave in section 15YM may have an adverse effect on the vulnerable witness and is contrary to the intent of the vulnerable witness protections more broadly.*

*Accordingly, these provisions remove the requirement for the court to grant leave before admitting a video recording of an interview of a vulnerable person as evidence in chief. The recorded interview will still need to be conducted by a constable or a specified person.*

*The evidence in chief interviews remain subject to the rules of evidence and parts may be ruled inadmissible, thereby protecting the rights of the accused person. There are sufficient safeguards in place that the defence will not be unreasonably disadvantaged by removing the requirement in 15YM to seek leave. On balance, any disadvantages to the defence are outweighed by the uncertainty, delay and inefficiency caused by the requirement to seek leave.*

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<sup>34</sup> Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (Cth), 17.



*Removing the requirement to seek leave also brings the Commonwealth's vulnerable witness protections into line with the approach taken by states and territories.*<sup>35</sup>

92. The Law Council notes that there are a number of advantages and disadvantages to admitting pre-recorded evidence. As identified by the Australian Law Reform Commission (**ALRC**) in its report on *Family Violence – A National Legal Response*, advantages include that it may improve the quality of evidence, facilitate pre-trial decisions by the prosecution and the defence, help with the scheduling and conduct of the trial and minimise system abuse of witnesses.<sup>36</sup>
93. The Law Council welcomes measures that seek to protect victims of Commonwealth trafficking and slavery offences in giving evidence. Despite human trafficking, slavery and slavery-related offences being criminalised by the Criminal Code, the amount of successful prosecutions remain low, with only twenty convictions to date.<sup>37</sup> Among the various complex issues that arise in the prosecution of these cases, a major impediment to prosecuting trafficking and slavery related offences appears to be the reluctance of victims to give evidence of the offence, especially as they and their families may be subject to threats for doing so, or may otherwise fear confronting the people or persons responsible for their exploitation and/or trafficking in court.<sup>38</sup> The Law Council considers it essential that if victims voluntarily choose to give evidence in criminal proceedings then they must be given appropriate protection and support.
94. The Australian Government has adopted a victim-centred approach to combatting human trafficking and slavery.<sup>39</sup> Governments that adopt a victim-centred approach worldwide have ensured that during the criminal justice process, steps are taken to protect victims' identity and privacy, and victims are allowed to provide testimony in a manner that is less threatening, such as testimonies that are written or recorded, or delivered via video conference.<sup>40</sup> The Law Council considers that removing the requirement for leave to be granted for vulnerable witnesses to give pre-recorded evidence to be consistent with international best practice and promotes the Government's victim-centred approach to combatting human trafficking and slavery.
95. The Law Council acknowledges that admitting pre-recorded evidence also has its drawbacks, including by impacting the ability of the defence to prepare its cross-examination of witnesses, that video technology lacks the immediacy and persuasiveness of a witness' live testimony, and technological issues.<sup>41</sup> While it is important for those involved with the trial process where pre-recorded evidence is given to be cognizant of these issues, the Law Council considers that they can be appropriately managed by the trial judge and parties. This includes through case

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<sup>35</sup> Ibid 17-18.

<sup>36</sup> Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report 114 (2010) [168].

<sup>37</sup> Australian Government, Submission no 89 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Inquiry into Establishing a Modern Slavery Act in Australia (April 2017) 8

<sup>38</sup> See Fiona McLeod, 'Human Trafficking and Exploitation in Australia' in Nora M Cronin and Kimberley A Ellis, *Human Trafficking: Emerging legal Issues and Applications* (Lawyers and Judges Publishing Company, 2016) 85; see also Fiona David, 'Labour trafficking' (2010) *Australian Institute of Criminology* 46 <[http://www.aic.gov.au/media\\_library/publications/rpp/108/rpp108.pdf](http://www.aic.gov.au/media_library/publications/rpp/108/rpp108.pdf)>.

<sup>39</sup> Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-9* (2014) 18 <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>.

<sup>40</sup> See Fiona McLeod, 'Human Trafficking and Exploitation in Australia' in Nora M Cronin and Kimberley A Ellis, *Human Trafficking: Emerging legal Issues and Applications* (Lawyers and Judges Publishing Company, 2016) 86.

<sup>41</sup> Ibid [169].

management conferences and the judge's power to issue directions to address any difficulties that may arise. Otherwise, given that the rules of evidence still apply to any pre-recorded evidence, the Law Council considers that appropriate safeguards are maintained and discretion of trial judges maintained.

96. To further manage the drawbacks associated with the admission of pre-recorded evidence, it may be useful for relevant participants in the criminal justice system to receive education about legislation authorising the use of pre-recorded evidence, and training in relation to interviewing vulnerable witnesses and pre-recording evidence.<sup>42</sup>

## Committal proceedings

97. Schedule 3 of the Bill would amend the Crimes Act to remove the requirement for vulnerable witnesses to be available to give evidence at committal proceedings.

98. The Explanatory Memorandum explains that:

*The Bill removes the requirement for vulnerable witnesses to be available to give evidence at committal proceedings. There is currently no restriction on cross-examination of vulnerable witnesses at committal proceedings (or proceedings of a similar kind) and few restrictions on the scope of questioning permitted in committal proceedings under Part IAD of the Crimes Act.*

*Presently, prohibitions on the scope of the cross-examination of a vulnerable witness appear in sections 15YB and 15YC of the Crimes Act. These provisions provide that evidence of the reputation or experience with respect to sexual activities of a child witness or child complainant is prima facie inadmissible. However, the accused's legal representatives can seek leave, for defined reasons, to cross-examine on these subjects. The ability to seek leave is not restricted to evidence at trial – it includes committal proceedings or proceedings of a similar kind. This restriction does not apply to vulnerable adult complainants, who have other protections in Part IAD.*

*By prohibiting cross-examination at committal proceedings or proceedings of a similar kind, 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. It will also help streamline criminal justice processes by ensuring lengthy cross-examination is reserved for trials and not committal proceedings or proceedings of a similar kind. It will also bring the Commonwealth broadly into line with practice in other Australian states and territories.<sup>43</sup>*

99. The Law Council does not support a complete ban on cross-examination of vulnerable witnesses at committal proceedings. Such proceedings can be an effective way of streamlining the trial process which may result in benefits for victims. The Law Council notes the ALRC's recommendation that, in relation to sexual offences, that State and Territory legislation should prohibit any child and any adult complainant, unless there are special or prescribed reasons, from being required to attend to give evidence at committal hearings.<sup>44</sup> The Law Council would therefore support an

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<sup>42</sup> Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report 114 (2010), recommendation 26-8. The recommendation was originally couched in relation to sexual assault proceedings and victims of sexual assault, but has been adapted by the Law Council as it considers that the substance of the recommendation applies to the pre-recorded evidence of vulnerable witnesses more broadly.

<sup>43</sup> *Ibid*, p. 19.

<sup>44</sup> Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report 114 (2010) recommendation 26-4.

approach which prevents cross-examination of vulnerable witnesses unless 'exceptional circumstances' can be demonstrated and for a defined set of offences only (e.g. child sex offences).

**Recommendation:**

- **The proposed ban on cross-examination of vulnerable witnesses should be removed from the Bill and replaced by an approach which prevents cross-examination of vulnerable witnesses unless 'exceptional circumstances' can be demonstrated and for a defined set of offences only (e.g. child sex offences).**

## Residential treatment orders

100. Schedule 12 of the Bill and proposed subparagraph 20AB(1AA)(a)(vii) would amend the Crimes Act to add 'residential treatment orders' as a sentencing alternative for intellectually disabled offenders.

101. The Explanatory Memorandum states:

*This item amends the list of sentencing alternatives in subsection 20AB(1AA) to include 'residential treatment orders'. Section 20AB(1AA) empowers courts to make certain alternative sentencing orders that are available under state or territory law. The new subparagraph is intended to capture the residential treatment order available under section 82AA of the Sentencing Act 1991 (Vic), as well as any similar orders that may exist or be enacted in other states and territories. It is appropriate that courts have the discretion to access such orders that have been designed to specifically meet the needs of certain classes of offenders.*<sup>45</sup>

102. The Law Council supports the amendment as an alternative to sentencing for certain classes of offenders. It notes that residential treatment orders are available in other jurisdictions.<sup>46</sup> However, in the timeframe available for response, the Law Council has not had the opportunity to examine whether there are adequate safeguards in the Bill to ensure that the Commonwealth residential treatment order scheme would comply with Australia's international human rights obligations.

**Recommendation:**

- **The residential treatment order regime should be implemented, subject to additional funding being provided and an assessment by the Parliamentary Joint Committee on Human Rights that such a scheme would be consistent with Australia's international human rights obligations.**

<sup>45</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017*, p. 50.

<sup>46</sup> See s 82AA *Sentencing Act 1991* (Vic).

## Withholding national security information

103. Schedule 13 would amend the Crimes Act to allow certain information to be withheld from an offender in national security circumstances. The effect of this amendment is that if an offender is refused parole, partially or wholly on the basis of intelligence information, the statement of reasons by the Attorney-General does not need to set out this information if disclosure of that information may adversely impact national security.

104. The Law Council is concerned that the offender may not be in a position to defend themselves despite evidence of good behaviour if not provided with the information, or a *précis* of the information, relied upon against them to be refused parole.

105. The subject should be provided sufficient information about the allegations against them to enable effective instructions to be given in relation to those allegations. A special advocate should also be appointed in such cases that can be privy to such sensitive information.

### Recommendation:

- **In national security sensitive cases, the subject should be provided sufficient information about the allegations against them to enable effective instructions to be given in relation to those allegations. . A special advocate should also be appointed in such cases that can be privy to such sensitive information.**

## Clean street time

106. Schedule 14 of the Bill would amend the Crimes Act to reduce the amount of 'clean street time' that can be credited against the outstanding sentence following commission of an offence by a person on parole and license by making it discretionary only for a court to consider 'clean street time'.

107. The ALRC's has previously recommended that:

*Federal sentencing legislation should provide that 'clean street time' is to be deducted from the balance of the period to be served following revocation of parole or licence.<sup>47</sup>*

108. Given that a court appears to retain discretion to deduct clean street time, the Law Council's preliminary view is that this provision does not appear to raise significant concern.

## Child abuse material

109. Schedule 15 of the Bill would amend the Crimes Act, Criminal Code, *Customs Act 1901* (Cth) and *Telecommunications (Interception and Access) Act 1979* (Cth) to replace references to 'child pornography material' in Commonwealth legislation with 'child abuse material'.

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<sup>47</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Rec 24-4.

110. The Explanatory Memorandum states that the:

*Criminal Code and other Commonwealth legislation currently distinguish between 'child abuse material' and 'child pornography material'. Attaching the term 'pornography' to this material proves to be 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 abuse and corruption of children.*<sup>48</sup>

111. The Law Council's preliminary view is that the proposed amendment does not appear to be problematic as it simply combines the current two definitions for 'child pornography material' and 'child abuse material' into the proposed 'child abuse material'.

112. The Law Council notes that internationally child abuse materials appear to be a subcategory of child exploitation materials.<sup>49</sup> Consideration may need to be given to whether particular offence provisions are aimed at targeting more broadly child exploitation and whether 'child exploitation materials' would be a more appropriate term.

113. However, the Bill does not amend the definition of child (which is someone under 18) – so consensual sexting (between 16-17 year olds) can still be prosecuted under Commonwealth legislation (474.19 and 474.20). This should be amended for consistency as it is a common issue.

**Recommendations:**

- **Consideration be given as to whether the term 'child exploitation materials' would be more appropriate for particular offences rather than the more narrow 'child abuse materials'.**
- **The Commonwealth Criminal Code should be consistent with the age of consent in Australian jurisdictions so as not to criminalise behaviour that would otherwise be lawful.**

## Defence based on valid and genuine marriage

114. Though the Bill has as its objects community from the dangers of child sexual abuse, it does not address section 272.17 of the Commonwealth Criminal Code, which provides a defence to several overseas child sex offences, and procuring or 'grooming' a child for sexual activity.<sup>50</sup> Section 272.17 states that it is a defence to these offences if:

<sup>48</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017*, p. 56.

<sup>49</sup> *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* (2016) p. 39 ('the Luxembourg Guidelines').

<sup>50</sup> *Criminal Code Act 1995* (Cth) sch 1 ('Criminal Code') ss 272.17(1) and (2).

(a) at the time he or she committed the offence, there existed between the defendant and the child a marriage that was valid, or recognised as valid, under the law of:

(i) the place where the marriage was solemnised; or

(ii) the place where the offence was committed; or

(iii) the place of the defendant's residence or domicile; and

(b) when it was solemnised, the marriage was genuine.<sup>51</sup>

115. The maintenance of this defence would appear inconsistent with the forced marriage provisions of the Criminal Code, since introduced in 2013.<sup>52</sup> For the purposes of 'forced marriage', the Criminal Code defines 'marriage' to include a marriage recognised under the law of a foreign country.<sup>53</sup> While nearly all jurisdictions within the Asia Pacific region set the minimum marital age at over 16, many jurisdictions permit persons younger than the minimum age to be married by order of the court for reasons such as religion. There may also be circumstances in some countries where marriage of persons under 16 pursuant to customary law will fall within the definition of a valid and genuine marriage for the purposes of this defence.

116. In addition to its inconsistency with the forced marriage provisions of the Criminal Code, this defence is entirely at odds with the rationale for Commonwealth legislation more generally, which is that it is both appropriate and necessary to criminalise the targeted conduct, precisely because that conduct may not be the subject of effective prosecution, and may not even be illegal, in the foreign jurisdiction in which it occurs.<sup>54</sup> Therefore, the Law Council considers that the defence should be removed.

**Recommendation:**

- **The Bill should be expanded to remove the defence of valid and genuine marriage in section 272.17 of the Criminal Code.**

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<sup>51</sup> Ibid ss 272.17(1)(a) and (2)(a).

<sup>52</sup> Ibid s 270.7B.

<sup>53</sup> Ibid s 270.7A(2)(b)).

<sup>54</sup> This position was originally outlined in the Law Council's submission to the Committee regarding the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010.



## Appendix 1 – Increase in maximum penalties comparison

<b>Section</b>	<b>Offence</b>	<b>Current penalty</b>	<b>New penalty</b>
Subsection 272.9(1)	Engaging in sexual activity with a child outside Australia	Imprisonment for 15 years.	Imprisonment for 18 years.
Subsection 272.9(2)	Causing child to engage in sexual activity in presence of defendant	Imprisonment for 15 years.	Imprisonment for 18 years.
Subsection 272.15(1)	“Grooming” child to engage in sexual activity outside Australia	Imprisonment for 12 years.	Imprisonment for 15 years.
Subsection 471.25(1)	Using a postal or similar service to “groom” persons under 16	Imprisonment for 12 years.	Imprisonment for 15 years.
Subsection 471.25(2)	Using a postal or similar service to “groom” persons under 16	Imprisonment for 12 years.	Imprisonment for 15 years.
Subsection 471.26(1)	Using a postal or similar service to send indecent material to person under 16	Imprisonment for 7 years.	Imprisonment for 10 years.
Section 474.25	Obligations of internet service providers and internet content hosts	100 penalty units.	800 penalty units.
Subsection 474.25A(1)	Engaging in sexual activity with child using a carriage service	Imprisonment for 15 years.	Imprisonment for 18 years.
Subsection 474.25A(2)	Causing child to engage in sexual activity with another person	Imprisonment for 15 years.	Imprisonment for 18 years.
Subsection 474.27(1)	Using a carriage service to “groom” persons under 16 years of age	Imprisonment for 12 years.	Imprisonment for 15 years.
Subsection 474.27(2)	Using a carriage service to “groom” persons under 16 years of age	Imprisonment for 12 years.	Imprisonment for 15 years.
Subsection 474.27A(1)	Using a carriage service to transmit indecent communication to	Imprisonment for 7 years.	Imprisonment for 10 years.

	person under 16 years of age		
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