SHINE LAWYERS

RIGHT WRONG.

Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019

Submission to the Senate Legal and Constitutional Affairs Legislation Committee.

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1. Introduction

Shine Lawyers are pleased to provide this submission in response to the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Bill).

Shine Lawyers supports the measures in the bill allowing victims and of child sexual abuse a less traumatic way to interact with the criminal justice system in schedules 2 and 3. We support the strengthening of child sexual offences outlined in schedule 4 and in general terms, agree that tougher penalties ought to be imposed on perpetrators of child sexual abuse offences in line with community expectations.

We are unable to support aspects of schedules 6, 7 and 10 relating to the creation of mandatory minimum sentences, the presumption against bail and the presumption in favour of cumulative sentences as these unnecessarily infringe on the rights of those interacting with the criminal justice system.

2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors seeking redress in every institutional redress scheme in Australia. These include but are not limited to the Defence Abuse Response Taskforce, *Victims of Crime Act 2001* (SA), Queensland ex gratia scheme, Tasmanian Abuse in Care ex gratia scheme, the WA Redress, Defence Force Ombudsman reparation scheme, Melbourne Response and Towards Healing.

Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

Neerkol Group Litigation
The claim involved some 80 former orphans of the St Joseph's Orphanage Neerkol, operated by the Sisters of Mercy.

Nudgee Orphanage Group Litigation
This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the Sisters of Mercy.

Brisbane Grammar Sexual Abuse Litigation
This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse as children.

St Paul's Sexual Abuse Group Litigation
The claim involved some 25 former students of St Paul's School in Brisbane who were subjected to sexual abuse during their school years.

Scriven v Toowoomba Preparatory School
This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

Australian Defence Force
Shine Lawyers has represented close to 200 current and former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force, including a large number of former child sailors who were abused at HMAS Leeuwin. Shine Lawyers worked closely with the legal representatives of the Australian Defence Force to develop a collaborative, cost effective and empathetic process which provides compensation, as well as Direct Personal Responses (apologies and acknowledgement of the harm done). The psychological welfare of the abuse survivor is central to the process.

3. Use of video recordings and cross-examination of vulnerable persons at committal proceedings

The Royal Commission made various recommendations regarding how vulnerable witnesses including victims of child sexual abuse interact with the criminal justice system. Giving evidence in the least traumatizing fashion by allowing evidence to be pre-recorded is one aspect of reforms recommended by the Royal Commission hoped to reduce negative impact on survivors giving evidence about abuse.

We support the changes proposed in schedule 2 permitting a video recording of an interview of a vulnerable witness to be admitted into evidence in chief in certain circumstances. We agree with the aim of schedule 3 insofar as it purports to reduce the likelihood of re-traumatizing vulnerable persons by subjecting them to cross-examination at committal proceedings. It is thought however that a rebuttable presumption against cross examination at a committal hearing would be more flexible than banning cross examination. This would allow judicial discretion to permit or prevent cross examination of a vulnerable witness in committal proceedings where proper to do so rather than imposing a blanket ban.

4. Schedule 4 – strengthening child sex offences

We support the provisions strengthening child sex offences in Schedule 4. All children have the right to a safe and happy childhood and any sexual abuse of children is a gross violation of a child's rights. Article 3 of the Convention on the Rights of the Child [1991] ATS 4 (CRC) provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 19(1) of the CRC requires parties to the convention to take appropriate legislative, administrative, social and educational measures to protect children from all forms of abuse and exploitation including sexual abuse and Article 34 requires steps be taken to protect from all forms of sexual exploitation and sexual abuse.
The bill gives effect to the Articles by creating new criminal offences which reflect the new ways technology is being utilized to perpetrate child sexual abuse. The new offences include using a postal or similar or carriage service to groom a person to make it easier to procure

persons under 16 for sexual activity. We note with approval the knowledge of the person being under 16 years is absolute liability pursuant to s272.15A(2).

We note a new offence is proposed to become 474.23A regarding conduct for the purposes of electronic service used for child abuse material. We note the penalty of 20 years imprisonment to be imposed on someone who creates, develops, controls or moderates, makes available or promotes an electronic service with the intention of committing or facilitating the commission of an offence using a carriage service for child abuse material or possession controlling, producing, supplying or obtaining child abuse material for use through a carriage service. We support this offence because service providers who profit from the production or exchange of child abuse material ought to be held accountable for their role they have in the commission of child abuse offences.

5. Schedules 5 and 6 – increased penalties for child sexual abuse offences

As a society, we owe it to all children to do as much as we can to protect children in our community. In its Criminal Justice Report, the Royal Commission observed an upward trend in custodial sentences being imposed and an increase in the lengths of sentences for child sexual abuse offences.

Our clients often express difficulty coming to terms with what they feel are inadequate sentences for perpetrators of child sexual abuse. As a general proposition we agree tougher penalties ought to be imposed and the increased sentences in schedule 5 of the bill are one such way.

We do not, however, support the implementation of mandatory minimum sentences for child sexual abuse offences. Our view is that imposing mandatory minimum sentences is unlikely to deter offenders. Judicial officers should maintain their discretion to apply sentencing principles including proportionality, parsimony and totality. Judges are appropriately experienced to make the nuanced decisions required during sentencing and should not be restricted by the imposition of mandatory minimum sentences.

6. Schedule 7 - presumption against bail

Clause 15AAA would introduce a presumption against bail for those convicted of certain Commonwealth child sex abuse offences. The presumption against bail would apply to persons charged with or convicted of offences to which mandatory minimum sentences apply and all offences where the person already has a conviction for a child sexual abuse offence.

Article 9 of the *International Covenant on Civil and Political Rights* [1976] ATS 5 (ICCPR) provides general rules that a person has a right to liberty of person and the right not to be detained in custody while awaiting trial. The bill's proposed introduction of a presumption against bail would appear to limit these rights. It instead makes the starting point for any inquiry about the granting of bail that the person is to be incarcerated until evidence is available to demonstrate why it should be otherwise. We feel the presumption against bail is an unjustifiable departure from the presumption of bail and it may result in loss of liberty in circumstances it is not reasonably necessary or proportionate given the specific circumstances of the individual matter.

7. Schedule 8 – matters to have regard to when passing sentence etc.

We note the Royal Commission's recommendation 74 in its Criminal Justice report that legislation be introduced to exclude the use of evidence of good character as a mitigating factor in sentencing for child sexual abuse. The Royal Commission considered it unnecessary to follow the approach proposed in Schedule 8 such that if a person used their standing in the community to aid the commission of the offence, that fact becomes an aggravating factor.[1] We see no reason to diverge with the Royal Commission's views in this respect. Aggravating factors already appropriately allow for consideration of the vulnerability of the victim and the breach of trust by a person with authority, supervision or control over the child when committing the offence.

8. Schedule 10 Cumulative sentences

The Royal Commission acknowledged the difficulties sentencing for multiple offences. It recognized that sentencing for multiple offences ought to provide separate recognition for separate episodes of child sexual abuse offending and certainty for multiple victims to the greatest extent possible. Imposing cumulative sentences is one possible way which might recognize the separate nature of harm done in discrete episodes of offending. However, the Royal Commission was not satisfied that legislating for presumption in favour of cumulative sentencing was the best approach to achieve this.

In light of the difficulties sentencing for multiple offences, the Royal Commission emphasized the importance of preserving judicial discretion for sentencing courts to ensure the specific circumstances of the offending that arise in the particular matter may be taken into account.

9. Conclusion

The criminal justice system has a role in justice being done for survivors of abuse and in an ideal world, preventing such abuse. Survivors of child sexual abuse deserve to see justice done and perpetrators held to account for their crimes. It is a community expectation that perpetrators of Commonwealth child sex offences be penalised appropriately. Some measures in the bill made under the guise of imposing tougher penalties may undermine public confidence in the judicial system where judicial discretion to impose penalties based on their consideration of the specific circumstances relevant to the matter is limited. Mandatory sentences undermine the discretion of judges to ensure sentences are proportionate and made in light of the specific circumstances of individual cases.

We are grateful for the opportunity to provide our views in this submission.

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report Vol 3, See discussion at p295-298.