Our **Mission** is to prevent child sexual assault in our society.
Our **Vision** is to make Australia the safest place in the world to raise a child.

3rd October, 2019

Legal and Constitutional Affairs Legislation Committee
Email: legcon.sen@aph.gov.au

Submission to: Inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 [Provisions]

To Whom It May Concern:
Bravehearts is pleased to provide this submission in relation to the Inquiry into the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 [Provisions]*.

As an agency that works with, and advocates for, survivors of child sexual harm, we welcome the Commonwealth Government's commitment to protecting children here in Australia and overseas. With our extensive experience working with survivors of child sexual assault and exploitation, and lobbying for reform, Bravehearts strongly advocates for legislative responses that ensure, as far as possible, justice for survivors.

Principles Underpinning Proposed Amendments

Bravehearts is pleased to see the Government's stated commitment within this Bill to strengthening the protection of the rights of children, their wellbeing and safety, and Australia's undertakings as signatories to a range of conventions and protocols including: the *Convention on the Rights of the Child* (CRC), the *International Covenant on Civil and Political Rights* (ICCPR), and the *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (OPSC).

Sentencing Reforms

Schedule 1: Revocation of parole orders or licence to protect safety

Bravehearts fully supports the amendment in relation to revocation of parole or licence to further the protection of children and the broader community.

The current legislation allows for the Attorney-General to revoke a parole order or licence by notifying the person of the specific conditions that they are alleged to have breached and then providing 14 days for a response. Bravehearts has long held that this process may place children and the community at risk. We support the current amendment that allows for parole or licence to be revoked immediately and for the subject person to be taken into custody immediately if they pose a threat to the safety of a person or the community.

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In relation to sex offenders, in particular serious sex offenders and serious violent offenders, Bravehearts advocates that any contravention of parole orders must constitute an offence and result in the revocation of parole (unless, a minor breach and that a sound reason is provided, for example a missed supervision appointment where the parolee contacts the parole officer within a reasonable timeframe and is able to provide a reasonable excuse).

We also support that this amendment applies to any revocation order on or after the commencement of the Bill, regardless of when parole or the licence was issued.

Schedule 2: Use of video recordings

Bravehearts agrees that removing the requirement to seek leave of court before video recordings of vulnerable witnesses can be admitted as evidence in chief will bring the Commonwealth legislation in line with vulnerable witness protections in the States and Territories.

In order to ensure fairness of trial and acknowledgment of the impact of giving evidence, this amendment addresses issues around trial delays and inefficient court processes. As noted in the Bill's accompanying Explanatory Memorandum, safeguards are in place to protect the rights of the accused to ensure they will not be disadvantaged by removing the requirement to seek leave.

We note that the Bill maintains the requirement for the video recording interview to be conducted by a specified person (Subsection 15YM(1)… a constable, or a person of a kind specified in the regulations, conducted the interview…)

Schedule 3: Cross-examination of vulnerable persons at committal proceedings

Bravehearts is pleased to see the removal of the requirement for vulnerable witnesses to give evidence at committal proceedings. As noted in the Explanatory Memorandum to the Bill, this amendment will reduce the risk of the re-traumatisation of victims and in addition, reduce the likelihood of victims withdrawing from the matter, with cross-examination being left to the criminal trial process.

Schedule 4: Strengthening child sex offences

<u>Part 1 – Main amendments</u>

Bravehearts broadly supports the proposed amendments to the *Criminal Code Act 1995*, and offer the following comments on specific Items.

- Section 272.10(1)(b): Bravehearts fully supports the criminalisation of activities that aggravate offences and the maximum penalty assigned to these offences of life imprisonment.

- Section 272.15A, Section 471.25 and Section 474.27: Bravehearts fully supports the extension of the application of the offence of grooming a child under 16 to recognise grooming behaviour directed at third parties.

  It is widely recognised that grooming of children often does not occur in isolation from grooming of parents, carers and/or organisations. Many individuals who

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groom children for the purpose of a sexual offence, invest time in grooming parents, carers and/or organisations to facilitate sexual 'access' to the child.

Grooming of children and young people, as well as family members/carers, is a routine part of the offending cycle. Bravehearts has long argued the need for a broad level grooming offence to be introduced to provide for the capacity to potentially intervene before a sexual assault/harm is committed. We also agree with the Royal Commission into Institutional Responses to Child Sexual Abuse's assertion that a broad grooming offence is likely to have educative, and hopefully consequently preventative benefits for those in a position to identify such behaviour.

As the Royal Commission recognised in Recommendation 26 of its Criminal Justice Report, expanding the application of grooming offences to include persons other than the child is critical in recognising the extent of harm committed by grooming offences. Amending legislation will ensure that the impact of grooming on third parties is considered and acknowledged within the criminal justice system.

- Section 272.15A(4), Section 471.28(2) and Section 474.28(9): Bravehearts supports the inclusion of amendments to ensure the irrelevance of whether a fictitious person is represented as a real person by law enforcement. We note that this is necessary to ensure that police are able to utilise standard investigation techniques of assuming the identity of a child victim or other fictitious person.

- Section 474.23A: Recognising the role that electronic services can play in facilitating the obtainment, possession, production, supply, or exchange of child exploitation material, Bravehearts fully supports the criminalisation of the provision of electronic services with the intention that the service will facilitate offences relating to child sexual exploitation.

  As an additional comment, we note the use of the term child abuse material (CAM). While the terminology of CAM is preferable to the previous terminology that spoke to "child pornography", we believe that the legislation should align with the terminology of "child exploitation material" (CEM) rather than the term child abuse material. Images that are considered CEM are not necessarily images that portray abuse, however the context of the material and the intention of the use of the material, clearly is focused on child exploitation.

- Section 474.25B: As noted above in relation to Section 272.10(1)(b), Bravehearts fully supports the introduction of new aggravated offences applying to the offence of using a carriage service to engage in sexual activity with a person under the age of 16. We also fully support the maximum penalty for these offences to be 30 years imprisonment as prescribed in the Bill.

  Bravehearts would additionally advocate, as for all sexual offences against children, that a minimum standard non-parole period be set for these offences. We believe that given the range of objective seriousness in many of the offence

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categories, the scheme should provide a defined standard non-parole period term for each level of objective seriousness. For example, the defined term should be set at:

- 30% of the prescribed maximum sentence for low-range offences
- 50% of the prescribed maximum sentence for mid-range offences
- 80% of the prescribed maximum sentence for high-range offences

Part 2 – Amendments contingent on the Combatting Child Sexual Exploitation Legislation Amendment Act 2019

Bravehearts supports the amendments outlined in Schedule 4, Part 2 to ensure alignment and consistency.

Schedule 5: Increased penalties

Bravehearts supports the increases in penalties outlined under Schedule 5 to better reflect the seriousness of these offences. We note the importance of the review of maximum sentences to reflect the increased awareness around the seriousness of sexual offences against children and the impact, immediate and long-term, on victims/survivors.

From our perspective, of most concern is that actual sentences being imposed and served must be reflective of the harm caused and the seriousness of child sexual offending. We note that maximum penalties are rarely given and that alongside ensuring that the maximum penalty is adequate, making certain that actual time served is appropriate is critical. Bravehearts' advocates for minimum *standard non-parole periods* as noted above and below under our response to Schedule 6.

As an additional note, it is our position that consideration should be given to introducing mandatory life sentences for persistent offenders, with parole eligibility only after a minimum standard non-parole period of 80% of the maximum sentence, and only if assessed as no longer a risk, unanimously, by three independent assessors. In addition, Bravehearts advocates for a specific, targeted, multiple strike legislative response to repeat, serious sex offenders. While Bravehearts respects that the concerns around multiple strikes legislation are legitimate in relation to the general introduction of laws, it is our position that child sex offences need to be considered with the utmost gravity. We draw attention to the two strikes legislation introduced in Queensland on the back of Bravehearts' lobbying.

Schedule 6: Minimum sentences

Part 1 – Main amendments

- As noted above, Bravehearts view is **actual sentences being imposed and served** must be reflective of the harm caused and the seriousness of child sexual offending.

- Section 16A(1) and Section 16 AAA: The current Bill notes that the amendment inserting mandatory minimum penalties, does not limit judicial discretion in setting non-parole periods.

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Bravehearts wholeheartedly supports the use of minimum standard non-parole periods in relation to sexual offences against children. Although it is argued by some in the legal sector that standard non-parole periods are an infringement on the independence and discretion of the judiciary, we believe that the prescription of standard non-parole periods allows for certainty and consistency in sentencing, promotes the proportionality principle and, as such, is consistent with one of the basic premises of our justice system – that the punishment must fit the crime.

Standard minimum non-parole periods have been identified as:

a) Ensuring that the offender is adequately punished for the offence;
b) Recognising the harm done to the victim of the crime and to the community;
c) Protection of the community;
d) Promoting the rehabilitation of the offender;
e) Making the offender accountable for his or her actions;
f) Denouncing the conduct of the offender; and
g) Preventing crime by deterring the offender and other persons from committing similar offences.

Bravehearts considers that there should be a number of key objectives in introducing a standard non-parole period scheme. These include:

- To provide consistency and certainty in the sentencing process;
- To provide transparency in the sentencing process;
- To increase community confidence in the criminal justice system through providing a system that meets community expectations;
- To minimise court costs; and
- To increase admissions of guilt, which has the impact of reducing levels of re-traumatisation of victims through the criminal justice processes.

It is Bravehearts position that a judge should determine the appropriate sentence based on the objective seriousness of the offence committed, giving consideration to the standard non-parole period set in legislation. The judge should use the prescribed standard non-parole period as a starting point and then determine the total sentence giving consideration to any aggravating or mitigating factors.

One of the issues in prescribing a minimum sentence for an offence type, is that for the majority of offences low-, medium- and high- range offences are included. We believe that given the range of objective seriousness in many of the offence categories, the scheme should provide a defined standard non-parole period term for each level of objective seriousness. For example, the defined term should be set at:

- 30% of the prescribed maximum sentence for low-range offences (for example., non-contact offences)
- 50% of the prescribed maximum sentence for mid-range offences
- 80% of the prescribed maximum sentence for high-range offences

The capacity to divert from the set minimum standard non-parole periods must be by exception, with reasons clearly articulated in the sentencing judgement.

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- Section 16AAC: We note that Section 16AAC outlines the conditions under which a court may reduce the minimum penalty and where minimum penalties do not apply.

  Bravehearts supports the exclusion of young people (those under the age of 18) from the minimum penalty regime.

  We note that there are two conditions under which a court may reduce the prescribed minimum sentence. Firstly, where a person has pled guilty, and secondly to take into account a person cooperating with authorities in the investigation of an offence.

  We note the Bill allows for a reduction of penalty of up to 25% for a plea of guilty and up to 25% for cooperating with law enforcement.

  Offenders receiving sentencing discounts for an early plea is a highly contentious issue for many victims. For victims of child sexual assault, many of whom experience impacts of the abuse throughout their lifetime, hearing that their perpetrator will receive 'any' reduction in sentence because of an admittance of guilt can be incomprehensible. This is particularly true when offenders plead just prior to trial or after the commencement of trial.

  We would suggest that set discounts for a plea of guilt be set at 25% if the plea was accepted in the committal proceedings or before and 10% if the offender pleads guilty after the matter has been committed for trial and before the first day of trial. We would advocate for no discount to be given if that guilty plea is entered on or after the first day of trial.

  We understand that a guilty plea will mean that the victim will not have to go through a trial and that potentially a lengthy and costly court process is avoided; however, we note that by the first day of trial victims are preparing themselves, both emotionally and tangibly (possibly taking time away from work/studies, the impact on family life). It would be our preference to see no 'reward' for entering a guilty plea at such a late phase of the process.

- Paragraph 16AAC(3)(c): We note that in this subsection, the Bill allows for the cumulative reduction in penalties if both a guilty plea and cooperation with law enforcement are taken into account. We support this, understanding that this may encourage cooperation with police and facilitate further investigations and potential convictions, and ultimately protect victims and potential victims.

Part 3 – Amendments contingent on the Combatting Child Sexual Exploitation Legislation Amendment Act 2019

Bravehearts supports the amendments outlined in Schedule 6, Part 3 to ensure alignment and consistency.

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Schedule 7: Presumption against bail

We have long advocated that governments review laws around bail presumption to ensure that the rights and protection of victims and the community are placed before those rights afforded to the accused.

Bravehearts position on bail presumptions for child sex offences is that the presumption should be against bail unless exceptional circumstances exist. Exceptional circumstances may include, for example, if a defendant is in need of urgent medical attention or where the nature of the offence indicates a low likelihood of continued offending and that such a risk is able to be managed.

The legislation around the granting of bail varies across Australian jurisdictions. Broadly, decisions around bail for accused across a range of offences are made around the need to balance a number of sometimes competing rights:

- The rights and interests of the accused
- The likelihood of the accused adhering to conditions
- The protection of victims
- The protection of the community

It is Bravehearts' position that there should be a presumption against bail for child sex offences as the gravity of these types of offences and the impacts on victims underscores the inherent risks in releasing offenders on bail. In relation to many of the Commonwealth offences, the anonymity and difficulty in monitoring and enforcing conditions related to internet offending must also be a consideration.

While some argue that the lack of timeliness in the court system and the rights of accused suggest that bail should be considered in all matters, our position is that there is a need to balance the rights of the accused with the rights and protection of victims and the community. Bravehearts believes that more timely court processes need to be prioritised for sexual offences to ensure that matters are heard in a reasonable time frame.

Schedule 8: Matters court has regard to when passing sentence

With regard to amended paragraph 16A(2)(g) referring to guilty pleas and reduction of sentences, please refer to our comments under Schedule 6, Section 16AAC.

With respect to proposed paragraph 16(A)(2)(ma) and 16(A)(2A), we are pleased to see the inclusion of this paragraph that clarifies that where a person's standing in the community was used to aid the offence, it is to be considered an aggravating factor.

It is our contention that in dealing with sexual assault matters, and specifically child sexual assault matters, the factor of a perceived "good character" or standing in community should not be considered and should never be seen as a mitigating factor.

Child sexual offenders, in particular, more often than not present as trusted and 'good' members of the community. While with other offender types evidence of good character and conduct may be a redeeming feature, this very aspect of a sex offender's public image is all about gaining the trust of children, parents and carers and the community generally.

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The "good character" and standing in the community of child sex offenders is often the very mask behind which their crimes are committed.

As noted above, the 'good character' of an offender is presented to minimise the impact of the offence. We know that often offenders present as of 'good character' as a means of both grooming victims and those around victims and of being able to continue offending without suspicion.

Bravehearts supports the consideration of rehabilitation when sentencing as outlined under Section 16A(2AAA). As noted in the Explanatory Memorandum, evidence suggests that a non-parole period of between 18 and 24 months is necessary to ensure offenders are able to complete relevant custodial treatment programs.

Schedule 9: Additional sentencing factors for certain offences

We acknowledge the proposal to take into consideration as an aggravating factor, the age of the victim (under the age of 10) in Subsection 272.30(1).

It is important to acknowledge that younger children are more vulnerable to this crime, particularly as they are less likely to disclose and do not make strong witnesses

While the most obvious advantage to including age of victim as an aggravating factor when determining sentencing is the recognition of the incredible harm done on young children, through the crime of sexual assault and their particular vulnerability, we must be careful to ensure this does not reinforce the misperception that younger children inherently suffer more from sexual assault than older children or that perpetrators of offences against younger children deserve harsher penalties than those who abuse older children.

Bravehearts also fully supports the amendment for courts to consider the 'relevant' factor of the number of people involved in offending when sentencing for offences under Subdivision B of Division 272 (Sexual offences against children outside Australia).

Schedule 10: Cumulative sentences

Bravehearts supports the presumption in favour of cumulative sentences. We note that the inclusion of this amendment will advance sentencing to ensure a more appropriate response to the seriousness of sexual offences against children, in particular where there are offences committed against multiple victims.

We note to address concerns raised that the amendment may impact on judicial discretion, Subsection 19(6) allows for an exception where the court is of the belief that sentencing cumulatively will result in an unacceptable outcome, and the court may sentence differently (e.g. partly cumulatively) on the provision that the reasons for doing so are provided and the prescribed sentence is of appropriate severity. We would strongly advocate that this be by exceptional circumstance only.

Schedule 11: Conditional release of offenders after conviction

We note that paragraph 20(1)(b) requires, except under exceptional circumstances, that the courts impose an actual term of imprisonment. In line with our comments under

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Schedule 6, we fully advocate for actual terms of imprisonment that are consistent and appropriate. We believe that this is achievable through the introduction of minimum standard non-parole periods.

Additionally, we support the inclusion of paragraphs 20(1)(b)(i) and 20(1)(b)(iii) that provide for exceptional circumstances to be considered and if the court is satisfied they exist for offenders to be released on a recognisance release order. We would advocate that if this occurs, the court must ensure the reasons for doing so are provided.

Schedule 12: Additional sentencing alternatives

Bravehearts fully supports amendments ensuring that those offenders who are deemed to suffer from a mental illness or intellectual impairment are able to be appropriately sentenced under a residential treatment order.

Schedule 13: Revocation of parole or licence

Broadly we support the amendments under Schedule 13.

We note that amendments in Subsection 19AA(2) and 19AA(3) relate to ensuring that "clean street time" is taking into consideration if revocation of parole or licence occurs because of a breach or subsequent offence. Bravehearts acknowledges the intention behind the reduction of time served on revocation based on "clean street time" or the period between when the offender was released on parole and the time of the subsequent breach or offence, *however* we would note that we are of the view that once a breach or subsequent offence has occurred, the person should be required to serve the full part of their sentence that was outstanding upon being granted parole (unless, as noted under Schedule 1, it is a minor breach and a sound reason is provided, for example a missed supervision appointment where the parolee contacts the parole officer within a reasonable timeframe and is able to provide a reasonable excuse).

In closing, we thank you for the opportunity to provide this submission.

Kind Regards,

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