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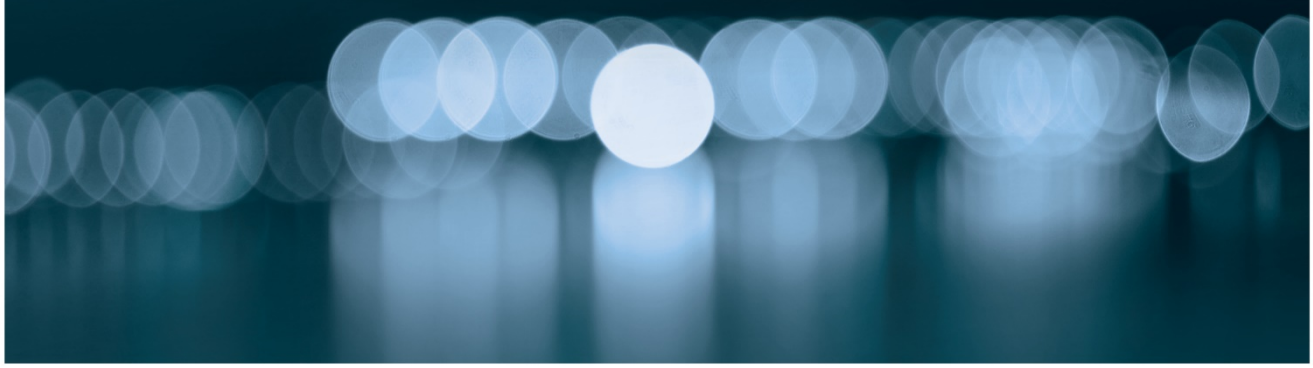
Australian Government
Attorney-General's Department
Department of Home Affairs

Senate Legal and Constitutional Affairs Legislation Committee

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

JOINT SUBMISSION

Attorney-General's Department
and
Department of Home Affairs



Summary

1. The Attorney-General's Department (AGD) and the Department of Home Affairs present this joint submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) on the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (the Bill) for the Committee's consideration. We note that AGD presented a submission to the Committee's inquiry into the Crimes Legislation (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (the 2017 Bill), and that the Committee commented upon that submission in its Report published in October 2017. The Committee made three recommendations, including that the Bill be passed (Recommendation 3—the Committee's other Recommendations and comments are discussed below). The 2017 Bill passed the House of Representatives on 19 October 2017 and was introduced to the Senate on the same day, but it lapsed with the proroguing of the 45th Parliament.

2. This submission addresses and engages with comments and concerns raised by the Committee in its Report on the 2017 Bill, by submitters to the Committee's 2017 inquiry, and in debate on the 2017 Bill in the House of Representatives on 18−19 October 2017. The submission also reflects changes to the Bill since the Committee considered the 2017 Bill. A summary of the amendments to the package of measures since the 2017 Bill was introduced in the House of Representatives on 13 September 2017 is at **Annexure A**.

3. The Government is committed to protecting the community from the risks posed by child sex offenders, and ensuring that penalties for Commonwealth child sex offences appropriately reflect the severity of these crimes. To deliver on this commitment, on 11 September 2019 the Attorney-General, the Hon Christian Porter MP, introduced the Bill.

4. The reforms in the Bill target inadequacies in the existing legal framework at key points in the criminal justice process, from bail and sentencing to post-release supervision. They also provide the tools to combat emerging forms of child sexual abuse, which is becoming increasingly prevalent due to technological developments.

5. Key measures proposed in the Bill will:

- increase protections for vulnerable witnesses in relation to giving evidence
- create a new offence of providing electronic services to facilitate dealings with child abuse material
- create new offences of 'grooming' a third party using the post, a carriage service or outside Australia to facilitate sexual activity with a child
- emphasise the importance of access to rehabilitation and treatment when sentencing child sex offenders
- overhaul the sentencing factors for all federal offenders, thereby preventing courts from discounting sentences on the basis of good character where this is used to facilitate the crime
- ensure that all sex offenders, upon release from custody, are adequately supervised and subject to appropriate rehabilitative conditions
- introduce presumptions in favour of cumulative sentences and actual imprisonment
- introduce mandatory minimum sentences for the most serious child sex offences and for recidivist offenders
- increase maximum penalties across the spectrum of child sex offences, including by specifying new aggravated offence elements that impose a maximum penalty of life imprisonment for the most serious offences.

6. The Bill complements a broad package of reforms introduced by the Government during the 45th Parliament, which strengthened the laws relating to child sexual abuse and created new protections for the community. This included new measures in the *Passports Legislation Amendment (Overseas Travel By Child Sex Offenders) Act 2017* (Cth), which stops registered child sex offenders from travelling overseas to abuse children, and the introduction of Carly's Law in the *Criminal Code Amendment (Protecting Minors Online) Act 2017* (Cth), which targets online offenders who use the internet to prepare or plan to sexually abuse children. This Bill also complements the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (Cth), which received the Royal Assent on 20 September 2019, and the Bill is consistent with recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).

7. The Bill was developed by AGD in consultation with the Australian Federal Police (AFP), the Commonwealth Director of Public Prosecutions (CDPP) and the Department of Home Affairs. A summary of the Bill is at **Annexure B**.

Policy rationale

8. Creating a safe environment for children online is a paramount concern for the Government. Law enforcement agencies are seeing an increase in the number of investigations for Commonwealth child sexual crimes. In 2018, more than 18.4 million reports of online child abuse material were made to the United States-based National Centre for Missing and Exploited Children, which acts as the international hub for such reports. Domestically, in 2018 the AFP received almost 18,000 reports of child abuse material—an 84 per cent increase from the previous year. In 2019, the AFP is once again on track to receive a significant number of incoming reports of child abuse material. Each report can contain thousands of images and videos depicting children being sexually and physically abused. Individual offenders are known to store hundreds of thousands of such items.

9. New technologies are facilitating the online sexual abuse of children more frequently, including live-streaming the sexual abuse of children using web cameras or mobile phones. This is often done for profit or other benefits, creating a commercialised demand for children to be targeted, recruited and coerced into sexual activity that may include instances which can only be described as extremely violent. The Internet Watch Foundation reports a steep increase in material created by children recording themselves involved in sexual activities in response to pressure or encouragement from offenders.[1] Offenders are also using more technologically sophisticated networks to distribute child abuse material, including through use of the dark web, encryption and online 'cloud' storage.

10. As these technologies pervade the homes of everyday Australian families and communities overseas, the vulnerability of children is heightened. The criminal justice response to these criminal behaviours must match that vulnerability in seriousness and better serve the community by deterring would be offenders and those that seek to continue sexually abusing children.

11. Australia's laws should reflect the changing landscape of offending and appropriately reflect the impact that online sexual abuse has on child victims. Penalties should adequately reflect the severity of the offences.

[1] Internet Watch Foundation, *2018 Annual Report,* page 7, viewed on 18 September 2019, www.iwf.org.uk/report/2018-annual-report.

12. Statistics on current Commonwealth child sex offences derived from the Commonwealth Sentencing Database demonstrate the low rate of convictions resulting in a custodial sentence, meaning many convicted offenders are released into the community. For example from 1 February 2014 to 31 January 2019:

- 40 per cent of sentences for Commonwealth child sex offences did not result in a custodial period
- 60 per cent of charges relating to child sex offences resulted in a custodial sentence
- of those offenders who received a custodial sentence during this period, the most frequent term of imprisonment was 18 months, with the most frequent custodial period recorded as six months.

13. Further examples of inadequate sentencing are evident in the context of specific offences. For example, for the offence of grooming a child using a carriage service contrary to subsection 474.27(1) of the *Criminal Code 1995* (Criminal Code), from 1 February 2014 to 31 January 2019:

- 80 convictions were handed down
- 44 were sentences of imprisonment
- the highest head sentence was 3.5 years' imprisonment
- the lowest head sentence was two months' imprisonment
- the most frequent head sentence of imprisonment was 18 months
- one offender was released on a non-conviction order
- 12 offenders were sentenced to community service
- 23 offenders were released on a recognizance release order without spending any time in prison.

14. Similarly, for the offence of using a carriage service for sexual activity with a person under 16 years of age, contrary to section 474.25A(1) of the Criminal Code, from 1 February 2014 to 31 January 2019:

- eight convictions were handed down
- seven were sentences of imprisonment
- the highest head sentence was eight years
- the lowest head sentence was 14 months
- the most common head sentence was two years
- one offender was released to community service without spending any time in prison.

15. The current approach to sentencing results in outcomes that are manifestly inadequate for Commonwealth child sex offences as they do not appropriately reflect the gravity of the offences or provide sufficient protection for the community.

16. Inadequate sentences do not sufficiently recognise the harm suffered by victims of child sex abuse. For example, the Bill addresses the myth that child sexual abuse material offences are a 'victimless' crime by criminalising emerging uses of technology to facilitate dealings in child abuse material and ensuring that the sentences for these offences reflect the gravity of the offending conduct. Behaviour such as accessing and transmitting child abuse material encourages the market demand for, and commercialisation of, this material and leads to further physical and sexual abuse of children. In addition to the harm suffered in the production of that material, the child is re-victimised each time the material is viewed and shared online.

17. *Case Study 1: illustrating a low sentence for technology-enabled dealing in child abuse material*

Director of Public Prosecutions (Cth) v Haynes [2017] VSCA 79

Facts: The offender pleaded guilty in the County Court of Victoria to nine charges relating to online sexual offending or indecent or offensive communication. The primary offences were using a carriage

service to 'procure' and 'engage' in sexual activity with persons under the age of 16, contrary to sections 474.26 and 474.25A of the Criminal Code respectively. These offences each attract a maximum penalty of 15 years' imprisonment. The offender used a false identity on various websites and social media platforms to encourage adolescent children to provide him with photos and videos of themselves engaging in sexual activities. Upon receipt of these materials, the offender then attempted to coerce or blackmail the victims, either asking for further materials or directing them to meet him in person.

Sentence: The offender was sentenced to 30 months' imprisonment on a recognizance release order with a pre-release period of 10 months. The CDPP appealed the decision but the appeal was dismissed. The Court of Appeal stated that '[F]or the purpose of future guidance as to sentencing principles and standards the immediate term of imprisonment of the pre-release period of 10 months was manifestly inadequate'. However in the circumstances of the case the Court of Appeal held that the individual sentences and the total effective sentence were properly to be described as low, but not manifestly inadequate.

18. As noted above and more extensively in the discussion below, the Bill proposes sentences that more adequately reflect the gravity of sexual offences against children. However, many of the measures in the Bill also serve to promote rehabilitation. For example, Schedule 11 of the Bill includes measures which require a court to impose conditions when a child sex offender is released on a recognizance release order (as distinct from a non-parole period), including the condition that the offender undertake such treatment or rehabilitation programs as the probation officer reasonably directs. As a consequence of the sentencing reforms proposed in the Bill, the Government aims to ensure that a greater proportion of persons who are convicted and sentenced for child sexual abuse offences will participate in meaningful rehabilitative programs while in custody and continue to be supported upon their release into the community.

Engagement with human rights

19. The Bill is designed to protect the rights of children, in particular the right to be protected from sexual abuse. Many of the measures in the Bill promote the principles underpinning, and the fundamental rights and freedoms protected by, the Convention on the Rights of the Child and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. This is particularly true of those measures that criminalise emerging forms of child sexual abuse as well as those that introduce aggravated offences relating to cruel, inhuman or degrading treatment in connection with sexual abuse, introduce and enhance vulnerable persons provisions, increase the maximum penalties for certain child sex offences and introduce mandatory minimum penalties for serious child sex offences. A more extensive analysis of the Bill's engagement with human rights obligations is provided in the Statement of Compatibility with Human Rights at pages 4−14 of the Explanatory Memorandum to the Bill.

Observations on Schedules in the Bill

Schedule 1 – Revocation of parole order of licence to protect safety

20. Currently, unless certain circumstances apply, before the Attorney-General can revoke a person's parole order or licence, the person must be notified of the specific conditions they are alleged to have breached and be given 14 days to respond. This time lag between when a person is notified of the intention to revoke their parole and the actual revocation and subsequent imprisonment of the person is problematic if it is

believed the person poses a danger to the community. In particular, it gives the person an opportunity to commit further offences or even to abscond.

21. To address this, Schedule 1 of the Bill introduces an ability to revoke parole where the Attorney-General is of the opinion that revocation without notice is necessary in the interests of ensuring the safety and protection of the community or of another person.

22. In their submissions to the Committee's inquiry on the 2017 Bill, both the Law Council of Australia (at p 22) and Associate Professor Lorana Bartels (at p 3) stated that the measures proposed in this schedule were contrary to procedural fairness and that the Government should establish an independent parole authority. The Law Council proposed that the parole authority should be given the power to revoke parole in order to protect safety, subject to the person being able to contest the decision (at p 22).

23. The Government does not accept that an independent parole board is required. It should be noted that parole is revoked only rarely. Appropriate procedural fairness protections are incorporated into the proposed amendments in Schedule 1. If an offender's parole were revoked under proposed Schedule 1 of the Bill, the offender would be provided with an opportunity to make a written submission to the Attorney-General as to why their parole order or licence should not be revoked in accordance with the existing provisions of the *Crimes Act 1914* (Cth) (Crimes Act). If the Attorney-General is satisfied of those reasons the offender would be immediately released from custody. The proposed mechanism reflects an appropriate balance between the right of the offender to procedural fairness and the need to protect the community from the dangers of child sexual abuse.

Schedule 2 – Use of video recordings

24. The Bill will remove the requirement for the court to grant leave before admitting a video recording of an interview of a vulnerable witness as evidence-in-chief. Using pre-recorded evidence assists child victims (and other classes of witnesses specified in section 15YM of the Crimes Act) by reducing the stress of giving evidence for long periods, and improving the quality of their evidence.

25. In its submission to the Committee's inquiry into the 2017 Bill, the Law Council of Australia raised concerns about the effect of the changed arrangements on prosecutions, including on the ability of the defence to mount its case, '[…] 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' (at p 25). The Law Council observed that it could be useful for relevant participants in the criminal justice system to be educated about the legislative requirements authorising the admission of pre-recorded evidence, as well as training in interviewing vulnerable witnesses and pre-recording evidence (at p 25).

26. The measures proposed in Schedule 2 of the Bill will facilitate the effective presentation of evidence by a vulnerable witness. The evidence-in-chief interviews are to be supervised by a constable, remain subject to the rules of evidence and parts may be ruled inadmissible, thereby protecting the rights of the accused person. It is considered there are sufficient safeguards in place that the defence will not be unreasonably disadvantaged by removing the requirement 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. Educational bodies that offer continuing legal professional education are encouraged to train legal professionals concerning the impact of these and other changes effected by the Bill.

27. These measures will bring the Commonwealth broadly into line with the practice in Australian states and territories. Further, the measures are consistent with Recommendation 53 of the *Final Report* of the Royal Commission, that '[F]ull pre-recording of a witness's evidence in child sexual abuse prosecutions should be made available for all complainants in child sexual abuse prosecutions and any other witnesses who are children or vulnerable adults […]'.

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

28. The Bill will remove the requirement for vulnerable witnesses to be available for cross-examination at committal proceedings. There is currently no restriction under Commonwealth law on whether a vulnerable witness can be cross-examined at committal proceedings or proceedings of a similar kind. There are fewer restrictions under Commonwealth law on the scope of questioning permitted in committal proceedings than under most state and territory laws where committal proceedings still apply.

29. In its submission to the Committee's inquiry on the 2017 Bill, the Law Council of Australia noted that it did not support a complete ban on the appearance of vulnerable witnesses at committal hearings, arguing that such appearances could streamline trial processes significantly, which could actually benefit victims (at p 27). The Law Council suggested, '[T]he 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 (eg child sex offences)' (at p 27).

30. The Bill does not propose a complete ban on the appearance of vulnerable witnesses at committal hearings. Rather, by prohibiting cross-examination at committal proceedings or proceedings of a similar kind, vulnerable witnesses will be spared an additional risk of re-traumatisation. Under the current legislation, vulnerable witnesses may be required to be cross-examined multiple times and often in distressing, combative environments. This may give rise to the risk that a vulnerable witness who has been cross-examined at committal will be unwilling to testify in the trial at all, due to the trauma associated with the cross-examination at committal. Further, the prospect of being cross-examined at both committal and trial may mean that some vulnerable witnesses do not proceed with their complaints. Such an outcome would be contrary to the interests of the administration of justice and, it is submitted, unfair to victims. For these reasons, this submission does not support the Law Council's proposal that cross-examination of vulnerable witnesses be prohibited in committal hearings unless 'exceptional circumstances' exist. The measures in Schedule 3 of the Bill will contribute to streamlining criminal justice processes by ensuring cross-examination of vulnerable witnesses is reserved for trials only, and will not be available in committal proceedings or proceedings of a similar kind.

Schedule 4 – Strengthening child sex offences

New offences

31. The Bill introduces new offences that target emerging trends in child sexual abuse.

Offences of grooming a third party through a carriage service, postal service or overseas

32. The term 'grooming' in the context of criminal law may refer to behaviours deliberately undertaken with the aim of facilitating sexual contact with a child. This may occur online, by phone, using a postal service or in person.

33. The Bill will amend the Criminal Code to make it an offence to groom a third party with the intention of facilitating sexual contact with a child where the grooming occurs over a carriage service, over a postal service, or where an element of the offence occurs overseas. For example, this may include using the internet to groom a parent or guardian or a person who has care, supervision or authority over a child.

34. The Royal Commission heard evidence of parents being groomed without their knowledge to facilitate the perpetrator's access to their children. These measures are consistent with Recommendation 26 of the Final Report of the Royal Commission, that '[E]ach state and territory government (other than Victoria) should introduce legislation to extend its broad grooming offence to the grooming of persons other than the child'.

35. An offence targeting the grooming of third parties will enable police to investigate online and travelling child sex offenders before contact or communication with a child has occurred, thereby better protecting children from harm.

Offence of providing an electronic service

36. The Bill will amend the Criminal Code to make it an offence for a person to provide an electronic service (for example, creating or administering a website, peer-to-peer network or dark web service) with the intention that the service be used to facilitate online dealings with child abuse material. Providing an electronic service includes creating, developing, altering, maintaining, controlling, moderating, making available, advertising or promoting an electronic service, or assisting to do any of these actions.

37. The Government recognises that child sex offenders will continue to seek new ways to use technology to facilitate offending. There has been a rise in the number of websites that function for the sole purpose of facilitating the online distribution of child abuse material and encouraging discussion about child abuse among its members.

38. This offence targets individuals who provide the technological means for global audiences to access child abuse material online. The services often take advantage of anonymising and encrypting technology, giving criminals a safe online environment to access and share child abuse material, and to reinforce and enable their offending behaviours. This behaviour results in the establishment of sophisticated and global criminal networks that perpetuate the demand for existing and new child abuse material.

39. The offence will importantly address the gap that arises where an individual creates a website dedicated to child abuse material but doesn't engage in behaviour that is criminalised by existing offences in the Criminal Code.

40. *Case study 2: illustrating the need for the offence of providing an electronic service*

R v Williamson [2011] QDC

Facts: The offender was the administrator of a highly frequented website which made available at least 15,375 images of child abuse material, depicting children of an average age of 8–14 years but also younger children. The offender was responsible for categorising material on the website and was fully aware that the website provided child abuse material to its users. The offender was convicted of using a carriage service to make child pornography available, contrary to section 474.19 of the Criminal Code.

Sentence: three years and six months' imprisonment with a non-parole period of one year.

Following passage of the Bill: At the time of sentencing this offender, there was no offence in the Criminal Code that adequately covered the behaviour of creating and administering a website to facilitate dealings with child abuse material. The proposed offence in the Bill of 'conduct for the purposes of electronic service used for child abuse material', to be inserted at section 474.23A of the Criminal Code, will more explicitly criminalise the behaviour of creating or administering a website to facilitate dealings with child abuse. This proposed offence will also impose a sentence that is commensurate with the gravity of the relevant offending. Had the offender been subject to this proposed offence, he would have faced a mandatory minimum sentence of five years' imprisonment under the first strike regime and a maximum sentence of 20 years' imprisonment.

41. *Case study 3: further case study illustrating the need for the offence of providing an electronic service*

R v Graham[2]

Facts: The offender created and controlled multiple child abuse material and child abuse websites. These sites formed a massive network which the United States Federal Bureau of Investigation considered to be one of the biggest active networks investigated with some of the most objectionable content ever viewed. The material the offender shared included a video called 'Daisy's Destruction', showing an infant being tortured and sexually abused. The offender was convicted of the following Commonwealth offences:

- using a carriage service to access child pornography material, contrary to subparagraph 474.19(1)(a)(i) of the Criminal Code
- possessing or controlling child pornography material for use through a carriage service, contrary to subparagraph 474.20(1)(a)(i) of the Criminal Code
- possessing etc. child abuse material for use through a carriage service, contrary to subsection 474.23(1) of the Criminal Code
- encouraging an offence against Division 272, contrary to subsection 272.19(1) of the Criminal Code
- using a telecommunications network with the intention to commit a serious offence, contrary to subsection 474.14(1) of the Criminal Code
- benefitting from sexual offences against children outside Australia, contrary to subsection

[2] A suppression order in this matter dated 3 February 2016 remains in place and for this reason a full citation is not provided (the name of the offender is not suppressed).

272.18(1) of the Criminal Code.

Sentence: The offender was sentenced to a total effective head sentence of 15 years and six months' imprisonment, and a non-parole period of 10 years for offences related to accessing and transmitting child abuse material.

Following passage of the Bill: Under the proposed measures in the Bill, the offender would be subject to a number of mandatory minimum penalties under the first strike regime including, for example, a mandatory minimum penalty of five years' imprisonment for the new offence of 'conduct for the purposes of electronic service used for child abuse material' at section 474.23A of the Criminal Code. As the offender's conduct was of the most egregious kind, he could be liable to the maximum sentence of 20 years imprisonment, in addition to his other sentences.

Amendments to current offences

'Live-streamed' child sexual abuse

42. The Bill will amend the Criminal Code to insert notes in section 474.25A of the Criminal Code (using a carriage service for sexual activity with person under 16 years of age) to clarify that live-streamed child sexual abuse is captured under existing Commonwealth child sexual abuse offences.

43. *Case study 4: illustrating the need for the notes concerning live-streamed child sexual abuse*

R v Ramos (Unreported, District Court of NSW, Arnott SC DCJ, 1 November 2018)

Facts: The offender downloaded a screen-capture application on his laptop computer, which he used to record seven live-streamed videos of females aged between 8–14 years engaging in sexual activity on two child abuse websites. These seven videos were located on his laptop and categorised at the time as 'child pornography material'.

The offender was convicted of the following Commonwealth offences:

- disseminating child abuse material contrary to subsection 91H(2) of the *Crimes Act 1900* (NSW) (NSW Crimes Act)
- possessing child abuse material contrary to subsection 91H(2) of the NSW Crimes Act
- using a carriage service to access child pornography material contrary to subparagraph 474.19(1)(a)(i) of the Criminal Code
- using a carriage service to transmit child pornography material contrary to subparagraph 474.19(1)(a)(iii) of the Criminal Code.

Sentence: The offender was sentenced to imprisonment for 23 months to be released after serving 12 months.

Following passage of the Bill: The new note in the Criminal Code will clarify that live-streamed child sexual abuse is captured under existing offences in the Criminal Code, including subsections 474.25A(1) and (2) (using a carriage service for sexual activity with person under 16 years of age). Under section 16AAA of the Crimes Act as proposed in Schedule 6 of the Bill, this offence will be a first strike offence and carry a mandatory minimum sentence of five years.

Note concerning 'engage in sexual activity': Recommendation 1 of the Committee's 2017 Report

44. The Bill will insert a note into the offence of 'sexual activity (other than sexual intercourse) with child outside Australia' at section 272.9 of the Criminal Code, clarifying that the definition of 'engage in sexual activity' in the Dictionary to the Criminal Code 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.

45. In the Committee's Report on its inquiry into the 2017 Bill, the Committee recommended 'that the Government consider whether the Bill's definition of "engage in sexual activity" should also be reflected in the Criminal Code subsection which details penalties for *Sexual intercourse with a child outside Australia* (Section 272.8 of the Criminal Code)' (Recommendation 1).

46. We note that the definition of 'sexual activity' in the Criminal Code expressly includes 'sexual intercourse or any other activity of a sexual or indecent nature […]'. However, the Criminal Code provisions dealing with child sex offences outside Australia clearly distinguish between offences that criminalise 'sexual intercourse' with a child and offences that criminalise 'sexual activity (not including sexual intercourse)' with a child (sections 272.8 and 272.9 respectively). This distinction is clarified in the Explanatory Memorandum to the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (the 2010 Bill), which introduced sections 272.8 and 272.9. The Explanatory Memorandum to the 2010 Bill explains that the offence of 'sexual activity (not including sexual intercourse) with a child outside Australia' at section 272.9 captures situations where '[…] a person is 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'. By way of contrast, the Explanatory Memorandum to the 2010 Bill does not include any corresponding text in relation to the offence at section 272.8 because this offence requires the offender to be physically present at the commission of the offence. For these reasons, it is considered appropriate to incorporate the Bill's definition of 'engage in sexual activity' within the text of section 272.9 but not within the text of section 272.8.

47. As noted below in the discussion about Schedule 5, the Bill will increase the maximum penalty for section 272.8 to 25 years' imprisonment and will increase the maximum penalty for section 272.9 to 20 years' imprisonment. These distinct offences and the penalties proposed to be attached to them reflect the differing nature and seriousness of the relevant offending.

Subjecting a child victim to cruel, inhuman or degrading treatment or death as a result of physical harm in connection with the sexual activity

48. The Bill criminalises additional activities that aggravate an offence against existing sections 474.25A (use of a carriage service for sexual activity with a person under 16 years of age), 272.8 (sexual intercourse with a child outside Australia) and 272.9 (sexual activity with a child outside Australia).

49. The existing aggravated offences relating to the sexual abuse of a child with a mental impairment or under the care, supervision or authority of a defendant committed online (section 474.25B) or outside Australia (section 272.10) will now also cover scenarios in which the conduct constituting the underlying offence includes subjecting the child to cruel, inhuman or degrading treatment, or results in the death of the child. The prosecution will need to show that the defendant, in committing the underlying offence, was reckless as to whether these outcomes would occur.

50. The Government is deeply disturbed by the alarming trend of offenders inflicting severe violence on children alongside sexual abuse. Recent global research conducted by ECPAT International found that online

child abuse material which depicts very young children–such as infants and toddlers–is more likely to involve violent rape, torture and sadism.[3]

51. These measures would capture the kind of conduct described in the matter of 'Daisy's Destruction' in case study 3 above. The measures will complement existing aggravated offences in the Criminal Code, lead to more serious prison terms for offenders, and deter would-be offenders from engaging in this particularly damaging conduct towards children.

Schedule 5 – Increased penalties

Increased maximum penalties

52. The Bill increases the maximum penalties for certain offences in the Criminal Code relating to the sexual abuse of children outside Australia and for offences committed through the use of online and postal services. The increased penalties more adequately reflect the gravity of the relevant offending conduct and send a strong message to the community that the sexual abuse of children will result in appropriately severe punishment for the offender.

53. For example, the maximum penalties for the grooming offences at subsections 474.27(1) and 474.27(2) have been increased from 12 years to 15 years' imprisonment and the new third- party grooming offences at proposed sections 272.15A, 471.25A and 474.27AA will similarly attract a maximum penalty of 15 years' imprisonment. The penalties for the offences of sexual activity (other than sexual intercourse) at sections 272.9 and 474.25A will attract an increased maximum penalty of 20 years' imprisonment. The offence of engaging in sexual intercourse with a child outside Australia at section 272.8 attracts an increased maximum penalty of 25 years' imprisonment, while the offences of persistent child sexual abuse outside Australia at section 272.11 will now attract a penalty of 30 years' imprisonment. At the most serious end of the offending spectrum, the new aggravated elements at subsection 272.10(1), applying to the offences of sexual intercourse or other sexual activity with a child outside Australia, will impose an increased maximum sentence of life imprisonment.

54. In her submission to the Committee's inquiry into the 2017 Bill, Associate Professor Lorana Bartels expressed concern that '[…] the proposed increases to sentences would have disproportionate impacts, given the current legislative maximum sentences which they seek to amend' and that the proposed increases do not '[…] appear to be done in any principled way with respect to the existing penalties […]' (at p 3).

55. Since the Committee considered the 2017 Bill, the penalties for certain offences in the Bill have been increased as a result of Government amendments to the Bill that are outlined in **Annexure B**. As noted in the Explanatory Memorandum to the Bill, these items ensure that the proposed maximum penalty for these offences reflects the relative seriousness of the relevant conduct. For example, the penalties outlined above differentiate between conduct that is *preparatory to sexual activity* (such as procuring and grooming), conduct where an offender engages in *sexual activity* with a child (including activity of a sexual or indecent nature, activity that does not require physical contact between people and online sexual activity), conduct where an offender has *sexual intercourse* through physical contact with a child (including penetration and oral intercourse) and conduct that involves, for example, *torture* or the *death* of a child. The increased penalties described above and the other increased penalties in Schedule 5 of the Bill are tailored to the culpability of the

[3] *ECPAT International Journal 2017, Issue 12*, viewed on 25 September 2019, at https://www.ecpat.org/wp-content/uploads/2017/04/Journal_No12-ebook.pdf, page 18.

criminal activity that constitutes each offence, and reflect a carefully calibrated response to the range of serious dangers posed by child sex offenders to the community.

Schedule 6 – Minimum sentences

56. The Bill proposes to introduce minimum sentences to reflect the significant threat that offenders pose to community safety and the significant, long term harm they cause to children. This scheme is a layered response to the dangers posed by child sex offenders, the current inadequate sentencing of child sex offenders, and the need to preserve judicial discretion to ensure that each sentence is appropriate to the offending. The mandatory minimum sentences set the total effective sentence an offender may receive. The Bill does not set mandatory minimum non-parole periods, nor does it remove the ability to provide discounts for assistance to law enforcement or an early guilty plea.

57. The Bill will amend the Crimes Act to introduce mandatory minimum sentences for the most serious child sex offences that attract the highest penalties—including offences relating to the use of a carriage service or postal service and offences relating to the sexual abuse of children overseas.

58. Mandatory minimum sentences will also apply to repeat offenders, that is, child sex offenders previously convicted of a separate child sex offence (including state and territory offences). This measure is designed to respond to the risk that repeat offenders pose to community safety.

59. For all offences that attract a mandatory minimum sentence, that mandatory minimum sentence has been calculated in the Bill at 25 per cent of the maximum penalty for the offence. This means that the head sentence (defined as the overall period of imprisonment, not just the period of time spent in custody) must be equal to or more than the prescribed mandatory minimum sentence. Where a person is charged with more than one offence, the highest applicable mandatory minimum sentence will apply as the absolute minimum head sentence.

60. To assist the Committee, the below scenarios illustrate the operation of the mandatory minimum penalty scheme.

61. *Example 1 – 'First strike' offence*

Person A is being sentenced for two offences under section 474.25A of the Criminal Code (using a carriage service for sexual activity with person under 16 years of age – new increased maximum penalty of 20 years' imprisonment). The mandatory minimum penalty for a single offence under this section is five years. Accordingly, the sentencing judge would use the minimum head sentence of five years as the starting point in calculating the sentence. The judge would then apply any relevant sentencing factors, such as the presumption in favour of cumulative sentences (given that the offender has been convicted of more than one offence), any available discounts for an early guilty plea or cooperation with law enforcement, and any other relevant considerations to which the judge may be permitted or required to have regard.

62. *Example 2 – Second or subsequent offence*

Person B is being sentenced for one offence contrary to subsection 474.27A(1) (using a carriage service to transmit indecent communication to persons under 16–maximum penalty of 10 years' imprisonment) and two other offences under section 474.22 of the Criminal Code (using a carriage service for child abuse material – maximum penalty of 15 years' imprisonment). The offender has previously been convicted of a state offence of possession of child sexual abuse material. The Bill

provides that the offences at subsection 474.27A(1) and section 474.22 are both second strike offences. The minimum mandatory penalty for a single offence under section 474.27A is three years' imprisonment and the minimum mandatory penalty for a single offence under section 474.22 is four years' imprisonment. In determining the head sentence, the highest minimum penalty will be the lowest head sentence to which the person can be sentenced. Accordingly, the minimum sentence will be four years. Again, the sentencing judge may take into account a range of considerations when calculating the final sentence, including the presumption in favour of cumulative sentences.

Mandatory minimum penalties and mentally ill/cognitively impaired offenders: Recommendation 2 of the Committee's 2017 Report

63. When the Committee considered the 2017 Bill it recommended that '[T]he Government considers where discretion could be applied by a court in considering cases where the defendant is severely cognitively impaired' (Recommendation 2).

64. Mentally ill people or people with a cognitive impairment are provided with safeguards under the Crimes Act. The Crimes Act provides for situations where the person is unfit to be tried, acquitted due to mental illness, and where summary disposition is available for persons suffering from a mental illness or intellectual disability. The Crimes Act also provides appropriate sentencing alternatives for this group of offenders that include hospital orders, psychiatric probation orders and program probation orders.

65. As mentally ill or cognitively impaired offenders may be protected from trial or acquitted on the above-mentioned grounds in the Crimes Act, a range of appropriate orders has been developed to ensure community safety. For this reason it is not necessary to explicitly exclude this cohort from the application of mandatory minimum sentences.

66. If the court finds that a person has the mental capacity to be tried and sentenced, Schedule 12 of the Bill now also includes an option for a residential treatment order where these orders are available in the relevant jurisdiction.

Mandatory minimum penalties and judicial discretion

67. In its submission to the Committee's inquiry into the 2017 Bill, the Law Council of Australia argued 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 […]' (at p 10).

68. The Bill proposes a nuanced and considered model of minimum sentences, reflecting the Government's concern that these penalties should be proportionate and adaptable to the level of culpability inherent in each case. The minimum sentences proposed in this Bill are deliberately designed to preserve key elements of judicial discretion, in order to assist in facilitating the imposition of penalties that appropriately reflect the seriousness of the relevant offending. The proposed minimum penalties are flexible in that judges will be able to:

- set a sentence higher than the mandatory minimum sentence
- retain discretion in relation to setting the minimum custodial period
- reduce a sentence by up to 25 per cent of the duration of the sentence to reflect either an offender's early guilty plea or an offender's cooperation with law enforcement or, where both of these factors are present, a discount of up to 50 per cent off the duration of the sentence.

69. Further, all the sentencing factors currently available in the Crimes Act will remain available to judges sentencing Commonwealth child sex offenders.

70. Although the minimum penalties proposed in the Bill will to an extent limit judicial discretion, these limits are appropriate. The significant judicial discretion maintained by this proposed sentencing regime demonstrates deference to the independence of the judiciary. For instance, the Bill does not impose mandatory minimum non-parole periods, but leaves the setting of non-parole periods to the discretion of judges. The minimum sentences in Schedule 6 of the Bill reflect the Government's commitment to ensuring that sentences imposed under the proposed regime are commensurate with the culpability of the relevant conduct. The proposed minimum sentences are not a 'one size fits all' model of sentencing, but are a nuanced and justified response to the current trend in which all too often child sex offenders receive inadequate sentences.

Mandatory minimum sentences and the Guide to Framing Commonwealth Offences

71. Mandatory minimum sentences are uncommon in Commonwealth legislation. AGD's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* recommends minimum sentences not be used 'other than in rare cases' (at paragraph 3.1.1).[4] It is submitted that child sexual abuse offences warrant being treated as one such rare case. Against the backdrop of the current trend towards inadequate sentences for child sex offenders, the minimum sentences in the Bill provide clear and necessary guidance to the judiciary as to the community's expectations when sentencing the most serious child sex offenders. As the High Court of Australia has observed, '[L]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks',[5] and '[T]he prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick'.[6]

Mandatory minimum sentences and benefit to the community

72. The minimum sentences in Schedule 6 of the Bill will serve to promote opportunities for the offender to participate in meaningful rehabilitation programs either during their incarceration or following release from prison. States and territories have advised that a sentence of two years or more is required in order to provide sufficient time for an offender to participate in a robust rehabilitation program. These measures will ensure judges retain broad capacity to tailor sentences that foster rehabilitation. The totality of measures in the Bill, including the new minimum sentences and the sentencing factors related to rehabilitation to which a court must have regard, is designed to ensure that child sex offenders should no longer be released back into the community without rehabilitation—thereby promoting the best outcomes for community safety.

Mandatory minimum penalties and increased maximum penalties

73. In debate on the 2017 Bill, the Australian Labor Party argued that the Government should increase penalties for child sex offences rather than impose minimum penalties. There is no doubt that increased maximum penalties give a strong message to the community that child sexual abuse is totally unacceptable. For this reason Schedule 5 of the Bill proposes a graduated range of increased penalties for the most serious child sex offences. However, given that recent sentences for Commonwealth child sex offences have too often been inadequate and very rarely approach the maximum penalties currently available, increased penalties alone are

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[4] Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, viewed on 24 September 2019, at www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealth OffencesInfringementNoticesandEnforcementPowers.aspx, page 37.
[5] *Markarian v The Queen* [2005] HCA 25 at [30].
[6] *Magaming v The Queen* [2013] HCA 40 at [48].

not sufficient, but should be complemented by the imposition of minimum penalties. In this way the Bill proposes a fitting and comprehensive response to these serious crimes.

Mandatory minimum penalties and conviction rates

74. In her submission to the Committee's inquiry into the 2017 Bill, Associate Professor Lorana Bartels raised concerns that an unintended consequence of mandatory sentencing is that fewer convictions may be made because '[…] juries may be unwilling to convict, knowing the minimum sentence; that is, they may be unwilling to be a party to a guaranteed outcome' (at pp 1−2).

75. By way of response to these comments, it should first be noted that the measures in the Bill are not concerned with conviction, which requires the prosecution to establish beyond reasonable doubt that the accused committed an offence. The measures in Schedule 6 of the Bill are instead clearly focussed on sentencing. The Government is not aware of any evidence that juries or judges are less likely to convict child sex offenders based on the length of sentence that may be imposed.

76. Under the measures proposed in Schedule 6 of the Bill, courts will retain discretion to set the custodial period for each offender. The Bill provides for the court to grant additional discounts to the mandatory penalties if it is appropriate to do so for early guilty pleas and/or assistance to law enforcement, while considering all the relevant sentencing factors available in the Crimes Act and considering the principle of totality (which requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved). The distinct flexibility built into the proposed mandatory minimum penalties will ameliorate any potential risk that juries may be unlikely to convict child sex offenders after the measures in Schedule 6 have entered into force.

Mandatory minimum penalties and young people

77. In its submission to the Committee's inquiry on the 2017 Bill, the Law Council of Australia raised concerns about the potential for the proposed amendments to inadvertently capture certain conduct of young people that would attract penalties that were unjust and too harsh (at pp 12-13). This could include courts handing down mandatory minimum penalties for consensual activities between individuals in a relationship where one was over 18 and the other was underage for the purpose of the relevant offence.

78. Commonwealth law respects the right of young people over the age of 16 to make their own decisions about sex, while ensuring that young offenders can be prosecuted where their actions seek to exploit or harm children. The Commonwealth Attorney-General's written consent must be sought in order to commence a prosecution against a person under the age of 18 for an existing Commonwealth offence relating to child abuse material. The Attorney-General will only provide consent to prosecute a minor for the most serious and exploitative offending against children. Further, under the *Prosecution Policy of the Commonwealth*, the CDPP may only commence a prosecution where it is in the public interest to do so. It is not foreseeable that young people consensually exchanging messages (such as 'sexting') would be prosecuted for child sex offences. The Government is not aware that young people are being prosecuted for Commonwealth child sex offences for conduct between 'sweethearts' and it is not intended that the offences in the Bill should target this behaviour.

79. The Bill provides that mandatory minimum penalties will not apply to offenders where the relevant offence was committed while they were under the age of 18. This ensures that only people over 18, whom the law treats as adults, are subject to these serious penalties.

80. The offences introduced by the Bill target serious child sex offenders who are trying to make it easier to engage in sexual activity with a child under the age of 16. These offences balance the need to protect vulnerable persons with the need to respect the right of young people, over 16, to make their own decisions about sex. The Government will monitor the operation of these offences to ensure they effectively protect children.

Mandatory minimum sentences and child abuse material offences

81. In its submission to the Committee's inquiry into the 2017 Bill, Anti-Slavery Australia submitted that '[T]he introduction of a mandatory minimum custodial sentence will not reflect the spectrum of child abuse material offending' (at p 10).

82. With respect, the Bill does not introduce any mandatory custodial period, but introduces minimum head sentences. Judges will retain discretion to set the minimum custodial period. Further, the Bill reflects an appropriate delineation of offending by separating the Commonwealth child sex offences into two separate groups of offences, one that will attract a mandatory minimum sentence in the first instance and one group that will attract a mandatory sentence only where an offender is a repeat offender. Accessing child abuse material is not a first strike offence in the Bill, so this offence will only incur a mandatory minimum sentence where an offender has previously been convicted of a relevant child sexual offence.

Mandatory minimum sentences and offenders' cooperation with law enforcement / early guilty plea

83. In its submission to the Committee's inquiry into the 2017 Bill, Anti-Slavery Australia submitted that '[M]andatory minimum custodial sentences may reduce the incentive for defendants to assist police in ongoing investigations. This may be particularly damaging to police investigations concerning online child exploitation, as defendants have no incentive to voluntarily provide passwords to encrypted devices and systems' (at p 11). Associate Professor Lorana Bartels also raised concern in her submission to the Committee that an accused facing a mandatory minimum sentence may be less likely to cooperate with police or enter an early guilty plea, '[…] thereby increasing workloads, delays, costs, and adverse experiences for victims' (at pp 1–2).

84. The proposed model of minimum sentences comprises opportunities for discounted sentences that will significantly lessen the risks that an accused will be less cooperative with law enforcement and less likely to offer a guilty plea. Under the proposed amendments in Schedule 6 of the Bill, judges are accorded the discretion to reduce a mandatory minimum sentence by up to 25 per cent of the duration of the sentence to reflect either an offender's early guilty plea or an offender's cooperation with law enforcement or, where both of these factors are present, a discount of up to 50 per cent off the duration of the sentence.

Schedule 7 – Presumption against bail

Presumption against bail

85. The Bill will introduce a presumption against bail, which is designed to protect the community from the potential risks posed by individuals who are accused of the most serious child sex offences while they await trial or convicted child sex offenders awaiting sentencing. The presumption will apply in two instances—where a person is charged with a 'first strike' offence (under proposed section 16AAA of the Crimes Act, in

Schedule 6), and where a person is a repeat offender and subject to the 'second or subsequent' mandatory minimum penalties (under proposed section 16AAB of the Crimes Act, in Schedule 6).

86. In its submission to the Committee's inquiry into the 2017 Bill, the Law Council of Australia argued that the inclusion of the presumption against bail within the Bill is 'inconsistent with the presumption of innocence' (at p 15). In their Additional Comments, the Australian Greens concurred with this view (at para 1.7).

87. The presumption against bail in the Bill is reasonable and proportionate as it applies only to the most serious child sex offences or where an offender would be facing a mandatory minimum penalty because they have been convicted of previous child sex offence. The presumption is rebuttable and allows for judicial discretion in determining whether the risk to the community of a person being released on bail can be mitigated through appropriate bail conditions.

88. The Bill sets out a non-exhaustive range of factors that the court may consider in determining bail for child sex offences. These factors include, for example whether the bail authority considers that the person would be likely to commit further offences, intimidate witnesses or destroy evidence.

89. The presumption against bail will apply to individuals who are accused of the most serious child sex offences while they await trial or convicted child sex offenders awaiting sentencing. This includes people who are under the age of 18. This is appropriate as the presumption only applies to the most serious Commonwealth child sex offences and to recidivist offenders. The Bill also requires the bail authority to consider the impact a refusal of bail would have on someone who is aged under 18 years.

90. It should also be noted that where minors are able to be charged for first-time offending, the criminal justice system has effective safeguards in place. Firstly, most child sex offences require the Attorney-General's consent to prosecute where the accused was a minor at the time of the offending. Secondly, police and prosecutors retain discretion to pursue an investigation or pursue a prosecution and must ensure that any prosecution is in the public interest.

91. *Case study 5: further illustrating the need for the presumption against bail*

DPP (Cth) v Watson [2016] VSCA 73

Facts: The offending took place over a period of almost three years and attracted 27 charges in relation to 71 child victims. The offender used fake social media accounts to make contact with the victims, procured child pornography from 43 of those victims, solicited child pornography from 10 victims and harassed a further 18 victims in an effort to obtain child pornography from them. He continued to offend in the same manner while on bail, creating further fictitious accounts to contact his victims, demanding the victims provide him with images and videos of sexually explicit material, and threatening to report the victims to police if they refused.

Schedule 8 – Matters court has regard to when passing sentence etc.

92. Section 16A of the Crimes Act currently provides sentencing factors that the court must consider when determining a sentence that is of a severity appropriate in all the circumstances of the offence. The sentencing factors the court must take into account include the nature and circumstance of the offence, personal circumstances of the victim, the degree of contrition of the offender, the deterrent effect on other persons as well as on the person, the need to ensure the person is adequately punished and the prospects of rehabilitation.

93. The Bill proposes to include two new sentencing factors that will apply to all federal offences: the timing and overall benefit of a guilty plea; and a person's standing in the community as an aggravating factor. The Bill also introduces one factor that will relate solely to child sex offenders, the objective of rehabilitation.

Guilty plea – timing and benefit to the community

94. The Crimes Act currently provides that the court must have regard to the fact that the person has pleaded guilty. The Bill inserts a requirement that the court must consider the timing of a guilty plea and the degree to which the guilty plea and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence. This is consistent with the approach taken in the states and territories.

Good community standing

95. The Bill provides that if a person has used their good community standing in the commission of the offence then this will be regarded as an aggravating factor on sentencing. For example, a respected community figure, such as a business or religious leader, who gains the trust of a child and their family, could exploit that trust in order to sexually abuse the child. This principle will also apply to other federal offences – for example, where a company director uses their position to facilitate the commission of a fraud offence.

96. When the Committee considered the 2017 Bill, it commented that '[…] the Committee sees some merit to tightening the measure relating to a "person's standing in the community" being restricted to child sex offences; the Commonwealth may wish to consider whether this is an appropriate amendment, or whether it should also apply to sex offences committed on adults' (at para 2.100). The Law Council of Australia, however, argued in its submission that '[T]he 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' (at page 20). Recommendation 74 of the *Final Report* of the Royal Commission provides that '[A]ll state and territory governments (other than New South Wales and South Australia) should introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending, similar to that applying in New South Wales and South Australia'. AGD and the Department of Home Affairs note these positions, and submit that if an offender is abusing their position in the community in order to commit any offence, that behaviour should be an aggravating consideration for the court.

Rehabilitation

97. In addition to the general sentencing factors, this Bill will introduce a requirement for courts to have regard to the objective of rehabilitation when determining the sentence to be passed or order to be made. Courts will need to consider whether it is appropriate to make orders that include conditions relating to rehabilitation or treatment options. Courts will also need to consider whether the sentence or custodial period provides sufficient time for the offender to undertake rehabilitation, noting that programs are available both in custody and in the community.

98. In its submission to the Committee's inquiry into the 2017 Bill, the Law Council of Australia argued that this sentencing consideration should be removed from the Bill, as '[…] it is not clear how a court would practically be able to comply with the new requirement unless it conducts inquiries into rehabilitation options for a particular offender' (at p 21). Further, the Law Council was concerned that there were currently not enough rehabilitation places, including places for juvenile offenders, due to resourcing constraints and proposed that this may impact on the ability of this measure to be effectively implemented and result in disproportionate sentences (at p 21).

99. Rehabilitation is a critical aspect of offenders' successful reintegration into the community and lessens the risk of further offending. As federal offenders are held in state and territory prisons, the availability of rehabilitation programs is a matter for the states and territories. Accordingly, it is the responsibility of states and territories to ensure that there is sufficient access to those programs.

100. The Explanatory Memorandum provides that 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, though defence counsel are likely to consider such options in the preparation of their brief and offer these options to the court for the court's consideration.

Schedule 9 – Additional sentencing factors for certain offences

101. Schedule 9 of the Bill sets out factors courts must have regard to when sentencing a person for Commonwealth child sexual abuse offences relating to the use of a carriage service or postal service for the purpose of engaging in sexual activity with a person under 16 years of age, and offences relating to the sexual abuse of children overseas. This includes new aggravating factors concerning whether the victim is under the age of 10 years, the number of people involved in the criminal act, and the age and maturity of the victim or intended victim.

Schedule 10 – Cumulative sentences

102. The Bill introduces a presumption in favour of cumulative sentencing which will require that, when sentencing an offender for a Commonwealth child sex offence, a court must not make an order that has the effect that a term of imprisonment for that offence would be served partly cumulatively, or concurrently, with an uncompleted term of imprisonment. The presumption in favour of cumulative sentences 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.

103. In its submission to the Committee's inquiry into the 2017 Bill, the Law Council of Australia asserted that the presumption in favour of cumulative sentencing would lead to unfair and unjust outcomes (at p 17).

104. The objective of the presumption in favour of cumulative sentences 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 an appropriate response to the objective seriousness of the sexual abuse of children.

105. Under the measures in Schedule 10 of the Bill, the court will retain discretion to consider the outcome for all of the offences in totality and, if appropriately satisfied, order the sentence in a different manner, provided that the sentence overall is still of an appropriate severity. In these circumstances, the new measures will require the court to provide reasons for deviating from the presumption in favour of cumulative sentencing.

106. This presumption addresses the fact that current inadequate sentences do not reflect the harm suffered by victims of child sexual abuse. For example, an offender who has groomed six different children over a 12 month period can be sentenced to six concurrent sentences of three years. This does not reflect the harm experienced by each child and the length of the sentence can mean an offender is released in a matter of months after the trial.

Schedule 11 – Conditional release of offenders after conviction

Presumption in favour of an actual term of imprisonment

107. Currently, child sex offenders who are sentenced to three years or less imprisonment are sentenced to recognizance release orders. This means that they are released into the community immediately or after serving a period of imprisonment. Many such offenders receive wholly suspended sentences, meaning they are immediately released without serving any period of time in custody, and often without any supervision conditions. To address the risk to community safety that arises as a result, Schedule 11 of the Bill introduces a presumption in favour of an actual term of imprisonment.

108. In its submission to the Committee's inquiry into the 2017 Bill, the Law Council of Australia argued:

> '[…] 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' (at p 18).

109. The Law Council argued in favour of suspended sentences, which it submitted could:

- 'be an effective deterrent to recidivism
- protect certain offenders from the 'corrupting influence of prison'
- serve as a symbolic effect, allowing offenders to recognise the seriousness of their offence
- reduce the prison population, and thus reduce overcrowding of prisons
- allow offenders to maintain their links to family and community helping them to avoid reoffending and minimise disruption to their family, accommodation and employment' (at p 18).

110. It is considered that the above position is not in keeping with community expectations. The current high rate of wholly suspended sentences handed to convicted child sex offenders presents a risk to community safety and does not reflect the severity of the often life-long harm inflicted on victims of child sexual abuse. The introduction of a presumption in favour of an actual term of imprisonment as set out in the Bill still provides the courts with enough discretion in setting the pre-release period under a recognizance release order to enable individual circumstances to be taken into account while ensuring that child sex offenders receive sentences that reflect the serious nature of their crimes.

Conditions on making a recognizance release order

111. Schedule 11 will introduce a requirement 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. The conditions that will apply to child sex offenders under new subsection 20(1B) of the Crimes Act 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
- undertake such treatment or rehabilitation programs that the probation officer reasonably directs.

112. In its submission to the Committee's inquiry into the 2017 Bill, the Law Council of Australia proposed that the supervision and rehabilitation conditions should be removed from the Bill as '[T]he 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' (at p 23). In its Report on the 2017 Bill, the Committee commented that '[T]he Government may also wish to consider refining the definition of 'reasonable' directions issued by a parole officer in Schedule 11 of the Bill, so as to assist in the interpretation of the amendments made by the Bill' (at para 2.101).

113. The measures in Schedule 11 of the Bill reflect the importance of rehabilitative justice. Rehabilitation of offenders decreases the likelihood of recidivism and is vital for public and community safety. The supervision of a probation officer is an important and accepted component in the rehabilitation of an offender post release from prison and in the offender's re-integration into the community. The Bill requires that the offender comply with the *reasonable* directions of the probation officer. It is noted that the execution of probation officers' duties is a matter regulated by the states and territories.

Schedule 12 – Additional sentencing alternatives

114. Rehabilitation is a critical aspect of successful reintegration into the community and lessens the risk of further offending. In addition to the general sentencing factors, this Bill will require courts to have regard to the objective of rehabilitating the offender when sentencing persons who commit Commonwealth child sex offences. This will involve consideration, to the extent that it is appropriate for the court to do so, of the imposition of conditions relating to rehabilitation or treatment options.

115. Schedule 12 amends the list of sentencing alternatives in subsection 20AB(1AA) of the Crimes Act to include 'residential treatment orders'. Subsection 20AB(1AA) empowers courts to make certain alternative sentencing orders that are available under state or territory law. This measure in the Bill 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, including intellectually disabled offenders who are assessed as unsuitable for either incarceration or release into the community.

Schedule 13 – Revocation of parole order of licence

116. Currently, offenders released into the community on parole or licence who reoffend have their parole order or licence revoked automatically at the time they are sentenced for a new offence. In such cases, the person is liable to serve that part of the sentence that was outstanding at the time of their release, but are given credit for 'clean street time'. Clean street time includes the time between reoffending and sentencing for the new offence (often a period of many years).

117. The Bill introduces a federal 'clean street time' policy which links revocation of a parole order or licence to the date on which any new offence is committed. For example, if an offender who has been released on parole or licence commits an offence before the expiry of the parole or licence term, the applicable 'clean street time' for which the offender may be credited will only include time from the date on which the offender was released on parole or licence until the date on which the offender committed the new offence. So if it takes two years after the date on which the offender commits an offence before the offender is sentenced, the two years between the commission of the offence and the sentencing hearing will no longer be counted as 'clean street time'. This will ensure that a person is only given credit for the time they were actually of good behaviour and will also ensure that the consequences of breaching parole or licence are adequately reflected in sentencing.

118. In its submission to the Committee on the 2017 Bill, the Law Council of Australia noted it did not think this measure raised concerns, '[…] given a court has to retain discretion to deduct clean street time' (at p 28).

Schedule 14 – Definitions

119. Schedule 14 will insert the following new definitions in subsection 3(1) of the Crimes Act.

a. The definition of 'child sexual abuse offence' is relevant to the mechanics of the mandatory minimum sentences in Schedule 6 and the presumption against bail in Schedule 7. This measure will ensure that repealed offences at a Commonwealth level are also captured as part of previous offences.

b. The definition of 'Commonwealth child sexual abuse offence' will capture the offences which are subject to the mandatory minimum penalties under proposed paragraph 16AAB(1)(a) in Schedule 6 (second or subsequent offence).

c. The new definition of 'State or Territory registrable child sex offence' is intended to capture state and territory registrable child sex offences as a 'previous offence' for the purposes of the mandatory minimum penalties (Schedule 6), the presumption against bail (Schedule 7) and cumulative sentencing (Schedule 10). It is critical that state and territory child sexual abuse offences be captured to ensure that repeat offenders are treated consistently in applying the Commonwealth measures, whether or not their first offence was a state, territory or Commonwealth child sex offence. The definition will include any offence where a person becomes, or may at any time have become, a person whose name is entered on a child protection offender register (however described) of a state or territory for committing a child sex offence.

Annexure A: Differences between the 2017 Bill and the Bill

1. The Bill introduces the new third party grooming offences listed in Schedule 4 of the Bill, at sections 272.15A, 471.25A and 474.27AA of the Criminal Code.

2. The Bill increases maximum penalties for the offences at the following sections of the Criminal Code: 272.8(1), 272.8(2), 272.9(1), 272.9(2), 272.10(1), 272.11(1), 272.15(1), 272.18(1), 272.19(1), 273.7(1), 471.22(1), 474.25A(1), 474.25A(2), and 474.25B(1).

3. The Bill increases minimum penalties for the offences at the following sections of the Criminal Code: 272.8(1), 272.8(2), 272.10(1), 272.11(1), 272.18(1), 272.19(1), 273.7(1), 471.22(1), 474.24A(1) and 474.25B(1).

4. Not included in the Bill is Schedule 13 of the 2017 Bill, which would have amended the Crimes Act to maintain the security of reports, documents and information from being disclosed to a person in relation to a parole decision under Part 1B of the Crimes Act where its provision is, in the opinion of the Attorney-General, likely to prejudice national security. Schedule 13 was intended to provide greater transparency and clarity to the parole decision-making process. Having considered issues raised by the Senate Scrutiny of Bills Committee and the Parliamentary Joint Committee on Human Rights about Schedule 13, the amendments are not included in the Bill. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) already permits a general restriction on the release of information in the course of administrative decision making (where the Attorney-General certifies that the disclosure of information would be contrary to the public interest, including where disclosure would be prejudicial to the security, defence or international relations of Australia). The absence in the Bill of the measures that constituted Schedule 13 of the 2017 Bill will not prevent the Attorney-General from exercising the functions referred to above under the ADJR Act.

5. The Bill does not include measures in the 2017 Bill amending the definition of 'child abuse material'. These measures are addressed through the *Combatting Child Sexual Exploitation Legislation Amendment Act 2019* (CCSE Act), which received the Royal Assent on 20 September 2019.

6. The Bill contains technical amendments which were not in the 2017 Bill. These measures are contingent on the commencement of the CCSE Act and are designed to ensure consistency between the Bill and the CCSE Act by:

    a. applying mandatory minimum sentences in certain circumstances to two new offences in the CCSE Act, namely the offence of 'possession of child-like sex dolls' and the offence of 'possession or control of child abuse material obtained or accessed using a carriage service', to ensure that these new offences include sentences that are consistent with sentences in the Bill for comparable offences

    b. providing that references to the new offence of 'possession or control of child abuse material obtained or accessed using a carriage service' in the CCSE Act will be incorporated into offences created by the Bill, where appropriate.

7. The Bill contains a technical amendment that is contingent on the commencement of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, which is currently before the Parliament. This measure will amend the Crimes Act to improve the readability of measures relating to entering reasons in court records where the court grants bail.

8. A minor technical amendment in the Bill will clarify the fault elements relating to the proposed new third-party grooming offences in the Bill, to improve readability.

9. The 2017 Bill included a measure to increase the maximum penalty for offences committed by internet service providers that fail to report child abuse material to the Australian Federal Police when the service provider becomes aware that the service provided can be used to access child abuse material. This amendment is not included in the Bill because the penalty for section 474.25 of the Criminal Code was recently increased from 100 penalty units to 800 penalty units in the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019*.

Annexure B: Summary of the Bill

The *Crimes Act 1914* will be amended by:

- Amending the vulnerable witness protection measures to remove the requirement to seek leave for the use of pre-recorded interviews and to prevent children and other vulnerable witnesses from being cross-examined at a committal proceeding.
- Introducing a presumption against bail for certain Commonwealth child sexual offences.
- Including additional factors which must be taken into account when sentencing federal offenders to ensure they are appropriate given the nature of the offending.
- Creating a presumption in favour of an actual term of imprisonment.
- Requiring that a court, when making a recognizance release order for a child sexual offender, must set supervision conditions, and must set rehabilitation treatment conditions unless inappropriate.
- Including a presumption in favour of cumulative sentences.
- Adding 'residential treatment orders' as an additional sentencing alternative.
- Reducing the amount of 'clean street time' that can be credited by a court as time served against the outstanding sentence following commission of a further offence by a person on parole or licence.
- Listing community safety as a factor that can be taken into account to revoke a federal offender's parole without notice.
- Requiring a period of time to be served in custody if their parole order is revoked.
- Introducing mandatory sentencing for certain Commonwealth child sex offences and repeat offenders.

The *Criminal Code 1995* will be amended by:

- Increasing maximum penalties for certain offences.
- Adding an offence of providing electronic services to facilitate dealings with child abuse material.
- Adding an offence of 'grooming' third parties using the post, a carriage service or outside Australia to procure children for sexual activity.
- Clarifying that live-streamed child abuse is captured in existing Criminal Code offences.
- Including additional 'aggravating factors' for engaging in sexual activity with a child for Divisions 272 and 474.
- Including additional aggravating sentencing factors that apply to relevant offences when the child victim is under the age of 10, or when multiple persons are present, at the time of offending.

Information concerning the commencement of the measures in the Bill is set out in Clause 2 of the Bill.