Law Council
OF AUSTRALIA

*Office of the President*

**1 November 2019**

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Chair

**Supplementary Submission: Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 [Provisions]**

On 29 October 2019, the Law Council appeared before the Senate Standing Committee on Legal and Constitutional Affairs (**the Committee**) as part of its inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (**the Bill**).

This supplementary submission addresses several issues that were raised during the evidence given by the Law Council before the Committee. These matters are addressed in turn below.

*Further resources to assist the Committee*

In the course of giving evidence, the Committee was directed to an interview conducted with the Chief Justice of the County Court of Victoria, Justice Peter Kidd SC, discussing the issue of mandatory sentencing. It was suggested that the interview conducted may be of some assistance to the Committee and the Law Council undertook to provide the link to the interview which is referenced below.[1]

It was further raised that the Committee may be assisted by referring to a relevant book which details the implications of mandatory sentencing following analysis of its impact in the United States.[2]

*Rates of Recidivism*

In the course of the public hearing, Senator Chandler asked the following question:

> *What's your understanding of the reoffending rates among child sex offenders?*

[1] See 3AW Radio , *Rare interview: Judge speaks out against mandatory sentencing* (13 June 2018) <https://www.3aw.com.au/rare-interview-chief-judge-speaks-out-against-mandatory-sentencing/>, and ABC Radio '*Chief County Court Judge criticises "denigrating" media coverage of court appeal*' (22 May 2018) <https://www.abc.net.au/radio/melbourne/programs/mornings/peter-kidd/9786720>.
[2] Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Sage Publications 16 October 2003).

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In terms of recidivism, the Law Council notes that the *Criminal Justice Report* of the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) found that:

> *Studies suggest that the rate of repeat offending (of the same type of offence) for convicted child sex offenders is low – generally at about 13 per cent…The Sentencing Research indicates that low reporting rates, high rates of attrition and the substantial delays in the reporting of child sexual abuse offences mean that the estimated rate of repeat offending that emerges from these studies is a 'reasonable, if conservative' estimate of sex offender recidivism. (Note that these studies only count offenders who, after an initial conviction for one or more child sexual abuse offences, go on to commit further child sexual abuse offences for which they are tried and convicted. They do not count offenders who commit many offences before they are convicted or offenders who are not convicted for subsequent offences.)*[3]

*Research into sentencing by the Royal Commission*

A further issue raised by Senator Carr was in relation to whether there was research conducted by the Royal Commission in relation to sentencing practices.

The Law Council notes that the Royal Commission did conduct limited research in relation to the current sentencing practises throughout Australia for child sexual offences. This is included in the *Criminal Justice Report* [4] where it was stated:

> *The Royal Commission commissioned research on sentencing in matters of child sexual abuse, with a focus on institutional child sexual abuse. The objective of the research was to examine the factors that inform sentencing policy and judicial decision-making when sentencing institutional child sexual abuse.*[5]

The Royal Commission made no specific recommendations in relation to the sentencing of commonwealth child sex offenders. This is to be understood in the context that offences of child sexual assault occurring in an institutional setting is often subject to state and territory legislation.

However, the Law Council considers that some of the recommendations made by the Royal Commission may be relevant in relation to sentencing commonwealth child sex offences. Specifically, the Law Council considers that it is significant that the Royal Commission did not identify a need to recommend the introduction of mandatory minimum sentences of imprisonment in any Australian jurisdiction.

The ultimate recommendations of the Royal Commission in relation to sentencing were as follows:

> *Excluding good character as a mitigating factor*
>
> *All 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*

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts VII – X, 274.
[4] Ibid, *Criminal Justice Report,* Parts VII - X, 272-294.
[5] Ibid, p 273.

*character facilitated the offending, similar to that applying in New South Wales and South Australia.*[6]

*Cumulative and concurrent sentencing*

*State and territory governments should introduce legislation to require sentencing courts, when setting a sentence in relation to child sexual abuse offences involving multiple discrete episodes of offending and/or where there are multiple victims, to indicate the sentence that would have been imposed for each offence had separate sentences been imposed.*[7]

*Sentencing standards in historical cases*

*State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.*[8]

*Victim impact statements*

*State and territory governments, in consultation with their respective Directors of Public Prosecutions, should improve the information provided to victims and survivors of child sexual abuse offences to:*

a. *give them a better understanding of the role of the victim impact statement in the sentencing process*
b. *b. better prepare them for making a victim impact statement, including in relation to understanding the sort of content that may result in objection being taken to the statement or parts of it.*[9]

*State and territory governments should ensure that, as far as reasonably practicable, special measures to assist victims of child sexual abuse offences to give evidence in prosecutions are available for victims when they give a victim impact statement, if they wish to use them.*[10]

*Sections 20BS and 20BY of the Crimes Act*

During the Law Council's evidence, a question was put by the Chair of the Committee, Senator Stoker in relation to the operation of sections 20BS and 20BY of the *Crimes Act 1914* (Cth) (**Crimes Act**) as follows:

> *How do you see those two provisions operating in circumstances where the submission of the Law Council is people who are suffering from these types of impairments need to be treated differently at the time of imposition of sentence?*

The Law Council considers that sections 20BS and 20BY are precluded from having any application to people convicted of offences listed in proposed sections 16AAA and 16AAB of the Bill. In order to provide some certainty around the interaction of these provisions so as to allow courts to apply the sentencing alternatives for people suffering from a mental illness or intellectual disability contained within Division 9 of the Crimes Act, including

[6] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017), Rec 74.
[7] Ibid, Rec 75.
[8] Ibid, Rec 76.
[9] Ibid, Rec 77.
[10] Ibid, Rec 78.

sections 20BS and 20BY, proposed section 16AAC should clearly state people suffering significant mental conditions are included in the list of specific exclusions to the mandatory sentencing provisions.

Under proposed section 16AAA, the section states that 'subject to section 16AAC' if a person is convicted of an offence listed in the table referred to in the section, 'the court must impose a sentence of imprisonment of at least the period specified in column 2 of that item'. Similarly, in proposed subsection 16AAB(2), the subsection states that 'subject to section 16AAC', if a person is convicted of one of the listed offences, the court 'must impose for the current offence' the head sentence specified in proposed subsection 16AAB(2).

The Law Council considers that unless people with cognitive impairment and mental illness are specifically included in the list of 'exclusions' in proposed section 16AAC (which at present is limited to a person who was under 18 years of age at the time the offence was committed) then neither sections 20BS or 20BY will operate where a person is convicted of an offence listed in proposed sections 16AAA or 16AAB.

The exclusion of the operation of these diversionary provisions for people suffering from significant mental conditions serves to highlight the injustice that can be caused by the proposed mandatory sentencing provisions contained in Schedule 6 of the Bill.

Where the mental condition or illness of an offender is raised in mitigation during sentence proceedings, the court should be free to place appropriate weight on this and other factors as required when determining the appropriate sentence, including whether to impose a full-time custodial sentence.

It is a well-established legal principle that an offender's mental condition can have the effect of reducing a person's moral culpability and the purposes of sentencing such as general deterrence, retribution and denunciation have less weight that for an offender who does not suffer from such a mental condition.[11] This is especially so where the mental condition contributes to the commission of the offence in a material way.[12]

The Law Council considers it is important to retain judicial discretion in the sentencing exercise. As stated by Gleeson CJ in *R v Engert*:[13]

> *In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.*[14]

In relation to section 20BS, which provides for the imposition of a 'hospital order', the Law Council considers this provision is restrictive in its application. Even if the application of this section was available, it is limited to a 'person suffering from a mental illness within the meaning of the civil law of a State and Territory' who has been convicted on indictment of a federal offence. Further, before it can be invoked the court needs to be satisfied that:

a) the illness contributed to the commission of the offence by the person; and
b) appropriate treatment for the person is available in a hospital in a State or Territory; and

[11] See *Muldrock v The Queen* (2011) 244 CLR 120 at [53]; *R v Israil* [2002] NSWCCA 255 at [23] and *R v Henry* (1999) 46 NSWLR 346 at [354].
[12] *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177].
[13] *R v Engert* (1995) 84 A Crim R 67.
[14] Ibid, per Gleeson CJ at [68].

c) the proposed treatment cannot be provided to the person other than as an inmate of a hospital within a State or Territory; and
d) that but for the mental illness of the person the court would have sentenced the person to a term of imprisonment.

The Law Council considers that this places a high threshold before a person can be diverted from the potential imposition of a mandatory minimum sentence of imprisonment as contained with Schedule 6 of the Bill. There are likely to be a significant number of people who are not so acutely unwell at the time of sentencing that they require hospitalisation, and therefore while still mentally ill, would not come within the ambit of section 20BS.[15]

In relation to section 20BY the Law Council notes the section permits the court, without passing sentence, to order a person be released on condition that a person undertake the program or treatment specified in the order. However, the court can only do this where the court is satisfied that:

a) the person is suffering from an intellectual disability; and
b) the disability contributed to the commission of the offence by the person; and
c) an appropriate education program or treatment is available for the person in that State or Territory.

The Law Council considers that where a person cannot establish to the satisfaction of the court the existence of an 'appropriate education program or treatment' that the person should not, as a result, then be subject to a mandatory prison sentence. The Law Council also considers that additional resources should be allocated to the States and Territories to ensure that in fact there is 'appropriate education or treatment' available for the court to be able to utilise section 20BY.

The Law Council considers that if the intention of the Government is that courts be able to apply the sentencing alternatives for people suffering from a significant mental illness or any intellectual disability contained within Division 9 of the Crimes Act, people with these conditions should be specified in proposed section 16AAC. However, it is important to emphasise that the Law Council considers that people who suffer from cognitive impairment and significant mental illness should be exempt from the application of proposed sections 16AAA and 16AAB, irrespective of whether the court decides to utilise the provisions contained within Division 9 of the Crimes Act, including sections 20BS and 20BY.

*Sentencing cases*

During the public hearing, the Chair of the Committee, Senator Stoker, referred a number of cases to the Law Council to consider on notice relating to the sentencing of commonwealth child sex offenders.[16] Having had a brief opportunity to consider each of the cases, the Law Council suggests that the proposed mandatory sentencing provisions in section 16AAA and 16AAB may not have applied in these matters, with the exception of *DPP v Bloomfield* [2013] VCC 1509, where the sentencing Judge imposed a head sentence within the range suggested by the prosecution (between 4 and 5 years).

[15] The Law Council notes that subsection 20BS(5) further requires the court to 'obtain and consider the the reports of 2 duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness' in order to be satisfied of the matters contained in subsection 20BS(1).
[16] *R v Michel Nahlous* [2013] NSWCCA 90 (18 April 2013); *R v Hutchinson* [2018] NSWCCA 152 (15 August 2018); *McNiece v The Queen* [2019] VSCA 78 (10 April 2019); *DPP v Bloomfield* [2013] VCC 1509 (15 October 2013); *DPP v Aumann* [2014] VCC 2299 (31 March 2014).

The Law Council again reiterates the view that the judiciary is best equipped to consider the circumstances of each particular case, and that mandatory minimum sentencing does not account for the potential factual issues which arise on a case-by-case basis.

We thank you once again for the opportunity to provide this supplementary submission to the Committee. If you have any further inquiries, please contact Dr Natasha Molt, Director of Policy,

Yours sincerely

**Arthur Moses SC**
**President**