

The Senate

Legal and Constitutional Affairs
Legislation Committee

Combatting Child Sexual Exploitation
Legislation Amendment Bill 2019 [Provisions]

March 2019

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Chapter 1

Introduction

1.1 On 14 February 2019, the Senate referred the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 22 March 2019.

Conduct of the inquiry

1.2 Details of the inquiry were advertised on the committee's website. The committee received 13 submissions. These are listed on the committee's website and in Appendix 1.

Objectives of the bill

1.3 The bill seeks to protect children from sexual exploitation by improving the Commonwealth framework of offences relating to child pornography material, child abuse material, overseas child sexual abuse, forced marriage, failing to report child sexual abuse and failing to protect children from such abuse.¹

1.4 To achieve this, the bill would implement a number of recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the royal commission) by:

- creating an offence of failure to protect a child at risk of a child sexual abuse offence
- creating an offence of failure to report a child sexual abuse offence, and
- strengthening overseas persistent child sexual abuse laws.²

1.5 The proposed suite of measures would also target child exploitation occurring in Australia and overseas and enhance investigation and prosecution outcomes at the Commonwealth level. The measures:

- criminalise the possession or control of child pornography material or child abuse material in the form of data that has been obtained or accessed using a carriage service
- prevent certain dealings with child-like sex dolls
- criminalise the possession of child-like sex dolls
- improve the definition of forced marriage, and

1 *Journals of the Senate*, 14 February 2019, p. 4669.

2 Explanatory Memorandum, p. 2.

- restrict the defence based on a valid and genuine marriage to overseas child sex offences.³

1.6 The bill would amend the *Criminal Code Act 1995*, the *Customs Act 1901*, the *Crimes Act 1914*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979* to achieve its objectives.

Key provisions of the bill

1.7 The bill is comprised of six schedules. The key provisions of these are set out below.

Schedule 1—Failure to protect children from, or report, child sexual abuse offences

1.8 Schedule 1 seeks to amend the *Crimes Act 1914* and *Criminal Code Act 1995*.

1.9 Provisions in this schedule would act on the Royal Commission's *Criminal Justice Report* recommendation 36, which urges state and territory governments to create a criminal offence of failing to protect a child who is in an institution from sexual abuse by an adult associated with the institution.

1.10 The bill recognises that the Commonwealth similarly has a responsibility to create such an offence, as Commonwealth government representatives work with children in various capacities. The bill would therefore introduce a new offence for Commonwealth officers who negligently fail to reduce or remove the risk of sexual abuse of children under their care, supervision or authority.⁴

1.11 The schedule also seeks to act on recommendation 33 of the Royal Commission's *Criminal Justice Report*, which urges state and territory governments to introduce a criminal offence for failing to report the sexual abuse of children. As with recommendation 36, the bill recognises that Commonwealth officers should be legally required to report child sexual abuse to the police and should be subject to criminal sanctions for failing to do so.⁵

1.12 Under the proposed offence, Commonwealth officers with caring or supervision responsibilities for children would be guilty of an offence if they know of, but fail to disclose, information 'that would lead a reasonable person to believe or suspect that another person has or will engage in conduct in relation to a child that constitutes child sexual abuse.'⁶ Such information would have to be disclosed as soon as practicable to the Australian Federal Police or a police force or service of a state or territory.⁷

3 Explanatory Memorandum, p. 2.

4 Explanatory Memorandum, p. 2.

5 Explanatory Memorandum, p. 3.

6 Explanatory Memorandum, p. 3.

7 Explanatory Memorandum, p. 3.

Schedule 2—Preventing certain dealings with child-like sex dolls

1.13 Schedule 2 of the bill would expand the definition of 'child pornography material' in the *Criminal Code Act* and 'child pornography' in the *Customs Act*. This is due to the existence of child-like sex dolls, an emerging form of child pornography. The proposed amendments would clarify that child-like sex dolls represent a form of child pornography and would clearly criminalise this new form of child abuse material, providing certainty to border officials who are responsible for detecting child pornography.⁸

1.14 Schedule 2 would also allow prosecutions to be carried out consistently across jurisdictional borders.⁹

Schedule 3—Possession or control of child pornography material and child abuse material that has been sourced using a carriage service

1.15 The bill seeks to introduce new offences under the *Criminal Code Act* for the possession of 'child abuse material' and 'child pornography material' stored on a computer, in a data storage device, or obtained or accessed through a carriage service, such as the internet. While existing criminal offences prohibit dealings in child abuse and child pornography material with intention to deal with it over a carriage service, the proposed amendments would criminalise the act of possessing such material in itself. This means possession without the requirement that the material be dealt with through a carriage service would be criminalised.¹⁰

Schedule 4—Strengthening overseas persistent child sexual abuse laws

1.16 The Royal Commission noted evidence that the most extensive cases of repeated, regular sexual abuse of children overseas may currently be the hardest to prosecute. This is due to a known phenomenon, whereby victims of ongoing child sexual abuse commonly find it difficult to distinguish specific instances. This, the explanatory memorandum explains, may particularly be the case where the abuse takes the same or a similar form each time, where it occurs regularly, and/or where the victim is very young.¹¹

1.17 Schedule 4 seeks to strengthen existing laws pertaining to overseas persistent child sexual abuse in order to address these difficulties, and responds to recommendations 21 and 22 of the Royal Commission.

1.18 Currently, criminalised persistent child sexual abuse overseas requires at least three underlying occasions of abuse overseas, which may have taken place over any period of time and with jury agreement required for each of the three occasions. The offence can result in a maximum penalty of 25 years of imprisonment.¹²

8 Explanatory Memorandum, p. 3.

9 Explanatory Memorandum, p. 4.

10 Explanatory Memorandum, p. 4.

11 Explanatory Memorandum, pp. 4–5.

12 Explanatory Memorandum, p. 4.

1.19 The bill would lower the minimum number of underlying occasions of child sexual abuse required to prove the offence from three occasions to two. The requirement for a jury to agree to both occasions would be maintained. This, the explanatory memorandum clarifies, is more compatible with how children who suffer sexual abuse remember repeated and regular abuse. It would reduce the difficulties associated with requiring children to distinguish particular occasions of sexual abuse, and would increase the ability to prosecute such crimes.

Schedule 5—Expanding the definition of forced marriage

1.20 Schedule 5 of the bill would strengthen forced marriage offences and increase protections available to children against this form of exploitation.

1.21 Forced marriage disproportionately affects vulnerable girls and young women both in Australia and globally. Perpetrators are often people who are in a position to exert subtle and prolonged influence, that is, apply familial, cultural and religious pressure. This form of exploitation is most often linked to parents, close relatives and religious and community leaders.¹³

1.22 Currently, a marriage is considered to be forced if it is entered into without consent, which must be full and free, and given without coercion, deception or threat. In practice, this has meant that prosecuting forced marriage offences involving children is difficult:

Operational experience to date has shown that the majority of child victims have, on their own evidence, clearly demonstrated that they understood the nature and effect of the marriage ceremony, which is commonly expressed as resulting in an exclusive commitment for life, a sexual relationship, cohabitation and children. Paired with many victims' reluctance to give evidence against their own family or community members, the offences as currently drafted have made it difficult to prosecute forced marriage offences involving child victims.¹⁴

1.23 To address this, the bill would expand the definition of forced marriage to include all marriages involving children under sixteen. The explanatory memorandum explains that by explicitly criminalising underage marriages, the bill would reduce the need to call on already vulnerable children to give evidence in court.¹⁵

Schedule 6—Restricting the defence to overseas child sex offences based on a valid and genuine marriage

1.24 Travelling overseas to abuse and exploit children is a known practice of Australian offenders. This is most prevalent in overseas jurisdictions which have weak child protection frameworks, and where the offending behaviour is less likely to attract attention and investigation from local authorities.

13 Explanatory Memorandum, p. 5.

14 Explanatory Memorandum, p. 5.

15 Explanatory Memorandum, p. 6.

1.25 Although sexual offences committed by Australians against children under sixteen overseas are already criminalised, a defence exists whereby the prosecution may be avoided if a valid and genuine marriage existed between the defendant and child at the time of the offence. As the explanatory memorandum points out, this is problematic for a host of reasons, including the fact that the legal age of marriage varies across international jurisdictions, with some permitting the marriage of children as young as ten. Similarly, many permit marriages where one party is younger than the minimum legal age in the presence of an order of the court.¹⁶

1.26 The bill would amend the *Criminal Code Act* to narrow the defence available on the basis of marriage between a defendant and a child to ensure that marriage involving children under the age of 16 no longer constitutes a valid defence for otherwise criminal conduct.¹⁷

Scrutiny of Bills Committee

1.27 The Standing Committee for the Scrutiny of Bills had not considered the bill at the time of writing.

Human rights implications

1.28 The explanatory memorandum sets out human rights and freedoms engaged by the bill. These fall under the following conventions to which Australia is a signatory:

- Convention on the Rights of the Child [1991] ATS 4 (CRC)
- International Covenant on Civil and Political Rights [1980] ATS 23 (ICCPR)
- International Covenant on Economic, Social and Cultural Rights [1976] ATS 5 (ICESCR), and
- Convention on the Elimination of All Forms of Discrimination Against Women [1983] ATS 9 (CEDAW).¹⁸

1.29 Interference with human rights occasioned by the bill is, the explanatory memorandum states, in pursuit of the legitimate aim of protecting children from harm and exploitation.¹⁹

Acknowledgements

1.30 The committee thanks submitters for their engagement with this inquiry.

16 Explanatory Memorandum, p. 6.

17 Explanatory Memorandum, p. 6.

18 Explanatory Memorandum, p. 9.

19 Explanatory Memorandum, p. 23.

Chapter 2

Key issues

2.1 The Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the bill) is premised on all children having the unequivocal right to a safe and happy childhood. Any sexual abuse of a child, whether it takes place in an institutional setting or elsewhere, constitutes a gross violation of a child's fundamental rights.

2.2 Submitters supported the objectives and welcomed the introduction of the bill. While some submissions expressed full support for the bill,¹ a number of submitters suggested limited amendments pertaining to some provisions of the bill. Key issues raised in submissions are set out below.

Definition of 'child abuse'

2.3 The Australian Lawyers Alliance (ALA), welcoming the bill's aim of protecting children who are within the care, authority or supervision of the Commonwealth from sexual abuse, called for the provisions of the bill to be extended to include physical and psychological abuse.² The submission explained:

The ALA submits that this can be as traumatic and destructive as sexual abuse and may in many circumstances be difficult to distinguish since it may be a precursor to sexual abuse or may otherwise be associated with sexual abuse.³

2.4 The ALA supported its calls for the definition of abuse to be extended with a paper by ALA spokesperson Dr Andrew Morrison RFD SC. The paper sets out the difficulties associated with confining the availability of a remedy to sexual abuse, particularly where physical abuse precedes sexual abuse:

If, for example, a child is beaten during the course of a rape, it seems at least arguable that the beating forms part of the rape and the limitation period would be extended for the whole occurrence. But what if the child had been repeatedly beaten on previous occasions so as to be coerced into assenting to the sexual abuse? What about the associated psychological trauma? On one view, these matters are so associated with the sexual abuse that a court would have to take them into account in assessing damages. On another view, they might be separated... In any event, it may well be that at law once the plaintiff has a valid cause of action in respect of sexual abuse, it would be perfectly open to plead and claim for physical and associated psychological abuse during the same period on the basis that they are sufficiently connected in time and sufficiently related in respect of cause of

1 See for example Catholic Women's League of Australia, *Submission 3*; Shine Lawyers, *Submission 6*; Sexual Assault Support Service, *Submission 11*.

2 Australian Lawyers Alliance, *Submission 2*, p. 5.

3 Australian Lawyers Alliance, *Submission 2*, p. 5.

action so as to give rise to a right to pursue the further claim without an extension of time being required.⁴

2.5 The committee notes that physical and psychological abuse of children can be tremendously traumatic and is not infrequently a precursor to, or associated with, the sexual abuse of children. These forms of abuse are required to be reported in certain circumstances under mandatory reporting schemes applicable in states and territories.⁵

Failing to report child sexual abuse

2.6 The Royal Commission into Institutional Responses to Child Sexual Abuse identified underreporting of sexual abuse as a significant barrier to justice.⁶ Children are less able to report abuse or take effective steps to protect themselves, leaving them particularly vulnerable and dependent on assistance and protection from 'persons providing care, supervision or authority'.⁷

2.7 The bill would introduce new offences for failing to report child sexual abuse in cases where the defendant has information which would lead a reasonable person to either suspect or believe that someone has sexually abused, or is intending to sexually abuse, a child.

2.8 This, the ALA submitted, may not go far enough, and responsibility for failing to report sexual abuse should be extended to include institutions:

The history of cover-up in institutions strongly suggests that the criminal offence should apply not just to individuals but to the institutions which have failed victims by exposing them to abuse and then, too often, by protecting their abusers.⁸

2.9 The ALA also argued that serious criminal offences of any sort, not only child sexual abuse, should give rise to a similar obligation to report.⁹

2.10 A joint submission from the Department of Home Affairs and the Attorney-General's Department (the departments) stated that directing offences at Commonwealth officers as individuals is appropriate:

The failure to report and failure to protect offences are directed at Commonwealth officers as individuals who engage with children in various capacities. This is necessary and appropriate, as individuals are the ones most likely to witness or suspect child sexual abuse and need to act. The proposed definition of 'Commonwealth officer' in section 273B.1 would capture the most senior people within a Commonwealth institution, including the Minister and departmental Secretary. Further consideration

4 Australian Lawyers Alliance, *Submission 2*, Appendix 1, [pp. 11–12].

5 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 4.

6 See Explanatory Memorandum, p. 18.

7 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 4.

8 Australian Lawyers Alliance, *Submission 2*, p. 7.

9 Australian Lawyers Alliance, *Submission 2*, p. 8.

would be needed to extend the failure to report and failure to protect offences to institutions.¹⁰

2.11 knowmore, an independent community legal centre providing free legal services and education for victims and survivors of child sexual abuse around Australia, also addressed provisions relating to the failure to report child sexual abuse. The submission suggested applying an end-date for failure to report:

We note that proposed s 273B.5 does not have such an end date and on its face appears to establish a continuing duty to report on the Commonwealth officer, even in the case of suspected historical sexual abuse where a survivor may not want the abuse to be reported.¹¹

2.12 The submission expressed a concern for the wellbeing and safety of sexual abuse survivors who do not wish to participate in a police process. Applying criminal sanctions for failure to report abuse irrespective of the time lapsed, current age of the victim or their views, could, knowmore submitted, be traumatising for some victims and provide a disincentive for coming forward with a complaint or participating in an institutional redress scheme.¹²

2.13 knowmore concluded:

In our view, the adoption of the 10-year time limit, coupled with mandatory reporting obligations where the alleged abuser still presents a risk to children, is an appropriate way to balance the competing interests here.

Additionally, reporting Commonwealth officers should ensure survivors are appropriately supported through the reporting process, such as referring survivors to external counselling or other support services to assist with the implications and effects of police reporting.¹³

Absolute liability

2.14 Responsibility for reporting was also raised by the Law Council of Australia. The Council identified perceived issues with provisions which relate to conduct alone, pointing out that many sexual abuse cases involving children 'have a requirement of knowledge or intention prior to the matter constituting a child sexual abuse offence.'¹⁴ The Council added that clarification around 'conduct' and 'sexual conduct' in relation to a child should be provided:

[T]he use of the word 'such conduct' refers back to proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) which provides that the 'defendant knows there is a substantial risk that a person (the potential offender) will engage in conduct in relation to the child. The Law Council suggests that proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) and (2)(c) should relate to the

10 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 4.

11 knowmore legal service, *Submission 7*, p. 6.

12 knowmore legal service, *Submission 7*, p. 6.

13 knowmore legal service, *Submission 7*, pp. 6–7.

14 Law Council of Australia, *Submission 13*, p. 5.

knowledge of the defendant and that proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) and (2)(d) should be amended. In each case, the conduct should be 'sexual conduct' and the prosecution should be required to prove that the accused knew the facts which would amount to a child sexual abuse offence. It should not be an offence if, for example, the accused wrongly believed that the sexual conduct was consensual between two 17 year olds but in fact the potential offender was 22 years old.¹⁵

Definition of responsible person

2.15 The Law Council of Australia pointed to a potential discrepancy between proposed sections 273B.4 and 273B.5, which relate to failure to protect a child at risk of sexual abuse and failing to report child sexual abuse respectively. The first, the Council submitted, includes a requirement that a child be 'under the defendant's care, supervision or authority', while the second only refers to care or supervision, omitting the word 'authority'.¹⁶

Self-incrimination

2.16 The Law Council also raised the issue of self-incrimination, suggesting that the bill may require a person to self-report conduct which would be criminal under the proposed legislation. Such a requirement, the Council submitted, explicitly abrogates the privilege against self-incrimination, which is a substantive common law right.¹⁷

2.17 The submission did, however, note 'that a direct use immunity is to apply under proposed subsection 273B.9(10)'¹⁸ which would prevent this information being used in 'relevant proceedings' against a discloser. The Council nonetheless remained concerned that self-incriminating information may be admissible if obtained as an indirect consequence of disclosure, as derivative use material is permitted if used in subsequent criminal proceedings:

The Law Council considers that should the offence be retained in its current form, the protection for the privilege against self-incrimination should be extended to cover the derivative use of material obtained as a result of answers given in accordance with questioning under proposed subsection 273B.5(5).¹⁹

Possession of child pornography or abuse obtained via a carriage service

2.18 Two main issues around the proposed criminalisation of the possession of child abuse material or child pornography obtained through a carriage service were raised in submissions. These are set out below.

15 Law Council of Australia, *Submission 13*, p. 5.

16 Law Council of Australia, *Submission 13*, p. 5.

17 Law Council of Australia, *Submission 13*, p. 6.

18 Law Council of Australia, *Submission 13*, p. 6.

19 Law Council of Australia, *Submission 13*, p. 6.

Capturing the recording of live-streamed abuse

2.19 The bill would create new offences of possessing or controlling material relating to child abuse or child pornography which is accessed using a carriage service.

2.20 International Justice Mission (IJM) described this as a welcome addition to legislation addressing the exploitation of children online. However, IJM submitted that it remains unclear whether this captures situations where offenders view child abuse material as it is live-streamed in real time, then record this for the purposes of viewing or sharing at a later time.²⁰

2.21 IJM explained that alleged perpetrators could argue that the recorded material in their possession is in a different form and therefore distinct from the original material accessed online.²¹ There is, IJM submitted, reason to be concerned about this possibility:

The legal distinction between these forms of material has been significant in copyright infringement cases. Further, Patrick Goggins, who recorded child abuse live-streamed over the internet, was convicted of the offence of ‘producing child pornography material’ under *Criminal Code* (Cth) section 474.20(1). This may provide support for the view that the material comes into existence after the recording is made and is therefore distinct from the material accessed via the internet.²²

2.22 IJM suggested the following amendment to subsections 474.19A and 474.22A (schedule 3) to prevent potential perpetrators using this defence to evade prosecution:

(4) To avoid doubt,

- (a) a reference to ‘material’ in subsection (1) includes both a communication accessed or obtained via a carriage service and a recording of that communication; and
- (b) a reference to ‘material’ in subsection (1)(a) includes a copy or recording of the ‘material’ referred to in subsection (1)(c).²³

2.23 The departments addressed this point, explaining that amendments to clarify whether proposed sections 474.19A and 474.22 cover situations where offending material is recorded for later dissemination or viewing are not necessary:

First, in our view, these situations would be covered by the proposed new Schedule 3 offences as currently drafted – recordings of live-streamed material would clearly be electronic data that was obtained/accessed via a carriage service. Second, there are existing offences in the Code which capture engaging in sexual activity with a child, including through live-streaming. Third, possession of hardcopy, child abuse or child pornography

20 International Justice Mission, *Submission 4*, p. 2.

21 International Justice Mission, *Submission 4*, p. 3.

22 International Justice Mission, *Submission 4*, p. 3.

23 International Justice Mission, *Submission 4*, p. 3.

material, including recordings or images, is also criminalised under state and territory laws.²⁴

Application to minors

2.24 yourtown, a national registered charity which engages with issues affecting young people, broadly welcomed the bill. At the same time, the submission pointed out that the bill does not limit the prosed offences relating to abuse material obtained via a carriage service to those aged 18 or over.²⁵ This, the submission argued, means that minors may be left open to prosecution:

yourtown strongly maintains that all laws relating to children and young people must be careful to not unduly criminalise them given their developmental immaturity and lack of experience, and evolving moral and ethical codes. In addition to these caveats, where sexual activity is concerned, we must also emphasise that minors will be open to taking risks as they seek to explore relationships and their boundaries, and their own sexuality.²⁶

2.25 The submission added that this could in turn result in ongoing repercussions for children and young people, whose behaviour is framed by complex realities of modern life which society as a whole is grappling with:

We know through contacts to KHL [Kids Helpline], for example, that sexting is a widespread practice of children and young people and they increasingly contact our counsellors for advice, including about the law, in relation to it. Indeed, the emerging new realities of childhood development framed by technology and the evolving dangers within it – including for example cyberbullying, blackmail, and widely accessible and increasingly aggressive and normalised pornography – are complex issues for adolescents to effectively navigate and contextualise, and are issues that adults and society at large are often ill-equipped to deal with. Yet this new legal provision would have the potential to do long-lasting harm to children and young people through criminally prosecuting them because of their own developmental and explorative behaviour.²⁷

2.26 Including minors under the proposed law could, yourtown posited, result in instances where a young person sends a sexually explicit image of themselves via text message, and thereby becomes both the victim and perpetrator of a criminal offence.²⁸

2.27 While the committee notes these concerns, and agrees that safeguards are required to protect the interests of minors, it is important to recognise that the

24 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 7.

25 yourtown, *Submission 5*, p. 3.

26 yourtown, *Submission 5*, p. 3.

27 yourtown, *Submission 5*, p. 3.

28 yourtown, *Submission 5*, p. 3.

approach taken by the bill is consistent with the existing approach for all Commonwealth offences relating to child abuse and child pornography material.²⁹

2.28 Furthermore, as stated by the departments, the *Criminal Code Act* explicitly requires the Attorney-General to provide consent before proceedings can commence against a minor:

Safeguards are in place to prevent the unnecessary prosecution of minors, including section 474.24C of the Code which requires the Attorney-General to consent to proceedings against a minor for offences against Subdivision D of Part 10.6 of the Code, which relate to the use of a carriage service for child pornography material or child abuse material, including the offences in new sections 474.19A and 474.22A.³⁰

2.29 The departments similarly pointed to the role played by police and prosecutorial discretion in preventing the unnecessary prosecution of minors whilst simultaneously allowing the prosecution of minors who engage in serious, malicious conduct:

The Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process details factors for prosecutors to take into account before prosecuting minors for criminal offences, including:

- the seriousness of the alleged offence and possible alternatives to prosecution
- the age and maturity and mental capacity of the minor, and
- any unduly harsh effect of prosecution on the minor.³¹

2.30 The committee is therefore of the view that these significant protections provide adequate safeguards against misplaced prosecutions of minors who may engage in non-malicious behaviour which could be captured by the bill.

Mandatory minimum sentencing

2.31 The Law Council of Australia recognised the importance of the bill and seriousness of child sex offences, but argued strongly against creating mandatory minimum sentences for any type of criminal offence. In this instance, minimum mandatory sentences of four years would be introduced for proposed offences relating to the possession of child-like sex dolls and the possession of child abuse material obtained from a carriage service.³²

29 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 7.

30 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 7. See also *Criminal Code Act 1995*, s. 474.24C.

31 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 7.

32 Law Council of Australia, *Submission 13*, p. 2.

2.32 The committee notes that the Law Council's objection to mandatory minimum sentences in relation to any criminal offence is based on the view that mandatory sentencing:

- potentially results in unjust, harsh and disproportionate sentences because it is not possible for Parliament to know in advance whether a minimum mandatory penalty would be just and appropriate across the full range of circumstances in which an offence might be committed;
- has a disproportionate impact on Aboriginal and Torres Strait Islander peoples and those with a cognitive or intellectual disability; unjust outcomes, particularly for vulnerable groups within society: indigenous peoples, young adults, juveniles, persons with a mental illness or cognitive impairment and the impoverished;
- when adopted, has failed to produce convincing evidence which demonstrated that mandatory minimum penalties deterred crime;
- potentially increases the likelihood of recidivism because prisoners are placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
- provides short-to-medium-term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;
- can undermine the community's confidence in the judiciary and the criminal justice system as a whole. In-depth research has demonstrated that when members of the public were fully informed about the particular circumstances of the case and the offender, 90 per cent viewed judges' sentences as appropriate;
- displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;
- results in significant economic costs to the community, both in terms of increasing incarceration rates, and increases the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and
- could be inconsistent with Australia's international obligations, including the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR)¹; the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR.³³

33 Law Council of Australia, *Submission 13*, p. 2.

The scope of schedule 2

2.33 A submission from Professor Jeremy Gans from the Melbourne University Law School queried three aspects of schedule 2 of the bill, relating to child-like sex dolls. These are set out below.

The term 'child-like sex objects'

2.34 The purpose of schedule 2 of the bill was described by the Home Affairs Minister in his second reading speech:

The bill also strengthens the Commonwealth framework of offences to ensure a comprehensive, technology-neutral and future-focused response to all forms of child pornography material and child abuse material. In particular, the bill will clarify the law to ensure that the abhorrent new trend of childlike sex dolls, used to simulate sexual intercourse with children, is clearly and robustly stamped out in Australia.³⁴

2.35 The Explanatory Memorandum further set out the purpose of schedule 2:

This new form of child sexual abuse material [child-like sex dolls] must be clearly criminalised to prevent children from being abused, as the dolls normalise abusive behaviour towards children, encourage the sexualisation of children and increase the likelihood that a person will engage in sexual activity with or towards children. These amendments are intended to further implement Australia's obligations under Articles 19 and 34 of the Convention on the Rights of the Child.³⁵

2.36 The provisions in question state:

A person commits an offence if:

- (a) the person possesses a doll or other object; and
- (b) the doll or other object resembles:
 - (i) a person who is, or appears to be, under 18 years of age;
 - (ii) a part of the body of such a person; and
- (c) a reasonable person would consider it likely that the doll or other object is intended to be used by a person to simulate sexual intercourse.³⁶

2.37 Professor Gans submitted that the above provisions would criminalise the possession of child-like sex objects beyond dolls.³⁷ Whether it matters in practice that the provision may not, if Professor Gans is correct, be limited to dolls, is also addressed in his submission:

34 The Hon Peter Dutton MP, Minister for Home Affairs, second reading speech, *House of Representatives Hansard*, 14 February 2019, p. 13387.

35 Explanatory Memorandum, p. 3.

36 Combatting Child Sexual Exploitation Legislation Amendment 2019, s. 273A.1.

37 Professor Jeremy Gans, *Submission 1*, [p. 2].

The defining feature of a ‘doll’ is that it is shaped like a person. That matters, because it makes it straightforward to apply the other two defining aspects of a ‘child-like sex doll’. First, if a doll is shaped like a person, then it makes sense to ask whether the doll is ‘child-like’, specifically whether or not it ‘resembles’ a child (in whole or in part.) You simply look to see if it has features (such as hair or clothing or proportions) that, in total, are child-like... Second, if a doll is shaped like a person, then it is fairly straightforward to understand whether or not it is ‘intended to be used by a person to simulate sexual intercourse.’ The Criminal Code defines ‘sexual intercourse’ to mean vaginal, anal or oral sex. Accordingly, the obvious way to determine this issue will be to examine the doll to see whether it has orifices or an appendage that could be used to simulate a vagina, anus, mouth, penis or finger.³⁸

2.38 By contrast, Professor Gans argued, it is harder to ascertain whether non-doll objects, that is, objects which are not shaped like a person, fall within the scope of schedule 2. Professor Gans' submission went on to question the range of objects the bill may criminalise the possession of if enacted.³⁹

2.39 The departments explained that the drafting of the provisions in question is intended to be technology-neutral:

This will better enable legislation to remain in-step with technological advancements. Objects such as child-like sex silicone parts, child-like sex robots and potentially virtual, holographic and other three-dimensional representations of children that are used to simulate sexual intercourse must be criminalised.⁴⁰

2.40 This, the departments noted, goes directly to concerns raised by Professor Gans regarding the potential for unintended objects to be captured by the provisions:

Possession of the object as described will only be criminalised if a reasonable person would consider it likely that that object is intended to be used by a person to simulate sexual intercourse. The words ‘sexual intercourse’ have been deliberately used, as opposed to the broader ‘sexual activity’ used elsewhere in the Criminal Code Act 1995 (the Code). This is because the central focus of Schedule 2 is to capture dolls and other objects designed for sexual functionality and advertised and sold for this purpose. The inclusion of parts in the offence is to reflect that some dolls are sold and shipped from overseas in component parts, to be assembled by the buyer after they arrive in country. The Bill therefore captures a doll or other object that resembles ‘a part of the body’ of a child, as component parts may not be construed to be ‘dolls’ on their individual merits.⁴¹

38 Professor Jeremy Gans, *Submission 1*, [p. 2].

39 Professor Jeremy Gans, *Submission 1*, [p. 3].

40 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 5.

41 Department of Home Affairs and Attorney-General's Department, *Submission 8*, p. 6.

2.41 The Law Council of Australia raised a related point. The Council noted that the bill requires that a person intended to possess a child-like sex doll or object, but does not require them to *know* that this is what the object or doll is.⁴²

2.42 The committee notes the Law Council's suggestions, but is satisfied with the requirement that a reasonable person would consider it likely that a doll or object is intended to be used by a person to simulate sexual intercourse with a child. The committee does not consider that the relevant provisions need revision.

Definition of 'child pornography material'

2.43 Professor Gans also posed questions around the definition of 'child pornography material'.

2.44 Currently, the *Criminal Code Act 1995* defines 'child pornography material' as follows:

child pornography material means:

- (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
 - (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
 - (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;
 and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (b) material the dominant characteristic of which is the depiction, for a sexual purpose, of:
 - (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
 - (ii) a representation of such a sexual organ or anal region; or
 - (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;
 in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (c) material that describes a person who is, or is implied to be, under 18 years of age and who:
 - (i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or

42 Law Council of Australia, *Submission 13*, p. 4.

- (ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;
and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
- (d) material that describes:
 - (i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or
 - (ii) the breasts of a female person who is, or is implied to be, under 18 years of age;and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.⁴³

2.45 Professor Gans pointed out that the common element of the definitions above is an offensiveness test. As such, Professor Gans stated, the amendments in schedule 2 relating to the definition of 'child pornography material' do not replicate the existing language of the *Criminal Code Act*.

2.46 The departments explained that the offensiveness test ensures that depictions can be assessed in context by a reasonable person, taking into consideration the varying nature of images, as well as the subjectivity inherent in making that assessment.⁴⁴ The significant difference, the department explained, is that child-like dolls described in schedule 2 are inherently sexual by virtue of containing functioning sexual parts designed to simulate intercourse. Therefore, the departments clarified, it is the functionality of the objects themselves which would attract the criminality.⁴⁵

2.47 The committee notes that the Synod of Victoria and Tasmania of the Uniting Church in Australia recommended that the bill be amended to include provisions allowing all references in the *Criminal Code Act 1995* to 'child pornography material' to be repealed. The submission instead called for these references to be replaced with a single definition of 'child abuse material'.⁴⁶ This, the Synod explained, would be in keeping with the terminology in use by those who work with victims and survivors of child sexual abuse:

The Synod notes that the Explanatory Memorandum envisages that the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 will proceed (p. 48), but given the length of time since the Bill passed the House (19 October 2017) and the proximity to the Federal election, it appears unlikely the Government will proceed with the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017. Therefore it would be better if the Combatting Child Sexual Exploitation

43 *Criminal Code Act 1995*, s. 473.1.

44 Department of Home Affairs and the Attorney-General's Department, *Submission 8*, p. 6.

45 Department of Home Affairs and the Attorney-General's Department, *Submission 8*, p. 6.

46 Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 9*, pp. 4–5.

Legislation Amendment Bill 2019 included the provisions to move from 'child pornography material' to 'child abuse material'.⁴⁷

Possession offences

2.48 The Law Council submitted that offences relating to the possession of images should be capable of summary prosecution where appropriate, as is the case with possession offences across a number of state and territory jurisdictions:

The maximum penalty of 15 years imprisonment for a doll possession offence based on negligence is excessive and would mean that possession of a single image would need to be prosecuted on indictment. It is also a greater maximum penalty than in state and territory jurisdictions.⁴⁸

2.49 The Council recommended that possession offences—as well as offences relating to accessing the material—should be 'prosecuted summarily with the consent of the prosecutor and the defendant'.⁴⁹

Forced marriage

2.50 Proposed measures pertaining to forced marriage were broadly supported by submissions. Good Shepherd, a community services organisation focusing on women, girls and families experiencing disadvantage, submitted that there is an explicit link between forced marriage and family violence. To recognise this, Good Shepherd called for forced marriage to be included in the definition of family violence.⁵⁰

2.51 Good Shepherd also called for the minimum age of marriage in Australia to be raised to 18 to ensure that circumstances in which a minor can be married no longer exist.⁵¹

2.52 The Synod of Victoria and Tasmania, Uniting Church in Australia, supported the proposed changes relating to forced marriage, adding that more could be done to address the issue. The submission called for greater emphasis on prevention, rather than prosecution.⁵²

Committee view

2.53 The committee welcomes the government's commitment to the implementation of the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, and also welcomes the new offences contemplated by the bill.

2.54 The committee is conscious of the widespread community concern regarding child sexual abuse and child exploitation that occurs both in Australia and overseas,

47 Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 9*, p. 5.

48 Law Council of Australia, *Submission 13*, p. 4.

49 Law Council of Australia, *Submission 13*, p. 4.

50 Good Shepherd Australia New Zealand, *Submission 12*, pp. 2–3.

51 Good Shepherd Australia New Zealand, *Submission 12*, pp. 3–4.

52 Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 9*, p. 5.

and is of the view that the bill is a proportionate and appropriate response to deficiencies in the existing legislative framework. The committee acknowledges the need for a legislative framework that is more responsive to an evolving cultural and technological environment.

2.55 The committee supports the intention to place stricter obligations upon individuals who have responsibility for the safety of children and also welcomes provisions in the bill that strengthen the legislative framework around child pornography, overseas child sex offences, and forced marriage.

2.56 The committee notes the small number of amendments suggested by submitters and acknowledges the issues raised. It is to be expected, however, that the legislative framework governing offences relating to child sexual abuse and child exploitation will continue to evolve. The committee does not rule out the possibility of a review of the effectiveness of the legislation in the future.

2.57 The committee is firmly of the view that the government's strong stance against child sexual abuse and child exploitation is appropriate and reflects community expectations regarding these offences. The committee supports the passage of the bill in its current form.

Recommendation 1

2.58 The committee recommends that the Senate pass the bill.

Senator the Hon Ian Macdonald

Chair

Australian Greens additional comments

1.1 The Australian Greens thank everyone who took the time to make a public submission to the committee's inquiry into the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the bill).

1.2 The Australian Greens support the objectives of the bill.

1.3 However, the Greens note that the Law Council of Australia, while also supportive of the bill's objectives, raised numerous concerns regarding its adherence to, or rather, inconstancy with, the fundamental rule of law and criminal justice principles.

1.4 Whereas the Australian Greens believe all their concerns are with merit, and deserving of consideration, we would like to draw attention to three in particular, regarding mandatory sentencing, and protected privileges.

Mandatory sentencing

1.5 Mandatory sentencing is widely condemned by legal and academic professions as an arbitrary exercise of power that is both blunt and unjust.

1.6 The Law Council of Australia, in its 2014 policy discussion paper on mandatory sentencing, wrote:

The Law Council of Australia has consistently opposed the use of mandatory sentencing regimes, which prescribe mandatory minimum sentences upon conviction for criminal offences. Its opposition rests on the basis that such regimes impose unacceptable restrictions on judicial discretion and independence, and undermine fundamental rule of law principles.¹

1.7 The Australian Greens have consistently opposed mandatory sentencing in all bills proposing it, including, recently, in our dissenting report on the Migration Amendment (Strengthening the Character Test) Bill 2018, and additional comments to the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017.

1.8 In its submission to this particular inquiry and bill, the Law Council of Australia noted:

...the Tasmanian Sentencing Council in September 2016 in considering whether mandatory sentencing should be introduced for sexual offences in Tasmania concluded that 'mandatory sentencing is inherently flawed' and that it had 'grave concerns that the introduction of mandatory minimum sentencing for sexual offences in Tasmania will create injustice by unduly fettering judicial discretion'.²

1 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014, p. 5.

2 Law Council of Australia, *Submission 13*, p. 3.

Recommendation 1

1.9 The Australian Greens recommend that all mandatory sentencing requirements be removed from the bill.

Self-incrimination

1.10 The privilege against self-incrimination is a fundamental human right, and common law right. As noted by the Law Society of Australia, this privilege is also recognised as a right under the International Covenant on Civil and Political Rights (Article 14(3)), which provides that:

... in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.³

1.11 The Law Council of Australia's concern is that the proposed subsection 273B.5(5) of the bill would explicitly abrogate the privilege against self-incrimination. These concerns ranged from issues of syntax/terminology (273B.5(2)(c)), through to the admissibility of self-incriminating evidence, where that information was obtained as an indirect consequence of a disclosure, and this derivative use material is permitted to be used in subsequent criminal proceedings (273B.9(10-11)).

1.12 The Australian Greens share this concern, and consider the privilege against self-incrimination a traditional right and freedom that the parliament must respect and uphold.

Recommendation 2

1.13 The Australian Greens recommend that section 273B of the bill be amended to ensure that the privilege against self-incrimination is protected.

Legal professional and client legal privilege

1.14 The Law Council of Australia also raised a concern in its submission to the committee regarding legal professional and client legal privileges. It argued that within section 273B.9, several of its subsections may, in rare but possible situations, unwittingly capture privileged communications between legal professionals and clients. As submitted by the Law Council of Australia:

It is vitally important that persons, especially children, be able to obtain legal advice and that lawyers do not become liable to report their clients in breach of legal professional privilege or client legal privilege.⁴

Recommendation 3

1.15 The Australian Greens recommend that section 273B of the bill be amended to ensure that legal professional and client legal privilege are protected in all situations.

3 Law Council of Australia, *Submission 13*, p. 6.

4 Law Council of Australia, *Submission 13*, p. 7.

Recommendation 4

1.16 The Australian Greens recommend that the bill be amended as detailed above, and passed by the Senate.

Senator Nick McKim

Senator for Tasmania

Appendix 1

Submissions

Submissions

- 1 Professor Jeremy Gans
- 2 Australian Lawyers Alliance
- 3 Catholic Women's League Australia Inc.
- 4 International Justice Mission
- 5 Yourtown
- 6 Shine Lawyers
- 7 knowmore legal service
- 8 Department of Home Affairs and Attorney-General's Department
- 9 Uniting Church of Australia, Synod of Victoria and Tasmania
- 10 Collective Shout
- 11 Sexual Assault Support Service (Inc.)
- 12 Good Shepherd Australia New Zealand
- 13 Law Council of Australia

