Law Council
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term.

The Council's six Executive members are nominated and elected by the board of Directors. Members of the 2019 Executive as at 16 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch, QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee and the New South Wales Bar Association in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (**the Bill**).

2. The Bill seeks to better protect the community from the dangers of child sexual abuse by addressing perceived inadequacies in the criminal justice system that result in outcomes that insufficiently punish, deter or rehabilitate offenders. The Bill targets all aspects of the child sex offender cycle from the commission of an offence, to bail, sentencing and post-imprisonment.

3. Sexual offences against children are serious and offenders should receive appropriate sentences that reflect the severity of the conduct for the protection of the community, particularly vulnerable children.

4. Following a review of the proposals contained in the Bill, the Law Council raises several concerns for the Committee's attention, including that the:

    - proposed mandatory minimum penalty measures may apply to conduct between teenagers that is not uncommon in an era of increased access to an expanding range of digital technology;

    - proposed mandatory minimum penalty measures do not permit the court full discretion in cases of individuals with significant cognitive impairment or mental illness;

    - range of measures in the Bill would place additional strain on the criminal justice system without a commitment of additional resources for the courts and the criminal justice system to properly fulfil the proposed new functions;

    - presumption against bail in the Bill is inconsistent with the presumption of innocence and established criminal law principles;

    - presumption in favour of cumulative sentences unless exceptional circumstances apply and presumption in favour of an actual sentence being served is unnecessary and may result in outcomes which are unjust;

    - ability of a court to practically comply with the requirement to consider whether the sentencing or non-parole period provides sufficient time for the person to undertake rehabilitation, particularly given potential deficiencies in resourcing for rehabilitation options for offenders; and

    - proposed removal of the requirement for the Attorney-General to give notice to revoke the parole order or licence for all Commonwealth crime is objectionable on procedural fairness grounds.

5. For these reasons the Law Council's primary recommendation is that the Bill should not be passed in its current form. However, should the Bill proceed the Law Council makes the following recommendations:

    - the mandatory minimum penalties should be removed from the Bill. If they are to proceed, the Bill should be amended to allow the court full discretion in cases of individuals with significant cognitive impairment or mental illness;

- the concluding words of paragraph 16AAA(2)(b), 'in the investigation of the offence or of a Commonwealth child sex offence' should be removed;

- there should be a review of the proposed increase in maximum penalties, and if justified, the Explanatory Memorandum should more clearly state the ground on which the increases in maximum penalties have been selected;

- the presumption against bail, the presumption in favour of cumulative sentences and the presumption in favour of an actual term of imprisonment for certain Commonwealth child sex offenders should be removed from the Bill;

- additional resourcing should be made available to ameliorate the further burden on the courts and criminal justice system as a result of the proposals;

- the proposed new sentencing consideration of whether the person's standing in the community was used to aid in the commission of the offence (proposed paragraph 16A(2)(ma)) should be limited to child sex offences to accord with the stated intent of the Bill;

- the requirement for a court to consider whether the sentence or non-parole period set provides sufficient time for the person to undertake rehabilitation (proposed paragraph 16A(2AAA)(b)) should be removed from the Bill;

- proposed paragraph 19AU(3)(ba) of the Bill removing the requirement for the Attorney-General to give notice prior to revoking parole or a licence should be removed. Alternatively, an independent parole authority should have the ability to revoke the parole or licence without giving notice to the person in the interests of ensuring the safety and protection of the community or of another person subject to the ability for the person to contest the revocation;

- schedule 11 of the Bill imposing requirements for 'exceptional circumstances' to be found before a recognizance release order can be imposed for a Commonwealth child sex offence should be removed;

- the 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; and

- the residential treatment order regime should be implemented subject to additional funding being provided and an assessment by the Parliamentary Joint Committee on Human Rights that such a scheme would be consistent with Australia's international human rights obligations.

Broad child sexual abuse offences

6. Child sexual abuse offences in the *Criminal Code Act 1995* (Cth) (**Criminal Code**) are currently already broadly framed. Schedule 4 of the Bill would increase the breadth of the offences by introducing the following new criminal offences into the Criminal Code:

    - section 272.15A – 'Grooming' a person to make it easier to engage in sexual activity with a child outside Australia;
    - section 474.23A - Conduct for the purposes of electronic service used for child abuse material;
    - section 471.25A - Using a postal or similar service to 'groom' another person to make it easier to procure persons under 16. The proposed section contains three separate offences for the 'grooming' of third parties; and
    - section 474.27AA - Using a carriage service to 'groom' another person to make it easier to procure persons under 16 years of age. The proposed section also contains three separate offences for the 'grooming' of third parties.

7. The Explanatory Memorandum states the new offences are designed to 'criminalise emerging forms of child sexual abuse'.[1] The Second Reading Speech accompanying the introduction of the Bill also refers to 'forms of child sexual abuse which is becoming increasingly prevalent due to technological developments', however does not provide further data as to the degree of this prevalence.[2]

8. The proposed new offences of using a postal or similar service and using a carriage service to groom another person to make it easier to procure persons under 16 are, like existing grooming offences, designed to capture situations where a person's intention is not to directly procure a child, but where a person's intention is to make it easier to procure a child. These proposed offences are designed to complement existing procurement and grooming offences set out in sections 471.24, 471.25, 474.26, 474.27 and 474.25C of the Criminal Code.

9. For both the proposed and existing offences, the evidence of a person's intention might not necessarily be strong, and only needs to be evidence that the accused intended to make it easier to procure a child. The existing and new proposed offences are designed to cover a broad range of situations, for example, where an offender builds a relationship of trust with the child and then over time seeks to sexualise that relationship.[3] These proposed new offences, like existing grooming offences, therefore cover a broader range of situations than where a person intended to directly procure a child.

10. The new offence for facilitating online dealing in child abuse material is designed to cover 'a broad range of scenarios in the timeline of offending, ranging from the creation of an electronic service that has not gone live yet to the maintenance of an established website with a global following'.[4] The physical and mental elements of the proposed offence are also very broad:

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[1] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 6.
[2] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2019, 6 (Christian Porter, Attorney-General).
[3] Attorney-General's Department, *Proposed Reforms to Commonwealth Child Sex-Related Offences* (2010) 7.
[4] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 31.

> *The physical element of this offence requires the offender to undertake conduct in relation to an electronic service. The range of conduct criminalised by this offence includes when the offender creates, develops, alters, maintains, controls, moderates, makes available, advertises or promotes an electronic service with the intention of facilitating dealings with child abuse material online. Examples of this conduct may include writing computer code, providing infrastructure to enable hosting of websites or moderating the content or use of a chat forum for the creation and sharing of child abuse material.*[5]

11. The mental element of this offence requires the offender to 'undertake the requisite conduct in relation to the electronic service with the intention that the service will be used in committing, or facilitating the commission of, an offence against sections 474.22 or 474.23. The offence does not require the prosecution to prove that a person (being the offender or someone else) actually used the requisite electronic service to commit an offence contrary to sections 474.22 or 474.23'.[6]

12. In addition, section 11.1 of the Criminal Code does not apply to this offence, meaning that a person cannot attempt to commit an offence against section 474.23A.[7]

13. The Bill would also amend the Criminal Code to insert a range of new aggravated offences for child sexual abuse. Sections 272.10 and 474.25B create a range of circumstances of aggravation for the offence of having sexual intercourse or other sexual activity with a child outside Australia and the offence of using a carriage service for sexual activity with a person under 16 years of age. It will be an aggravated offence for a person to commit an offence where:

    - the child has a mental impairment;
    - the person is in a position of trust or authority in relation to the child, or the child is otherwise under the care, supervision or authority of the person;
    - the child is subjected to cruel, inhuman or degrading treatment in connection with the sexual activity; and
    - the child dies as a result of physical harm suffered in connection with the sexual activity.

14. The Law Council does not object in-principle to this amendment in reflecting the higher level of culpability. However, the practical utility may not be as intended given that most of these factors can already be taken into account as aggravating factors in sentencing in a federal context.

15. Nonetheless, given that proposed and existing child sex offences are so broadly framed with potential aggravating factors, retaining judicial discretion in this area is critical to ensure appropriate sentences are issued that reflect the culpability of the offending conduct in question. This concern is discussed in greater detail below

[5] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 30.
[6] Ibid 31.
[7] Ibid.

Mandatory minimum sentences

Principled opposition to mandatory sentencing

16. The Bill proposes mandatory minimum penalties in two circumstances, firstly, for offences classified as the most serious Commonwealth child sex offences (proposed section 16AAA); secondly, to all Commonwealth child sex offences (excluding section 474.25C of the Criminal Code) where the Commonwealth child sex offence(s) follows a conviction (at an earlier sitting) for a child sexual abuse offence (section 16AAB).

17. There is no doubt that child sex offences result in serious social and systemic harms. The Law Council notes that the rationale for the inclusion of mandatory minimum penalties for these offences is aimed at ensuring offenders receive sentences that reflect the seriousness of their offending.

18. However, the Law Council opposes the use of mandatory minimum sentences as a penalty for criminal offences, particularly (as noted above) where those offences are broadly framed as is the case with child sexual offences. To assist the Committee in the rationale behind this position, the Law Council's Mandatory Sentencing Policy and Discussion Paper describes in detail a number of concerns expressed by the Law Council's Constituent Bodies, the judiciary, other legal organisations and individuals regarding mandatory sentencing.[8]

19. A fundamental concern of the Law Council in relation to mandatory sentencing is that the imposition of mandatory minimum penalties upon conviction for criminal offences imposes unacceptable restrictions on judicial discretion and independence and undermines fundamental rule of law principles and human rights obligations.

20. In addition, the Law Council's Mandatory Sentencing Policy considers that mandatory sentencing:

    - potentially results in disproportionate sentences where the punishment did not fit the crime because it was 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;

    - can result in unjust outcomes, particularly for vulnerable groups within society such as indigenous peoples, young adults, juveniles, persons with a mental illness or cognitive impairment and the impoverished;

    - fails to produce convincing evidence which demonstrated that mandatory minimum penalties deter 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;

[8] Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014) <https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf >; Law Council of Australia, *Mandatory Sentencing Policy Statement* (May 2014) <https://www.lawcouncil.asn.au/docs/00d7155f-ce39-e711-93fb-005056be13b5/1405-Policy-Statement-Mandatory-Sentencing-Policy-Position.pdf>.

- provides short-to-medium-terms of incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;

- wrongly undermines 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;[9]

- displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;

- increases the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime;

- is likely to result in an increase in contested hearings (since offenders who may have considered pleading guilty in the hope of receiving an alternative to full-time imprisonment may be inclined to go to trial) and, consequently, a further drain on resources, delay and unnecessary distress to alleged victims; 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**)[10]; 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.

21. The Law Council notes that the Tasmanian Sentencing Council (**Council**), when 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'.[11] These conclusions were reached while the Council was required by the terms of reference for the inquiry to consider offences that a mandatory minimum scheme should be limited to and the structure of such a scheme.

22. Further, the Standing Committee for the Scrutiny of Bills has consistently noted that:

> *mandatory penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. While a court retains a discretion as to the non-parole period, a mandatory minimum sentence still requires that a person be subject to a penalty for that period (either in prison or subject to parole conditions), and sentencing principles generally provide that a non-parole period is to be in proportion to the head sentence.*[12]

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[9] K Warner et al, Australian Institute of Criminology, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (No 47, Trends & Issues in Crime and Criminal Justice, February 2011) 3 <https://aic.gov.au/publications/tandi/tandi407>.
[10] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976).
[11] Sentencing Advisory Council, *Mandatory Sentencing for Serious Sex Offences Against Children* (2016) vi.
[12] Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 6 of 2019, 18 September 2019) 3.

23. The Law Council continues to oppose mandatory sentencing for the reasons outlined in its policy and discussion paper and recommends that those measures be removed from the Bill.

Application of proposed mandatory minimum sentences

24. The Law Council acknowledges that the mandatory minimum penalties in the Bill do not apply to those under the age of 18. They also do not impose a minimum non-parole period on offenders. This latter aspect is said in the Bill's Explanatory Memorandum to preserve a court's discretion in sentencing.[13]

25. However, while the Bill does not specify a fixed minimum non-parole period, it does not provide the court with the full discretion to determine an appropriate and proportionate head sentence that reflects the criminal culpability in the particular circumstances of the case. For example, there may be instances where a person's culpability is worth less than the mandatory minimum term of imprisonment or an alternative form of punishment is better suited to the offence and offender for the protection of the community. A mandatory sentence will inevitably mean that despite a person's level of culpability he or she will be ordered to serve a portion of the head sentence in custody.

26. The arbitrary nature of mandatory sentencing, particularly in relation to teenagers and young adults, is not ameliorated by the selection of an arbitrary age below which it does not apply. There is no real difference in the moral culpability of an offender who commits such an offence a few days before his or her 18th birthday, and an offender who does so a few days after it. However, the latter will be subject to mandatory sentencing while the former will not.

27. Similarly, while juveniles are exempt, nothing is said as to persons with 'significant cognitive impairment' (as has happened in other legislation, for example, in sections 25A and 25B of the *Crimes Act 1900* (NSW) and the 'one punch' mandatory sentencing legislation in NSW). The Law Council submits that the exclusion of sentencing discretion in such cases is manifestly unjust.

28. The Law Council also notes in this context that the imposition of mandatory sentencing is likely to reduce the propensity of accused persons to plead guilty, produce more contested cases and exacerbate existing court delays. In this regard, proposed subsection 16AAC(2) would permit a court to impose a sentence of imprisonment of less than the minimum penalties where there are early guilty pleas and where there has been cooperation with law enforcement agencies in the investigation of the offence or of a Commonwealth child sex offence.[14] However, this concession may not adequately encourage guilty pleas, particularly where the conduct involved may be towards the lower end of objective seriousness.

29. Proposed paragraph 16AAC(2)(b) only permits a mandatory minimum sentence to be reduced for cooperation with law enforcement agencies 'in the investigation of the offence or of a Commonwealth child sex offence'. The Law Council considers that this is too restrictive. It would not permit any reduction for assistance provided to law enforcement agencies in the investigation of other state or territory child sex offences, only 'Commonwealth' child sex offences, as defined. Nor would it permit any reduction for assistance provided to law enforcement agencies in the investigation of other offences, such as murder, slavery, or other very serious offences. There is a powerful

[13] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 9, [42].
[14] Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) cl 16AAC(2)(b).

public interest in encouraging offenders to provide assistance to law enforcement agencies, both in terms of information and willingness to testify against other offenders. It is well understood under the current law that such reductions should not be so large as to produce a sentence that is unreasonably disproportionate to the nature and circumstances of the offence committed by the offender. To preclude such discounts will remove the incentive and reduce the extent to which such assistance is provided. The Law Council recommends that proposed paragraph 16AAA(2)(b) be amended to remove the words 'in the investigation of the offence or of a Commonwealth child sex offence'.

30. In the current context, the Law Council considers that the proposed mandatory minimum penalties have the potential to create unjust outcomes, particularly given that they are framed around broad criminal offences. In particular, it is submitted that there is scope for what is not uncommon teenage behaviour to be caught by the mandatory minimum penalty regime. Potential examples of the unjust application in the current Bill are set out below.

Bill Item	**Criminal Code offence**	**Example of potential conduct caught by the offence**	**Mandatory minimum penalty**
First time offences – section 16AAA			
1	Subsection 272.8(1) – sexual intercourse with child outside Australia	On a scout's trip to New Zealand, an 18 year old Year 12 student has sex with his 15 year old Year 10 girlfriend.	6 years
3	Subsection 272.9(1) – sexual activity (other than sexual intercourse) with child outside Australia	On a holiday overseas between two families, an 18 year old and 15 year old commence a romantic relationship and they touch each other.	5 years
13	Subsection 474.25A(1) – using a carriage service for sexual activity with person under 16 years of age – engaging in sexual activity with child using a carriage service	An 18 year old and a 15 year old exchange images and sexual stories on Snapchat. An 18 year old and a 15 year old engage in sexual activity using FaceTime.	5 years
14	Subsection 474.25A(2) – using a carriage service for sexual activity with person under 16– causing child to engage	An 18 year old text messages her 15 year old friend encouraging him to send an indecent image to his 18 year old girlfriend.	5 years

Bill Item	Criminal Code offence	Example of potential conduct caught by the offence	Mandatory minimum penalty
	in sexual activity with another person		
Second or subsequent offence – section 16AAB			
35	Subsection 474.27A – Using a carriage service to transmit indecent communication to person under 16 years of age	An 18 year old boy and a 15 year old girl in a relationship and constantly exchange intimate images. The boy has previously been convicted of a child sexual abuse offence.	3 years

31. Other examples of where the mandatory minimum penalties will inevitably produce unjust sentences are:

    - An 18 year old offender who is one of the coaches of a sporting team (of which one member is his 15 year old girlfriend), so that he is in a 'position of authority in relation to' his girlfriend, has sex with his girlfriend while the team is on an overseas trip. A mandatory minimum penalty of 7 years imprisonment applies for an offence against section 272.10. Even if the offender enters a plea of guilty, a mandatory minimum sentence of 5 years 3 months must be imposed.

    - An 18 year old offender encourages his 15 year old girlfriend to take a nude 'selfie' of herself and send it to him over the internet. As noted above a mandatory minimum penalty of 5 years imprisonment applies for an offence against section 474.25A. Even if the offender enters a plea of guilty, a mandatory minimum sentence of 3 years 9 months must be imposed.

32. Furthermore, a sentencing court will be deprived of the possibility of imposing an alternative means of serving a prison sentence, such as an 'intensive corrections order' pursuant to section 20AB(1) of the *Crimes Act 1914* (Cth) (**Crimes Act**) because the state or territory law permitting the imposition of such a sentence provides that it may not be made if the duration of the term of imprisonment exceeds a specified number of years.[15]

33. In each of the above scenarios, if the conduct continued after the victim's 16th birthday, the conduct would *no longer be an offence*. This serves to highlight the arbitrary and unjust nature of the mandatory sentencing provisions and their blindness to the actual moral culpability of offenders in particular cases. The evaluation of the moral culpability of offenders and determining a just punishment is a fundamental part of a sentencing judge's task. The potential for unjust outcomes to arise in the context of the above examples when combined with mandatory minimum penalties highlights the importance

[15] For example, in New South Wales if the term of imprisonment for a single offence exceeds two years or the total term for multiple offences exceeds three years, an intensive corrections order is not available as an alternative to full time imprisonment: *Crimes (Sentencing Procedures) 1999* (NSW) s 68.

of retaining judicial discretion in such cases rather than referring such discretion to law enforcement and the prosecutorial authorities.

34. The Law Council considers that mandatory sentencing is particularly arbitrary when it comes to sentencing young offenders. It is concerning to the Law Council that under the proposed Bill an offender aged 17 years and 11 months who engages in a particular offence avoids the imposition of a full time custodial sentence but an offender aged 18 years and 2 days at the time of committing the same offence will be sent to prison as a result of the mandatory minimum sentences proposed by the Bill. That the Government can, in effect, determine that a young person should be sentenced and exposed to the potentially life changing trauma of a prison sentence is of great concern to the Law Council.

35. It is well established legal principle that, when sentencing young offenders, greater weight must be placed on rehabilitation as a purpose of sentencing and that allowance must be made for the offender's youth and not just their biological age. In *KT v R*,[16] McClellan CJ, then Chief Justice of the New South Wales Court of Criminal Appeal stated that:

> *The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence…The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age (R v Hearne (2001) 124 A Crim R 451 at [25]). The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence (Hearne at [24]). Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult (Hearne at [25]; MS2 v The Queen (2005) 158 A Crim R 93 at [61]).*[17]

36. The requirement for a court to impose a mandatory minimum sentence of imprisonment also appears to be contrary to section 17A of the Crimes Act which imposes a restriction on imposing sentences and states that 'a court shall not pass a sentence of imprisonment on any person for a federal offence…unless the court, having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case'.[18]

37. It is apparent from the Second Reading Speech in relation to the Bill that the motivation for the Government to introduce mandatory minimum sentences of imprisonment is that the 'government is fed up with lenient sentencing practices that fail to protect the community from child sex offenders'.[19] The Law Council is concerned that such assertions undermine respect for the judicial system and lack a proper foundation. If there is any inadequacy in the sentence imposed for any offence, the prosecution in the respective matter can always seek correction in a higher court by lodging an appeal against the inadequacy of the sentence at first instance.

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[16] (2008) 182 A Crim R 571.
[17] *KT v R* (2008) 182 A Crim R 571, [22] (McClellan CJ).
[18] *Crimes Act 1914* (Cth) s 17A(1).
[19] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2019, 6 (Christian Porter, Attorney-General).

38. Further while the Government cites statistics (from an unknown source that is not available to the public for analysis) that '28 per cent of Commonwealth child sex offenders walked away with a non-custodial sentence'[20], there was little detail provided as to what factors the court took into consideration when imposing those sentences. The Law Council notes that in the absence of further data as to individual circumstances, the fact that the vast majority (or the remaining 72 per cent) of Commonwealth child sex offenders did receive a prison sentence is not indicative of 'lenient sentencing practices.'

39. Constitutional issues may also arise relating to for example the implied right of legal equality in the Australian Constitution.[21]

Recommendations:

- **The mandatory minimum penalties should be removed from the Bill. If they are to proceed, the Bill should be amended to allow the court full discretion in cases of individuals with significant cognitive impairment or mental illness.**
- **The concluding words of paragraph 16AAA(2)(b), 'in the investigation of the offence or of a Commonwealth child sex offence' should be removed.**

Increased maximum penalties

40. The Bill contains measures that if implemented would increase the maximum penalties for certain Commonwealth child sex offences and breaches of reporting requirements (see Appendix A for further details). It proposes to increase the maximum penalties for a range of child sex offences by between 3 years and 5 years. It also seeks to increase the penalty for the offence under subsection 272.10(1) of the Criminal Code from 25 years to life imprisonment.

41. While the Law Council supports a penalty system that reflects the seriousness of the conduct concerned, it is submitted that further information is required to demonstrate that the increase in these maximum sentences has been done in a principled manner, and not arbitrarily decided upon. It is not clear for example why the three-year to five-year increase in maximum penalties has been chosen.

Recommendation:

- **There should be a review of the proposed increase in maximum penalties, and if justified, the Explanatory Memorandum should more clearly state the ground on which the increases in maximum penalties have been selected.**

[20] Ibid.
[21] *Leeth v Commonwealth* (1992) 174 CLR 455.

Additional burden on courts and criminal justice system

42. The Explanatory Memorandum notes that:

> *The financial impact of this Bill is largely limited to the costs associated with housing federal prisoners on remand and sentence.*
>
> *The Commonwealth does not own or operate any prisons and federal prisoners are currently housed in state and territory prisons. Convicted federal offenders comprise approximately 3 percent of Australia's total prison population while convicted federal sex offenders comprise only 0.4 percent of that population. As such, the overall financial impact on states and territories will be negligible. There will be some increase in costs borne by state and Commonwealth agencies for investigating and prosecuting new offences, these costs will be absorbed.*[22]

43. Nonetheless, the measures in the Bill which may impact on the 3 per cent of Australia's federal offenders have the potential to create an additional burden on the criminal justice system without a commensurate resourcing commitment being made.

44. Additionally, as noted above, the minimum penalties and presumption in favour of actual terms of imprisonment are likely to reduce the propensity of accused persons to plead guilty and therefore produce challenges to forensic evidence resulting in more lengthy jury trials and result in increasing the already significant court delays.

45. The financial impact statement does not address allocation of funding to the courts or legal assistance services. The criminal justice system is already over-stretched[23] and it is critical that additional resourcing be provided if the measures in the Bill proceed.

Presumptive measures

46. The Bill would insert presumptions for certain Commonwealth child sex offenders as follows:

- against bail;
- in favour of cumulative sentences; and
- actual terms of imprisonment.

47. The Law Council supports an approach which allows a court the discretion to impose an appropriate sentence to reflect the severity of the conduct and the subjective features

[22] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 3.

[23] According to the most recent Australian Bureau of Statistics data, in the June quarter 2019, the average daily number of full-time prisoners in Australia was 43,306. This a 1 per cent (451 persons) annual increase from the June quarter 2018. In the last ten years (from the June quarter 2009 to the June quarter 2019), the average number of persons in custody has increased by 52 per cent (14,897 persons). In comparison, the Estimated Resident Population for persons aged 18 and over increased by 19 per cent, over a similar time period (from the December quarter 2008 to the December quarter 2018): Australian Bureau of Statistics, *Australian Demographic Statistics* (Catalogue No 3101.0, 19 September 2019) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>. In the June quarter 2019, the average number of full-time prisoners on the first day of the month was 43,385: of these, 66 per cent (28,666) were sentenced and 34 per cent (14,635) were un-sentenced: Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2019* (Catalogue No 4512.0, 12 September 2019) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4512.0Main+Features1June%20Quarter%202019?OpenDocument>.

of the offender, as well as discretion to grant bail or impose suspended sentences in appropriate cases. However, the Law Council is concerned that these presumptions may create additional burdens on the court process and may produce additional delay and cost to the criminal justice system. It is also concerned about the possible impact these measures may have on Aboriginal and Torres Strait Islander incarceration rates.

48. For these reasons, the Law Council submits that the presumptions in the Bill for certain Commonwealth child sex offenders should be removed. This position is explained in more detail below.

Presumption against bail

49. Schedule 7 would insert a presumption against bail in the Crimes Act for certain Commonwealth child sex offenders.

50. A 'bail authority' is defined as a court or a person authorised to grant bail under a law of the Commonwealth, a state or territory. Therefore, proposed section 15AAA applies not only to court bail, but also to police bail.

51. The Law Council is of the view that section 15AAA runs counter to the long held presumption in Australian criminal law in favour of bail.[24] In respect of most criminal charges, the person charged is entitled to be released on bail unless the police demonstrate to the court particular grounds on which bail should be refused.[25]

52. The presumption against bail is also inconsistent with the presumption of innocence. It presumes that defendants in certain Commonwealth child sex offences cases, regardless of their individual circumstances, must be, because of the nature of the accusation against them, likely to re-offend, likely to interfere with witnesses or other evidence, are a threat to the community or a flight risk.

53. This may be in conflict with Australia's obligations under Article 9(3) of the ICCPR, which provides that it shall not be the general rule that persons awaiting trial should be detained in custody.

54. Further to this, the Law Council notes the report of the Standing Committee on the Scrutiny of Bills that:

> *it is a cornerstone of the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption. As such, the committee expects that a clear justification be given in the explanatory materials for imposing a presumption against bail and any evidence that courts are currently failing to consider the serious nature of an offence in determining whether to grant bail.*[26]

55. In answer to the statement of compatibility's contention that the presumption against bail aims to achieve the objective of community protection from Commonwealth child sex offenders while they are awaiting trial or sentencing, and where conditions of bail

[24] See *R v Light* [1954] VLR 152; *R v Wakefield* (1969) 89 WN Pt 1 (NSW).
[25] See, eg, *Bail Act 2013* (NSW) s 20. Generally, the court retains the discretion to refuse bail where the court is satisfied that detention of the accused is necessary to protect witnesses or preserve evidence, to protect the community from the commission of further offences or to ensure that the accused does not abscond prior to trial. See, eg, *Bail Act 2013* (NSW) s 18.
[26] Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 6 of 2019, 18 September 2019) 4.

'cannot mitigate the risk to the community, witnesses, and victims'[27] and its contention that 'the presumption is rebuttable and provides judicial discretion in determining whether a person's risk on bail can be mitigated by appropriate conditions'[28], the Law Council echoes the Standing Committee's observation that:

> *no information is provided to demonstrate that the courts are currently not appropriately considering the risks posed by those accused of Commonwealth child sex offences.*[29]

56. However, the proposed presumption against bail appears to leave a broad discretion to the bail authority by noting that bail must not be granted 'unless the bail authority is satisfied by the person that circumstances exist to grant bail'.[30] While subsection 15AAA(2) sets out factors that must be taken into account, these are not limiting factors as indicated by the words 'In addition to any other matters' at the beginning of the subsection. The factors which must be taken into account do not appear to be remarkable although the Law Council queries the extent to which these may already be captured by existing bail procedures and laws.

57. It is noted that section 15AB of the Crimes Act already provides a range of matters which can be considered in bail applications when a person is charged or convicted of, a Commonwealth offence, such as the impact upon any witness or any person whom it is alleged that the offence was committed against. Furthermore, subsection 68(1) of the *Judiciary Act 1903* (Cth) provides that the bail laws of the relevant state or territory are to be applied in respect of Commonwealth offences tried in those jurisdictions.[31]

58. Finally, the Law Council supports the proposed amendments which provide a right of appeal to both the prosecution and the defendant against the grant or refusal of bail under proposed section 15AAA of the Crimes Act.

Presumption in favour of cumulative sentences

59. If enacted, Schedule 10 of the Bill would amend the Crimes Act to insert a presumption in favour of cumulative sentences.

60. The Explanatory Memorandum states:

> *This presumption in favour of cumulative sentences only 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.*
>
> *The objective of the presumption 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 a tougher response to the objective seriousness of the sexual abuse of children.*[32]

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[27] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 10.
[28] Ibid.
[29] Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 6 of 2019, 18 September 2019) 4.
[30] Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) cl 15AAA(1).
[31] See, eg, section 18 of the *Bail Act 2013* (NSW) and section 4 of the *Bail Act 1977* (Vic) for the factors the Court must take into account when determining whether to release an accused on bail.
[32] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 60.

61. A concern arises with the proposed insertion of subsection 19(5) into the Crimes Act that it may restrict judicial discretion to some extent. However, proposed subsection 19(6) retains this discretion and enables a court to consider the outcome for all the offences in totality and, if appropriately satisfied, structure the sentence in a different manner provided that the sentence overall is still of a severity appropriate in all the circumstances. This presumption is therefore somewhat paradoxical and its purpose unclear. Subsection 16A(1) of the Crimes Act already requires a court to impose a sentence 'that is of severity appropriate in all the circumstances of the offence'.

62. Nonetheless, there are many different variations and combinations of sentences for what often results in both state/territory and Commonwealth convictions such that the Law Council is concerned that the presumption will lead to unjust and unfair outcomes. This is particularly so given that there is significant overlap in the both state/territory and Commonwealth charges being laid in child sexual abuse cases where offences will often have different maximum penalties. The presumption is likely to lead to significant legal challenges and delays in the courts.

Conditional release of offenders after conviction

63. Schedule 11 would require that a Commonwealth child sex offender serve an actual term of imprisonment unless there are exceptional circumstances that justify the offender being released immediately on a recognizance release order. This measure is likely to place additional strain on the criminal justice system particularly given that the 'exceptional circumstances' threshold is a very high bar[33] and may result in inordinate pressure on the remand population.

64. The Explanatory Memorandum states:

> *Paragraphs 20(1)(b)(ii) and 20(1)(b)(iii) apply to people convicted of a Commonwealth child sex offence and provide that the court can only release a person on a recognizance release order immediately (without serving any period of imprisonment) if the court is satisfied that there are exceptional circumstances. Otherwise the child sex offender will have to serve an actual term of imprisonment before being released into the community on recognizance.*[34]

65. The Law Council notes that the requirement to show 'exceptional circumstances' is inconsistent with increased recognition that relatively short periods of imprisonment are not as effective at preventing re-offending and protecting the community than alternatives to imprisonment. As the current New South Wales Attorney General Mark Speakman observed in 2017, when introducing a Bill intended to create new sentencing options in NSW to replace reliance on relatively short periods of imprisonment, 'community safety is not just about incarceration'. He went on to state:

> *We know from Australian and international research that community supervision, combined with programs that target the causes of crime, reduce offending. We know that community supervision is better at reducing reoffending than leaving an offender in the community with no supervision,*

[33] The phrase 'exceptional circumstances' has been interpreted in other contexts as imposing a heavy onus on an accused. See, eg, *Re Pickersgill* [2013] VSC 715 where the court commented that the hurdle was a high one.
[34] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 35 [294].

support or programs. We also know that community supervision is better at reducing reoffending than a short prison sentence.[35]

66. That is consistent with research with respect to comparative reoffending rates of intensive correction orders and relatively short prison sentences.[36]

67. At present, where Commonwealth sex offences have been committed, the usual course of action is for the prosecutor to submit at sentence that substantial penalties, namely terms of imprisonment are generally appropriate, with general deterrence and denunciation being paramount considerations.[37] As a result, in child sex offence cases more generally, the key issue arising at sentencing will generally be how a term of imprisonment should best be served and releasing an offender forthwith is at present an important option at the disposal of a sentencing judge.

68. At present a judge may for example decide that the offence is serious enough for a prison term, but that in the particular circumstances of the case the offender can be released forthwith on a recognizance to be of good behaviour for a specified period (with or without further conditions). If the offender breaches the terms of the recognizance, they are liable to go to prison to serve the term of imprisonment. There are many reasons why releasing an offender forthwith, may be an important and serious sentencing option at the disposal of sentencing judges:

    - it is an effective deterrent. Research has shown that suspended sentences appear to perform better than actual custodial sentences in preventing recidivism;

    - it enables people who have committed crimes to avoid short prison sentences, thereby protecting them from the corrupting influences of prison;

    - it has a symbolic effect, allowing the seriousness of the offence to be recognised and denunciation of the person's criminal behaviour through the formal imposition of a prison sentence, while allowing the court to deal with that person in a merciful way;

    - it assists to reduce the size of the prison population as short prison sentences significantly increase the prison population, potentially leading to prison overcrowding;

    - a court may be of the view that the period of time a person has spent on remand awaiting sentencing is sufficient and the person could now benefit from an extended period of supervision following their immediate release from custody; and

[35] Commonwealth, *Parliamentary Debates,* House of Representatives, 11 October 2017 (Mark Speakman MP).
[36] In a 2017 study by the NSW Bureau of Crime Statistics and Research it was concluded that '[t]here was a 11%-31% reduction in the odds of re-offending for an offender who received an ICO compared with an offender who received a prison sentence of up to 24 months': J Wang and S Poynton, NSW Bureau of Crime Statistics and Research, 'Intensive Correction Orders Versus Short Prison Sentence: A Comparison of Re-Offending' (No 207, Crime and Justice Bulletin, October 2017).
[37] See *R v Porte* [2015] NSWCCA 174, [60]. In *R v Porte*, for example, where the Court recently reviewed the authorities in this area of law, the prosecution submitted that a term of imprisonment was appropriate.

- it provides a protective effect against re-offending by maintaining a person's links with their community, as well as minimising the disruption to that person's family, accommodation and employment.[38]

69. To this end, the Standing Committee for the Scrutiny of Bills has noted in relation to proposals seeking to limit the court discretion to make a recognizance order that:

> *severely limiting the court's discretion to make a recognizance order (or suspend a sentence) undermines the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. The statement of compatibility states that the court retains a discretion as to how long the term of imprisonment will be. However, the committee notes that the proposed amendments in Schedule 6 would impose mandatory minimum sentences and as such the court's discretion as to the term of imprisonment is already limited. In addition, while the court would retain a discretion to suspend a sentence in 'exceptional circumstances', the committee notes that this will require offenders to demonstrate that exceptional circumstances exist.*[39]

70. Given the importance and frequency of this issue, and given the above reasons, 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.

Recommendation:

- **The presumptions against bail, the presumption in favour of cumulative sentences and the presumption in favour of an actual term of imprisonment for certain Commonwealth child sex offenders should be removed from the Bill.**

Other measures

Record of reasons for granting bail and concurrent sentence

71. Proposed subsection 15AA(3AAA) of the Bill would amend the Crimes Act to require a court to state and record the reasons for granting bail for federal offenders. Similarly, proposed subsection 19(7) requires that where a court under subsection 19(6) is satisfied that the sentences do not need to be served cumulatively, the court must explain the reasons for doing so and ensure that the reasons are entered in the records of the court.

72. These amendments appear to be designed to facilitate providing a right of appeal to both the prosecution and defence. Appropriate additional court resourcing should be provided to assist the court in recording its reasons in such cases.

[38] See Balanced Justice, *Suspended Sentences: Should They Be Abolished* (5 October 2017) <http://www.balancedjustice.org/suspended-sentences-should-they-be-abolished.html>.
[39] Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 6 of 2019, 18 September 2019) 5.

Period of time to be served in custody where federal offender's parole order revoked

73. Item 5 of Schedule 14 of the Bill would amend the Crimes Act to require a period of time to be served in custody if a federal offender's parole order is revoked.

74. Currently, a court retains a discretion as to whether to require a period of time to be served in custody. The Explanatory Memorandum states that if a person's parole order or licence has been revoked, 'they no longer have legal authority to be in the community and must be returned to prison to continue serving their sentence'.[40] However, the practical effect of the amendment is likely to mean that more individuals are held within corrective service facilities increasing demand and cost which under current resourcing constraints cannot be sustained.

Recommendation:

- **If the Bill is to proceed, additional resourcing should be made available to the states and territories in particular to ameliorate the further burden on the courts and criminal justice system in those jurisdictions.**

Matters court has regard to when passing sentence

Federal offenders

75. Schedule 8 would amend the Crimes Act to require the court to have regard to certain considerations when passing a sentence. The Explanatory Memorandum states:

> *These items introduce additional general sentencing factors to which the court must have regard when sentencing a federal offender. The existing paragraph 16A(2)(g) is expanded upon so that in addition to considering the fact that the person pleaded guilty to the charge in respect of the offence, regard is also to be had to the timing of that plea and the degree to which these factors resulted in any benefit to the community or to any victim of or witness to the offence.*
>
> *The amendment to paragraph 16A(2)(g) is an acknowledgement that is it appropriate for offenders to be offered a reduction in their sentence as early guilty pleas reduce the costs associated with prosecuting offenders and save victims and witnesses from the often harrowing experience of giving evidence and being cross-examined in open court*.[41]

76. The Law Council supports these amendments, which would clarify any confusion in this area of law.[42]

[40] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 68.
[41] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 55.
[42] *R v Thomas* [2016] VCC 141, citing *Cameron v R* (2002) 209 CLR 339. There has been a controversy as to whether a person who pleads guilty to a Commonwealth offence should be entitled to a discount for a utilitarian benefit of plea. This appears to be one of the main reasons why section 16A(2)(g) of the *Crimes Act 1914* (Cth) is proposed to be amended.

77. Proposed paragraph 16A(2)(ma) introduces a new sentencing consideration regarding whether the person's standing in the community was used to aid in the commission of the offence. The Explanatory Memorandum states:

> *It is intended that this will capture scenarios where a person's professional or community standing is used as an opportunity for the offender to abuse children. For example, this would cover a medical professional using their professional standing as a medical practitioner or a person using celebrity status to create opportunities to sexually abuse children.*[43]

78. It is proposed that this provision be amended by providing that a sentencing court may take into account the matter referred to in proposed paragraph 16A(2)(ma) being 'the person's standing in the community was used by the person to aid in the commission of the offence … as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates', even where that 'standing' derives from 'customary law or cultural practice'. The Law Council considers that it is unfair, unjust and discriminatory to take customary law and cultural practice into account to aggravate the seriousness of an offence but to prohibit taking it into account where it would tend to mitigate the seriousness of an offence.

79. This suggested amendment does not expressly state that it is confined to sexual offences or situations where children might be abused. The 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.

Recommendation:

- **The proposed new sentencing consideration of whether the person's standing in the community was used to aid in the commission of the offence (proposed paragraph 16A(2)(ma)) should be limited to child sex offences to accord with the stated intent of the Bill.**

Child sex offenders

80. Schedule 8 would amend the Crimes Act to require the court to have regard to certain rehabilitation considerations when sentencing Commonwealth child sex offenders.

81. Paragraph 16A(2)(n) of the Crimes Act currently requires a court to take into account various factors personal to the offender including their prospects of rehabilitation. A primary objective of the criminal justice system is the rehabilitation and reintegration of offenders into society.[44]

82. Proposed subsection 16A(2AAA) would require the court to have regard to the objective of rehabilitation when determining the sentence to be passed or order to be made. Under subsection 16A(2AAA) the court will also have to consider if it would be appropriate to make orders imposing conditions about rehabilitation or treatment options.

83. The Law Council does not oppose such amendments as they would appear to be consistent with a key purpose of sentencing, namely, rehabilitation. However, proposed

[43] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 55.
[44] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 13 September 2006) 133.

paragraph 16A(2AAA)(b) requires consideration of whether the sentence or non-parole period set provides sufficient time for the person to undertake rehabilitation. The Explanatory Memorandum to the Bill notes that:

> *… state and territory correctional facilities advise that typically a non-parole period of at least 18 months is required for offenders to complete a relevant custodial sex offender treatment program.*[45]

84. 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.[46]

85. However, it is not clear how a court will practically be able to comply with the new requirement unless it conducts inquiries into rehabilitation options for a particular offender. Further, the Law Council is concerned that there are currently not enough rehabilitation places due to resourcing constraints. There are often rehabilitation waiting lists for people to undertake programs. For less serious offences and where there is overcrowding in prisons, offenders may be released on parole and await the opportunity to undertake a rehabilitation program.

86. This amendment does not appear to take into account the reality that there may be no access to such programs or that the offender may not in fact be eligible for programs. There may also not be juvenile sex offender programs in place so there may be a risk that a child does a program in an adult prison. This may impact on the ability of this measure to be effectively implemented and may also result in disproportionate sentences. That is, sentences that are longer than necessary or appropriate to address the various purposes of sentencing, including protecting the community.

Recommendation:

- **The requirement for a court to consider whether the sentence or non-parole period set provides sufficient time for the person to undertake rehabilitation (proposed paragraph 16A(2AAA)(b)) should be removed from the Bill.**

Removing the requirement for the Attorney-General to give notice to revoke the parole order or licence

87. Proposed paragraph 19AU(3)(ba) of the Bill would amend the Crimes Act to insert 'in the opinion of the Attorney-General it is necessary to revoke the parole order or licence without giving notice to the person in the interests of ensuring the safety and protection of the community or of another person'.

88. Such an amendment is objectionable on procedural fairness grounds notwithstanding the applicability of section 19AX of the Crimes Act which would allow a person while detained in custody to make a written submission to the Attorney-General as to why the parole order should not be revoked. The provision would apply to Commonwealth

[45] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 55, [256].
[46] Ibid 56.

criminal offences generally. The Explanatory Memorandum justifies this on the basis that:

> *Including this in the current list of exceptions will ensure that if the Attorney-General or their delegate becomes aware that a person who has been released into the community on parole or licence poses a threat to the safety of the community or to another person, that person can be taken into custody immediately.*[47]

89. However, the concept of necessity is not defined and may be interpreted broadly and subjectively by the Attorney-General that day with a potential to create unfairness. It is concerning that the Attorney-General rather than an independent body has this power.

90. In this context, the Law Council supports the Australian Law Reform Commission's (**ALRC**) previous recommendation in its report *Same Crime, Same Time: Sentencing of Federal Offenders* that:

> *The ALRC also recommends the establishment of a federal parole authority to make parole-related decisions about federal offenders. Federal offenders are unique in Australia in having their parole decisions determined by a ministerial delegate within a government department rather than by an independent authority with broad-based expert and community membership. In the course of the Inquiry there was strong support for the principle that decisions in relation to parole should be made by a body independent of the political arm of government. This was on the basis that, because such decisions affect an individual's liberty, they should be made, and be seen to be made, through an independent, transparent and accountable process and in accordance with high standards of procedural fairness*.[48]

Recommendations:

- **Proposed paragraph 19AU(3)(ba) of the Bill removing the requirement for the Attorney-General to give notice prior to revoking parole or a licence should be removed.**
- **Alternatively, an independent parole authority should have the ability to revoke the parole or licence without giving notice to the person in the interests of ensuring the safety and protection of the community or of another person subject to the ability for the person to contest the revocation.**

Requirements under a recognizance order

91. Schedule 11 would amend the Crimes Act to impose certain requirements on Commonwealth child sex offenders under a recognizance release order. The conditions that apply to child sex offenders under subsection 20(1B) are that the person will, during the specified period:

    a) be subject to the supervision of a probation officer;

    b) obey all reasonable directions of the probation officer;

[47] Ibid 16.
[48] Australian Law Report Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) 24.

c) not travel interstate or overseas without the written permission of the probation officer; and

d) undertake such treatment or rehabilitation programs that the probation officer reasonably directs.

92. The Explanatory Memorandum states:

> *This item inserts a new subsection after subsection 20(1A) to require 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.*
>
> *Importantly, the directions of the probation officer must be reasonable. For example, a direction to attend a rehabilitation program in a different city to which the person lives would not be reasonable as it may be impossible to fulfil.*[49]

93. The 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.

Recommendation:

- **Schedule 11 of the Bill imposing requirements for 'exceptional circumstances' to be found before a recognizance release order can be imposed for a Commonwealth child sex offence should be removed.**

Vulnerable witnesses

Removal of requirement to seek leave for a recorded interview of a vulnerable witness

94. Schedule 2 of the Bill would amend section 15YM of the Crimes Act to remove the requirement to seek leave before a recorded interview of a vulnerable witness can be admitted as evidence in chief.

95. Subsection 15YM(2) provides at present that the Court must not give leave under subsection 15YM(1) if satisfied that it is not in the interests of justice for the person's evidence in chief to be given by video recording, where the interview is of a child witness, a vulnerable adult complainant or a special witness for whom an order under subsection 15YAB(3) is in force.

96. The Explanatory Memorandum to the Bill explains that the amendment is designed to:

> *… strengthen the protections in Part IAD of the Crimes Act for vulnerable witnesses (such as children) who give evidence in particular criminal proceedings, including for Commonwealth offences and human trafficking and slavery offences.*[50]

[49] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 63.
[50] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 17.

97. The Explanatory Memorandum to the amendment further explains that:

> *If contested by the defence, the requirement to seek leave in section 15YM may have an adverse effect on the vulnerable witness and is contrary to the intent of the vulnerable witness protections more broadly.*
>
> *Accordingly, these provisions remove the requirement for the court to grant leave before admitting a video recording of an interview of a vulnerable person as evidence in chief. The recorded interview will still need to be conducted by a constable or a specified person.*
>
> *The evidence in chief interviews remain subject to the rules of evidence and parts may be ruled inadmissible, thereby protecting the rights of the accused person.*[51]

98. The Law Council notes that there are a number of advantages and disadvantages to admitting pre-recorded evidence. As identified by the ALRC in its report on *Family Violence – A National Legal Response,* advantages include that it may improve the quality of evidence, facilitate pre-trial decisions by the prosecution and the defence, help with the scheduling and conduct of the trial and minimise system abuse of witnesses.[52]

99. The Law Council welcomes measures that seek to protect victims of Commonwealth trafficking and slavery offences in giving evidence. Despite human trafficking, slavery and slavery-related offences being criminalised by the Criminal Code, the amount of successful prosecutions remain low, with only twenty convictions to date.[53]

100. Among the various complex issues that arise in the prosecution of these cases, a major impediment to prosecuting trafficking and slavery related offences appears to be the reluctance of victims to give evidence of the offence, especially as they and their families may be subject to threats for doing so, or may otherwise fear confronting the people or persons responsible for their exploitation and/or trafficking in court.[54] The Law Council considers it essential that if victims voluntarily choose to give evidence in criminal proceedings then they must be given appropriate protection and support.

101. The Australian Government has adopted a victim-centred approach to combatting human trafficking and slavery.[55] Governments that adopt a victim-centred approach worldwide have ensured that during the criminal justice process, steps are taken to protect victims' identity and privacy, and victims are allowed to provide testimony in a manner that is less threatening, such as testimonies that are written or recorded, or delivered via video conference.[56] The Law Council considers that removing the requirement for leave to be granted for vulnerable witnesses to give pre-recorded

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[51] Ibid.
[52] Australian Law Reform Commission, *Family Violence - A National Legal Response* (Report 114, 2010) [168].
[53] Australian Government, Submission No 89 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (April 2017) 8.
[54] See Fiona McLeod, 'Human Trafficking and Exploitation in Australia' in Nora Cronin and Kimberley Ellis, *Human Trafficking: Emerging Legal Issues and Applications* (Lawyers and Judges Publishing Company, 2016) 85; see also Fiona David, 'Labour Trafficking' (Australian Institute of Criminology, 2010) 46 <https://aic.gov.au/publications/rpp/rpp108>.
[55] Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015-9* (2014) 18 <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>.
[56] See Fiona McLeod, 'Human Trafficking and Exploitation in Australia' in Nora Cronin and Kimberley Ellis, *Human Trafficking: Emerging Legal Issues and Applications* (Lawyers and Judges Publishing Company, 2016) 86.

evidence to be consistent with international best practice and promotes the Government's victim-centred approach to combatting human trafficking and slavery.

102. The Law Council acknowledges that admitting pre-recorded evidence also has its drawbacks, 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.[57] While it is important for those involved with the trial process where pre-recorded evidence is given to be cognizant of these issues, the Law Council considers that they can be appropriately managed by the trial judge and parties. This includes through case management conferences and the judge's power to issue directions to address any difficulties that may arise.

103. To further manage the drawbacks associated with the admission of pre-recorded evidence, it may be useful for relevant participants in the criminal justice system to receive education about legislation authorising the use of pre-recorded evidence, and training in relation to interviewing vulnerable witnesses and pre-recording evidence.[58]

Committal proceedings

104. Schedule 3 of the Bill would amend the Crimes Act to remove the requirement for vulnerable witnesses to be available to give evidence at committal proceedings.

105. The Explanatory Memorandum explains that:

> *The Bill removes the requirement for vulnerable witnesses to be available to give evidence at committal proceedings. There is currently no restriction on cross-examination of vulnerable witnesses at committal proceedings (or proceedings of a similar kind) and few restrictions on the scope of questioning permitted in committal proceedings under Part IAD of the Crimes Act.*
>
> *Presently, prohibitions on the scope of the cross-examination of a vulnerable witness appear in sections 15YB and 15YC of the Crimes Act. These provisions provide that evidence of the reputation or experience with respect to sexual activities of a child witness or child complainant is prima facie inadmissible. However, the accused's legal representatives can seek leave, for defined reasons, to cross-examine on these subjects. The ability to seek leave is not restricted to evidence at trial – it includes committal proceedings or proceedings of a similar kind. This restriction does not apply to vulnerable adult complainants, who have other protections in Part IAD.*
>
> *By prohibiting cross-examination at committal proceedings or proceedings of a similar kind, vulnerable witnesses will be spared an additional risk of re-traumatisation. Presently, vulnerable witnesses may have to give evidence twice and often in distressing, combative environments. It will also help streamline criminal justice processes by ensuring lengthy cross-examination is reserved for trials and not committal proceedings or proceedings of a similar*

[57] Ibid [169].
[58] Australian Law Reform Commission, *Family Violence - A National Legal Response* (Report 114, 2010) recommendations 26-8. The recommendation was originally couched in relation to sexual assault proceedings and victims of sexual assault but has been adapted by the Law Council as it considers that the substance of the recommendation applies to the pre-recorded evidence of vulnerable witnesses more broadly.

kind. It will also bring the Commonwealth broadly into line with practice in other Australian states and territories.[59]

106. The Law Council does not support a complete ban on cross-examination of vulnerable witnesses at committal proceedings. Such proceedings can be an effective way of streamlining the trial process which may result in benefits for victims. The Law Council notes the ALRC's recommendation that, in relation to sexual offences, that State and Territory legislation should prohibit any child and any adult complainant, unless there are special or prescribed reasons, from being required to attend to give evidence at committal hearings.[60] The Law Council would therefore support an approach which prevents cross-examination of vulnerable witnesses unless 'special reasons in the interests of justice'[61] can be demonstrated and for a defined set of offences only such as child sex offences.

Recommendation:

- **The 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.**

Residential treatment orders

107. Schedule 12 of the Bill would insert subparagraph 20AB(1AA)(a)(vii) into the Crimes Act to add 'residential treatment order' as a sentencing alternative for intellectually disabled offenders. The Explanatory Memorandum states:

This item amends the list of sentencing alternatives in subsection 20AB(1AA) to include 'residential treatment orders'. Section 20AB(1AA) empowers courts to make certain alternative sentencing orders that are available under state or territory law. The new subparagraph 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.[62]

108. The Law Council supports the amendment as an alternative to sentencing for certain classes of offenders. It notes that residential treatment orders are available in other jurisdictions.[63] However, in the timeframe available for response, the Law Council has not had the opportunity to examine whether there are adequate safeguards in the Bill to ensure that the Commonwealth residential treatment order scheme would comply with Australia's international human rights obligations.

[59] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 19.
[60] Australian Law Reform Commission, *Family Violence - A National Legal Response* (Report 114, 2010) recommendations 26-4.
[61] For example, this is applicable test in New South Wales relating to when the cross examination of vulnerable witnesses is permitted: *Criminal Procedure Act 1986* (NSW) s 84(1).
[62] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 64.
[63] See *Sentencing Act 1991* (Vic) s 82AA.

Recommendation:

- **The residential treatment order regime should be implemented, subject to additional funding being provided and an assessment by the Parliamentary Joint Committee on Human Rights that such a scheme would be consistent with Australia's international human rights obligations.**

Clean street time

109. Schedule 13 of the Bill would amend the Crimes Act to reduce the amount of 'clean street time' that can be credited against the outstanding sentence following commission of an offence by a person on parole and license by making it discretionary only for a court to consider 'clean street time'.

110. The ALRC's has previously recommended that:

> *Federal sentencing legislation should provide that 'clean street time' is to be deducted from the balance of the period to be served following revocation of parole or licence.*[64]

111. Given that a court appears to retain discretion to deduct clean street time, the Law Council's preliminary view is that this provision does not appear to raise significant concern.

[64] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) recommendations 24-4.

Appendix 1 – Increase in maximum penalties comparison

Section	Offence	Current penalty	Increase proposed by 2017 Bill[65]	Proposed penalty
Subsection 272.9(1)	Engaging in sexual activity with a child outside Australia	Imprisonment for 15 years.	Imprisonment for 18 years.	Imprisonment for 20 years.
Subsection 272.9(2)	Causing child to engage in sexual activity in presence of defendant	Imprisonment for 15 years.	Imprisonment for 18 years.	Imprisonment for 20 years.
Subsection 272.15(1)	"Grooming" child to engage in sexual activity outside Australia	Imprisonment for 12 years.	Imprisonment for 15 years.	Imprisonment for 15 years.
Subsection 471.25(1)	Using a postal or similar service to "groom" persons under 16	Imprisonment for 12 years.	Imprisonment for 15 years.	Imprisonment for 15 years.
Subsection 471.25(2)	Using a postal or similar service to "groom" persons under 16	Imprisonment for 12 years.	Imprisonment for 15 years.	Imprisonment for 15 years.
Subsection 471.26(1)	Using a postal or similar service to send indecent material to person under 16	Imprisonment for 7 years.	Imprisonment for 10 years.	Imprisonment for 10 years.
Section 474.25	Obligations of internet service providers and internet content hosts	100 penalty units.	800 penalty units.	N/A[66]
Subsection 474.25A(1)	Engaging in sexual activity with child using a carriage service	Imprisonment for 15 years.	Imprisonment for 18 years.	Imprisonment for 20 years.

[65] Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (Cth).
[66] The increase proposed by the 2017 Bill was achieved by item 1 of schedule 2 of the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth),. which commenced on 6 April 2019.

Section	Offence	Current penalty	Increase proposed by 2017 Bill[65]	Proposed penalty
Subsection 474.25A(2)	Causing child to engage in sexual activity with another person	Imprisonment for 15 years.	Imprisonment for 18 years.	Imprisonment for 20 years.
Subsection 474.27(1)	Using a carriage service to "groom" persons under 16 years of age	Imprisonment for 12 years.	Imprisonment for 15 years.	Imprisonment for 15 years.
Subsection 474.27(2)	Using a carriage service to "groom" persons under 16 years of age	Imprisonment for 12 years.	Imprisonment for 15 years.	Imprisonment for 15 years.
Subsection 474.27A(1)	Using a carriage service to transmit indecent communication to person under 16 years of age	Imprisonment for 7 years.	Imprisonment for 10 years.	Imprisonment for 10 years.
Subsection 272.8(1)	Sexual intercourse with a child outside of Australia	Imprisonment for 20 years	Not listed in Bill	Imprisonment for 25 years
Subsection 272.8(2)	Causing child to engage in sexual intercourse in presence of defendant	Imprisonment for 20 years	Not listed in Bill	Imprisonment for 25 years
Subsection 272.10(1)	Sexual intercourse with child with mental impairment under authority outside Australia	Imprisonment for 25 years	Not listed in Bill	Imprisonment for life
Subsection 272.11(1)	Persistent sexual abuse of a child outside of Australia	Imprisonment for 25 years	Not listed in Bill	Imprisonment for 30 years
Subsection 272.18(1)	Benefiting from an offence against Division 272	Imprisonment for 20 years	Not listed in Bill	Imprisonment for 25 years
Subsection 272.19(1)	Encouraging an offence against Division 272	Imprisonment for 20 years	Not listed in Bill	Imprisonment for 25 years

Section	Offence	Current penalty	Increase proposed by 2017 Bill[65]	Proposed penalty
Subsection 273.7(1)	Aggravated offence of possessing child abuse material outside Australia	Imprisonment for 25 years	Not listed in Bill	Imprisonment for 30 years
Subsection 474.24A(1)	Aggravated offence of possessing or accessing child abuse material	Imprisonment for 25 years	Not listed in Bill	Imprisonment for 30 years
Subsection 474.25B(1)	Aggravated offence of causing child with mental impairment under authority to engage in sexual activity using a carriage service	Imprisonment for 25 years	Not listed in Bill	Imprisonment for 30 years