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Committee Secretary
Legal and Constitutional Affairs Committee
PO Box 6100
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CANBERRA ACT 2600
AUSTRALIA

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

Dear Secretary

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

Thank you for the opportunity to make a submission to the Standing Committee on Law and Justice with respect to its inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019.

This submission is written by members of the Centre for Crime, Law and Justice, at the Faculty of Law, University of New South Wales. The views expressed in this submission are the views of the undersigned individuals.

## *Introduction and Overview*

The Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 seeks to further strengthen laws and implement stronger measures in protecting children both in Australia and overseas from sexual exploitation.[1] The Bill also seeks to assist agencies such as the Australian Federal Police, Australian Border Force and Commonwealth Director of Public Prosecutions, much like the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 assented to earlier this month.

We acknowledge that it is imperative for victims of child sexual exploitation to have the opportunity to seek a just outcome from the criminal justice system for this abuse. However, it is also imperative that the criminal justice system balances the needs of victims and the rights of accused persons in alignment with human rights standards and rule of law principles.

[1] Commonwealth, *Parliamentary Debates,* House of Representatives, 11 September 2019, 6 (Christian Porter, Attorney General, Minister for Industrial Relations and Leader of the House).

In this submission we do not attempt a comprehensive analysis of all aspects of the Bill. Rather, we raise concerns about two features of the Bill:

1. The proposal for *mandatory minimum sentences* for a wide range of child sex offences is potentially problematic as there is strong research demonstrating that mandatory sentencing is not an effective way of reducing recidivism. Further, the introduction of mandatory sentencing has the potential to fetter judicial discretion and may not align with the rehabilitative principles put forward by the Bill.

2. The concept of *rehabilitation* is a central component of Australian sentencing law; it is a core purpose of post-conviction punishment. It places an emphasis on the ability for an offender to 'pay their debts' and reintegrate as an 'honourable member of society'. Aspects of this Bill appear to add a punitive dimension to the operation of rehabilitation as a sentencing principle and this may serve to impede access to genuine rehabilitative opportunities.

***Mandatory Sentencing***

At the outset, we wish to emphasise that we have great sympathy for individuals and families affected by child sexual abuse, and understand that there is a long history of justice system failure in providing appropriate outcomes when handling matters of child sexual exploitation. The exploitation of society's most vulnerable is deeply upsetting and traumatic – effects that are exacerbated when reprehensible conduct has been concealed and perpetrators may have avoided punishment.

However, we do not believe that the introduction of mandatory minimum sentencing (proposed s16AAA of the *Crimes Act 1914* (Cth)) is an appropriate mechanism for 'correcting' any actual or perceived deficit in the justice system's response. The proposed minimum sentences will apply to offences ranging from using a carriage service for sexual activity with a person under 16 years of age (s 474.25A) to sexual intercourse with a child outside of Australia (s 272.8).[2] Under the changes proposed by the Bill these offences would have minimum sentences of 7 and 5 years respectively.

There is a strong body of research and scholarly literature which opposes the use of mandatory sentencing. A research paper written by the Victorian Sentencing Advisory Council ("VSCA") in 2008 noted that mandatory sentencing is unlikely to achieve its aim of deterring crime.[3] The VSCA further noted that if mandatory sentencing did achieve its goal, this would typically come at a significant social cost for the offender and an economic cost to the wider community.[4] The VSCA compared and contrasted both American and Australian justice systems and their differing minimum sentencing schemes, and concluded that there is a low likelihood of mandatory sentencing being a successful method of reducing crime.[5]

[2] *Criminal Code Act 1995 (Cth)* sch 1.
[3] Victorian Sentencing Advisory Council, 'Mandatory Sentencing' (Information Paper, August 2008).
[4] Ibid 18.
[5] Ibid 21.



We refer also to the Law Council of Australia's ("LCA") *Discussion Paper on Mandatory Sentencing* published in 2014.[6] Some of the issues raised by the LCA discussion paper include the potential for disproportionate impacts, including on Aboriginal and Torres Strait Islander persons; the potential

increases in recidivism; the increased economic cost on society and burden on the justice system; and the absence of strong evidence that mandatory sentencing does deter crime.

Previous proposals for mandatory sentencing in relation to child sex offences have been contentious. For example, in 2012 the Queensland Government attempted to introduce mandatory life sentences for repeat offenders of certain child sex offences. This was almost unanimously opposed by every legal professional body in Queensland, who cited concerns that mandatory sentencing had little to no deterrent effect on offending.[7]

We note that an earlier version of the current Bill was first tabled in 2017 by the Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism.[8] We further note that the 2017 Bill also attracted criticisms regarding the ineffectiveness of mandatory sentencing and was not passed, with one Member of the House of Representatives stating that … 'in the end I do think these matters ought to be determined by judges and magistrates'.[9]

Mandatory sentencing effectively fetters the discretion of the judiciary and undermines important rule of law and human rights principles. Australia enjoys a strong separation of powers that ensures each branch of government performs its duties. Mandatory sentencing for Commonwealth child sex offences would not only hinder the judicial decision-making process, but it would fail to respect the judiciary as a distinct, separate arm of government. Respecting the separation of powers involves recognising that sentencing is a *judicial* function. For that function to be carried out in a manner that engenders confidence in the criminal justice system, and continues the system's commitment to individualised justice, judges must have discretion to take into account all relevant sentencing principles and give proper consideration to all of the circumstances of an offender and his/her offending.[10]

The Explanatory Memorandum to the Bill notes that '... mandatory minimum penalties [apply] to first time offenders only for the most serious child sex offences' and '[t]he mandatory minimum scheme will apply to child sex offences that attract lower maximum penalties where the offender has been previously convicted of another child sex offence' (cl 41).[11] The Memorandum further notes that 'the mandatory sentencing scheme … only relate to the length of the head sentence, not the term

[6] Law Council of Australia, 'Discussion Paper on Mandatory Sentencing' (Discussion Paper, May 2014).
[7] Legal Affairs and Community Safety Committee, Parliament of Queensland, *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012* (Report No 2, July 2012) 4–24
[8] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017.
[9] Commonwealth, Parliamentary Debates, House of Representatives, 13 September 2017, 11285 (Emma Husar, Member for Lindsay (NSW)).
[10] Nicholas Cowdery, 'Mandatory Sentencing' (Discussion Paper, Sydney Law School, 15 May 2014) 5.
[11] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 9.

of actual imprisonment' and that Courts will 'retain discretion as to any term of actual imprisonment, and … retain access to sentencing alternatives that may be appropriate' (cl 42).[12]

On one reading, these statements, and the provisions of the Bill to which they relate, carry an acknowledgement that fettered judicial discretion can produce injustice, and that there must be room for judges to take account of unique individual circumstances in fashioning an appropriate sentence. This echoes a view that has bene expressed previously: it is inappropriate and unjust to assume a minimum mandatory punishment will fit every instance of a crime without knowing the facts and circumstances which making surround the commission of the offence in the future.[13] When contemplating the Bill's objective of promote offender rehabilitation and treatment, it is difficult to contemplate the circumstances in which the imposition of the mandatory sentence would be appropriate.

***'Rehabilitation'***

Rehabilitation and the prospects of rehabilitation are widely recognised – in legislation and case law – as important factors to consider when sentencing an offender for federal and state (and territorial) offences.[14] The purpose of rehabilitation as an attribute of punishment is to reform the offender, minimise the chance of reoffending and assist the offender in re-establishing themselves as a law abiding citizen.[15] In *R v Pogson* McClellan CJ at CL and Johnson J stated that the concept of the offender paying their debt to society for their offending '... captures the essence of rehabilitation, enabling the offender to re-establish him or herself as an honourable member of the community'.[16] At The Federal Court has also emphasised that rehabilitation involves making sure that the sentence imposed on an offender aligns with their ability to resume their role as a contributing member of society after release.[17]

We submit that the concept of rehabilitation that is manifested in the Bill is in tension with the courts' traditional concept of rehabilitation as a purpose of sentencing. Proposed s 16A(2AAA) of the *Crimes Act 1914* is said to reflect a legislative objective that sentencing judges should hand down a sentence that gives an offender the best chance of completing a rehabilitative program. The Explanatory Memorandum suggest that a custodial period of '18 months to two years' is the minimum required to allow for the completion of a custodial sex offender program. [18] It appears that what is contemplated is that, in some circumstances, a *longer* custodial sentence (than would otherwise be the case) may be necessary in order to advance 'rehabilitation' in the form of access to in-prison perpetrator programs.

[12] Ibid.
[13] Law Council of Australia Paper (n 5) 12.
[14] *Crimes Act 1914* (Cth) s 16A2(n); see also, eg, *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 3A(d).
[15] *R v Bugeja* [2001] NSWCCA 196, [39] (Adams J); *Vartzokas v Zanker* (1989) 51 SASR 277 at 279; *R v Pogson* [2012] NSWCCA 225.
[16] *R v Pogson* [2012] NSWCCA 225, McClellan CJ at CL and Johnson J (RA Hulme and Button JJ agreeing) stated at [122]–[123].
[17] *R v Valentini* [1980] FCA 133.
[18] Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth) 55.

In this incarnation, 'rehabilitation' appears to be blurred with other more punitive sentencing considerations – where longer sentences reflect the need for retribution and incapacitation.

A related practical consideration is that, at the time of sentencing, it may be difficult for a judge to predict the period of time which will elapse before an offender will have the chance to complete a custodial program. Worse still, inadequacies in resourcing, long waiting lists or simply the non-availability of programs may result in disproportionate sentences for offenders if 'rehabilitation' is able to influence sentencing in this way.

While we welcome the opportunity for offenders to have better access to treatment programs, with enhanced prospects for effective rehabilitation, we are concerned that the thrust of the Bill is more punitive than rehabilitative and heavily influenced by risk management considerations. This tenor is exacerbated by the presumption in favour of cumulative sentencing proposed by the Bill. Excessive overall imprisonment may lead to a decreased willingness to participate in treatment programs if the custodial sentence length is such that offender does not realistically face the prospect of re-entering society as a rehabilitated offender.

Finally, we note with concern that the Explanatory Memorandum suggests that the financial impact of the Bill will be 'negligible'.[19] A genuine commitment to effective rehabilitation carries with it a responsibility to adequately resource perpetrator programs – including custodial and community-based programs.

We would be happy to provide further elaboration on issues raised in this submission, or assist the Senate Legal and Constitutional Affairs Committee in any other way.

Yours sincerely

**[by email]**

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