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

Legal Aid NSW submission to the Senate Legal and Constitutional Affairs Committee

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Legal Aid NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

The Commonwealth Crimes Unit (CCU) is a specialist Unit within the Criminal Law Division providing representation to people charged with Commonwealth offences. CCU solicitors provide representation in Local Court summary matters and matters proceeding on Indictment for sentence or trial in the District Court. The Unit provides advice, representation and advocacy for Federal Offenders who are refused parole or have their parole revoked.

The Children's Legal Service advises and represents children and young people under 18 years who are involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

The Family Law Division provides services in Commonwealth family law and state child protection law.

Legal Aid NSW welcomes the opportunity to make a submission to the Inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019. Should you require any further information, please contact:

Table of Contents

Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (**the Bill**).

Our submission outlines a number of concerns with the current drafting of the Bill, particularly in relation to increases in sentences and hampering of judicial discretion.

We address the relevant sections of the Bill below.

Schedule 1 - Revocation of parole order or licence to protect safety

Schedule 1, item 1 of the Bill would provide an additional exception to the requirement in s 19AU(2) of the *Crimes Act 1914* (Cth) (**Crimes Act**) for the Attorney-General to provide notice to a person before revoking a parole order or licence.

It is unclear why this amendment is considered necessary. We oppose the amendment because existing exceptions to the notice requirement already provide sufficient power to revoke without notice, when necessary to ensure the safety and protection of the community or another person.[1]

Further, s 19AU(2)(b) of the Crimes Act safeguards procedural fairness by providing an opportunity to respond to a proposal to revoke a parole order or licence. While s 19AX of the Crimes Act provides a scheme for responding to revocation of a parole order or licence without notice, the person is held in custody pending a decision on whether or not to rescind the revocation. In our casework experience, there can be significant delays in the issuing of a notification under s 19AX(2), which extends the period that a person is held in custody without opportunity to respond to the grounds of revocation.

We oppose the suggested expansion. However, if it is to proceed, we suggest that it be accompanied by a stricter time limit for the provision of notification under s 19AX, to ensure that people have the opportunity to object to the revocation at the earliest possible opportunity.

[1] Revocation without notice is permitted in circumstances of urgency (s 19AU(3)(b)), and where necessary in the interests of the administration of justice (s 19AU(3)(d)).

Schedule 2 – Use of video recordings

We support the proposed amendment to remove the requirement for leave to admit a recorded interview as evidence in chief. The amendment would bring the Crimes Act into line with NSW provisions, which allow vulnerable witnesses to give evidence in chief via a recording of an interview.[2]

Schedule 3 – Cross-examination of vulnerable persons

We oppose the amendments in Schedule 3 of the Bill, because they are too broad. Part IAD of the Crimes Act contains a range of protections in relation to vulnerable witnesses, which apply in committal proceedings,[3] and include limitations on cross-examination. What is proposed is a blanket prohibition on cross-examination at committal proceedings or similar proceedings. This goes further than provisions in other jurisdictions in Australia, some of which do not impose any limitations at all on questioning of vulnerable witnesses at committal.

Some jurisdictions impose restrictions on the cross-examination of child witnesses of sexual offences and victims of sexual offences.[4] In NSW, complainants are not to be required to attend committal proceedings for certain sexual assault offences if they have a cognitive impairment, or if they were under 16 at the time of the alleged offence and under 18 at the time of committal.[5]

If the amendment proceeds, we suggest that it should only apply to child witnesses and vulnerable adult complainants. This will ensure that it is predominantly targeted towards the sexual offences listed in s 15Y of the Crimes Act. Because special witnesses may be involved in proceedings for *any* Commonwealth offence[6] (including non-sexual offences and offences not involving children), they should be excluded from this provision to avoid an excessively broad application.

[2] *Criminal Procedure Act 1986* (NSW), Part 6.
[3] Section 15Y(4) of the *Crimes Act 1914* (Cth) provides that Part IAD applies to committal proceedings.
[4] For example, *Local Court (Criminal Procedure) Act 1928* (NT), s 105L.
[5] *Criminal Procedure Act 1986* (NSW), s 83.
[6] *Crimes Act 1914* (Cth), ss 15YAB(1), 15Y(3) and (5).

Schedule 4 – Strengthening child sex offences

Item 6 – Engaging a third party for grooming

Schedule 4, item 6 of the Bill inserts a new offence into the *Criminal Code Act 1995* (Cth) (**Criminal Code**) of engaging a third person with the intention of making it easier to procure a child to engage in sexual activity outside Australia. We oppose this provision. It is not clear why the provision is necessary, and why 'conduct in relation to a child', captured in the existing s 272.15 grooming offence, would not encompass engaging a third party.

We suggest that, if the amendment proceeds, the maximum penalty should be 12 years imprisonment or less, in line with s 272.15[7] and the NSW grooming provision in s 66EB(3) of the *Crimes Act 1900* (NSW).[8]

Items 9 and 30 – Using a postal or carriage service for grooming

Item 9 inserts three new offences into the Criminal Code relating to the use of a postal service for grooming. We agree with the proposed penalty for the offence of sending to a third party to procure a child to have sex with a third party in the presence of the sender (cl 471.25A(3)). This is consistent with the similar offence under s 471.25(3) of the Criminal Code. However, we consider these offences to be more serious than the offences under subsections (1) and (2) (item 9), because they involve an element of being in company. As such, we oppose the proposal that clauses 471.25A(1) and 471.25A(2) carry maximum penalties of imprisonment for 15 years. Instead, we suggest that the maximum penalties for these offences should be 12 years, consistent with the maximum penalty for similar offences under s 471.25(1) and (2). We address the penalties for section 471.25 of the Criminal Code under Schedule 5, below.

The same comments apply in relation to the proposed carriage service offences in item 30, cl 474.27AA.

[7] Because s 272.15 could involve more direct contact with the child, it covers conduct which is more culpable than conduct covered by the proposed new offence. Hence, if the amendment proceeds, the proposed new offence should have either the same or lesser maximum penalty than s 272.15, namely 12 years imprisonment.
[8] Section 66EB(3) of the *Crimes Act 1900* (NSW) provides a maximum penalty of 12 years imprisonment where the child is under the age of 14 years and 10 years imprisonment in any other case.

Schedule 5 – Increased penalties

Schedule 5 proposes to increase the penalties for a range of child sex offences that occur outside of Australia. The proposed penalties exceed (sometimes significantly) the maximum penalties available for sexual offences against children within Australia. It is disproportionate to increase penalties so that they exceed the available penalties for offences within Australia.

For example, the Bill proposes to increase the penalty for sexual activity (other than intercourse) with a child outside Australia, from 15 to 20 years (item 3). The equivalent offence within NSW attracts a maximum penalty of 10 years.[9]

Penalties for child sexual assault offences in NSW have been the subject of a number of independent reviews, which have involved detailed consideration and extensive consultation. We do not consider there to be a good argument for significantly exceeding penalties determined through rigorous processes. For this reason, we oppose increases in penalties to the offences in ss 272.8(1), 272.8(2), 272.9(1), 272.9(2), 272.15(1), 474.25A(1) and 474.25A(2) of the Criminal Code. By extension, we oppose the increase to penalties for aggravated offences under ss 272.10(1) and 474.25B(1) of the Criminal Code.

In line with our comments in relation to cl 471.25A of the Bill above, we suggest that it is appropriate to maintain a distinction between the penalties for postal/carriage service grooming offences that involve an element of being in company, and those which do not. As such, we oppose the proposed increase to the penalties under ss 471.25(1), 471.25(2), 474.27(1) and 474.27(2) of the Criminal Code. We also oppose the corresponding increases in penalties for offences under s 471.26(1) and 474.27A(1) of the Criminal Code.

We oppose the proposed increase to the penalties for offences under s 272.18(1) and 272.19(1) of the Criminal Code for benefiting from or encouraging an offence under Division 272. The increase from 20 to 25 years may result in the benefitting/encouragement offence attracting a higher penalty than the substantive offence.

Schedule 6 – Minimum sentences

We strongly oppose the use of minimum penalties. Minimum penalties hamper the discretion of the court and the ability to deliver individualised justice that is appropriate in all the circumstances of a case. The NSW standard non-parole period system provides

[9] *Crimes Act 1900* (NSW), s 66DB.

guidance to the court when it is determining the appropriate sentence, without limiting the court's discretion. This is a preferable model to any form of mandatory sentencing, which is an approach that has been widely criticised.[10]

Schedule 7 – Presumption against bail

We strongly oppose a presumption against bail. Including such a presumption in the Crimes Act would create further inconsistencies and confusion within a bail regime that is already exceedingly complex. Reforms to NSW bail law have attempted to simplify the system, and this would be undermined by the current proposal. The *Bail Act 2013* (NSW) already requires a bail authority to assess the factors listed in item 4, cl 15AAA(2)(a)-(d) when making a bail determination and it is unnecessary and confusing to include these considerations in this section.

Schedule 8 – Matters court has regard to when passing sentence

We are concerned about the impact of item 3, cl 16A(2AAA) which allows a court to determine the length of any sentence or non-parole period to include sufficient time for the person to undertake a rehabilitation program. We would support any decrease in an offender's non-parole period to enable them to have sufficient time to undertake a rehabilitation program in the community. However, in our view there is a real risk that this provision could lead to significantly extended sentences (particularly the non-parole period) due to a lack of available places in rehabilitation programs. There is the risk that an offender's non-parole period is extended so that they may complete a program in custody and this extension may be affected by delays or a lack of access to the program in custody. There is also the risk that an offender's non-parole period would be extended because of delays or a lack of access to a program in the community

It is possible that 'sufficient time' would be construed not simply as the time it would take to complete a program, but also any additional waiting time required to gain access to the program. We suggest that the provision should be amended to note that rehabilitation programs may be available in custody or in the community, and to clarify that cl 16A(2)(2AAA)(b) should not operate to extend a sentence as a result of factors such as lack of access to rehabilitation programs. Further, cl 16A(2AAA)(b) should not operate to extend the non-parole period at all.

[10] See for example, the Law Council of Australia, Discussion Paper on Mandatory Sentencing (May 2014).

Schedule 10 – Cumulative sentences

We oppose the presumption that sentences be cumulative. While item 2, cl 19(6) retains some discretion to depart from the requirement to impose cumulative sentences, it unduly limits the matters that may be taken into account by the court. The test of whether or not a sentence should be concurrent is focussed on totality, not necessarily on whether a sentence is 'appropriately severe'.

Schedule 11 – Conditional release of offenders after conviction

Schedule 11, item 1 would amend the Crimes Act to prohibit conditional release of Commonwealth child sex offenders, except in exceptional circumstances. Again, this provision unduly limits judicial discretion. It is particularly important that a sentencing court have all sentencing options available to it in cases of this nature, given the very wide range of child sex offences. There are many instances of offending which are on the more minor end of the scale and it is extremely concerning to restrict a court's sentencing exercise in this way.

If the provision does proceed, it should not apply to offenders who were under 18 at the time of the offence.

Schedule 13 – Revocation of parole order or licence

Schedule 13, items 1 and 2 make amendments about how 'clean street time' can be taken into account when dealing with revocation of parole. The provisions are confusing and do not provide clarity to an already complex area of law. We note that any time that an offender has complied with parole orders should be taken into account.

Schedule 13, item 5 amends the automatic revocation of parole process in s19AQ of the Crimes Act. Under the current s 19AQ, parole is automatically revoked upon imposition of a sentence greater than three months for a new offence, and parole is taken to be revoked upon imposition of the new sentence. The new provisions purport to allow a court to decide on the date of revocation, taking into account the time the new offence was committed or was "most likely to have been committed". This kind of enquiry seems problematic and may require a court to enquire into inappropriate matters where a plea of guilty has been entered.

Schedule 13, items 6 and 7 then go on to provide that a court sentencing someone who has had their parole automatically revoked cannot be sentenced to a recognisance release order. This represents a considerable restriction upon the sentencing options available to the court where parole has been revoked and is strongly opposed.