

3 September 2019

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

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

Dear Chair

**Supplementary Submission: Combatting Child Sexual Exploitation Legislation
Amendment Bill 2019**

On 27 August 2019, the Law Council appeared before the Senate Standing Committee on Legal and Constitutional Affairs (**the Committee**) as part of its inquiry into the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (**the Bill**).

This supplementary submission addresses two issues that were raised by the Committee during the Law Council's appearance. The first question raised by Senator the Hon Kim Carr related to whether there are professions other than lawyers who might be exempted from the duty to protect under proposed section 273B.4 and the duty to report imposed by proposed section 273B.5 of the Bill.

The second question on notice from Senator Carr concerned whether the Bill should be amended and strengthened so that further categories of offences could be created in relation to the manufacturing, importation and supply of child-like sex dolls, in addition to what the Law Council considers to be the less serious offence of possession simpliciter of such a doll.

Fail to protect/fail to report and client confidentiality

The duties imposed by the proposed sections 273B.4 and 273B.5 of the Bill apply to a 'Commonwealth Officer'. This term is defined broadly in the proposed section 273B.1.

People who contract or subcontract with the Commonwealth, or are officers or employees of a contractor or subcontractor, would be subject to these duties as they would be captured by the definition of 'Commonwealth Officer' set out in proposed paragraph 273B.1(j). A lawyer, a member of the clergy, registered medical practitioner or counsellor contracted or subcontracted by a Commonwealth agency or authority to attend an immigration detention centre and provide legal, religious, medical or other services would come within the ambit of the offence provisions.

Disclosure by the Child

Issues arise where the risk of future abuse (as contemplated by proposed section 273B.4) or the fact of past abuse (as contemplated by proposed section 273B.5) is disclosed confidentially *by the child*.

Future Abuse

In the case of disclosure to a lawyer of future abuse, if the risk can be reduced or eliminated without breach of confidentiality, for example arranging for the child to be transferred to another location, that should be done and no exemption from section 273B.4 should apply. Where the risk cannot be reduced or eliminated without breaching confidentiality, the obligation to prevent further abuse would outweigh the privilege and no exemption should apply.

Past Abuse

In the case of past abuse, different considerations apply. The laws relating to mandatory reporting have been subject to much debate, especially where the healthcare professions are concerned because of the possibility that children will be deprived of necessary assistance.

In the case of lawyers, client legal privilege – the right of a person, including a child to obtain legal advice without fear of a loss of confidentiality – is very important. Lawyers frequently act for young children. Those communications should be protected, as they are for example in Victoria where in the *Crimes Act 1958* (Vic) paragraph 327(7)(b) applies to client legal privilege and paragraph 327(7)(c) applies to confidential communications in the course of treatment by doctors and counsellors, whether before or after the alleged conduct occurs. This may, to some extent, depend on the age of the child.

The position of other professionals rests on different but similarly important bases. This is illustrated by subsection 327(5) of the *Crimes Act 1958* (Vic) which provides that the offence in subsection 327(2) is not contravened if the victim was of or over the age of 16 years at the time of the disclosure.

Disclosure by Someone Other than the Child

Future Abuse

There is no basis for a lawyer to be exempt where another person discloses the prospect of future abuse.

Past Conduct

Where someone suspected of past abuse seeks legal advice, that person must be entitled to client legal privilege and to legal representation.

The Law Council notes, for example, that subsection 327(7)(b) of the *Crimes Act 1958* (Vic) provides that a person does not contravene the offence in subsection (2) if the information would be privileged under the *Evidence Act 2008* part 3.10, including under client legal privilege or disclosure in a religious confession.

Child-like sex dolls

The Law Council submits that the creation of an indictable offence carrying a 15 year maximum sentence for possession of a child-like sex doll is disproportionate. At present, the Bill seeks to amend the *Customs Act 1901* (Cth) to add a child-like sex doll as a prohibited import under subsection 233BAB(4) attracting a maximum penalty of 10 years imprisonment.

The Law Council points to the hierarchy of offences used in relation to illicit drugs and considers that a similar approach may be appropriate in relation to offences relating to child-like sex dolls. That is, greater penalties should be attached to offences based on the manufacture, importation and trafficking of such dolls.

In relation to the offence of possessing a child-like sex doll, as with possession offences in a drug case, the prosecution should be required to prove that the defendant knew that the child-like sex doll was to be used for sexual purposes. The rationale for the offence is said to be that it tends to encourage acts of paedophilia. In that case it is a form of precursor offence. The Law Council maintains that such an offence should be indictable but triable summarily with a maximum sentence of 5 -7 years. However, offences relating to the manufacture, importation, supply and distribution of child-like sex dolls for commercial gain should carry maximum penalties ranging up to 10 years.

We thank you for the opportunity to provide this supplementary submission. If you have any questions in the first instance please contact Christopher Brown, Senior Policy Lawyer

Yours sincerely

Arthur Moses SC
President