



Law Council
OF AUSTRALIA

Combatting Child Sexual Exploitation Legislation Amendment Bill 2019

Senate Legal and Constitutional Affairs 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 28 June 2019 are:

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

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

Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission.

Introduction

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 Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (**the Bill**).
2. The Law Council welcomes the Bill as an important part of implementing recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**).
3. The Law Council acknowledges that it is critical that survivors of sexual abuse are able to seek and obtain a criminal justice response to child sexual abuse. It is also vital that the criminal justice response adheres to fundamental rule of law and criminal justice principles. The Law Council's submission is based on these principles.
4. On 18 March 2019 the Law Council wrote to the then Chair of the Committee in relation the previous version of the Bill, which lapsed when Parliament dissolved on 11 April 2019 (**the lapsed Bill**). In that earlier submission, the Law Council provided a number of comments on the proposed measures in the lapsed Bill, most of which are again set out in this submission, albeit updated to reflect changes in the current version of the Bill.
5. The Law Council makes the following key recommendations aimed at the improvement of the Bill:
 - The proposed possession offences for both child abuse material and a child-like sex doll should be able to be prosecuted summarily with the consent of the prosecutor and the defendant.
 - The maximum penalty for the offences should be reduced from 15 to 10 years imprisonment.
 - Proposed paragraph 273A.1 should be amended to require that there be proof of subjective knowledge by the offender of the sexual nature of the child-like doll or other sex object.
 - Proposed sections 273B.4(1)(d) and 273B.5(1)(d) should be amended so that the prosecution are required to prove that the accused knew the facts which would amount to a child sexual abuse offence.
 - In the absence of justification, proposed paragraph 273B.5(1)(b) should require that the child be under the 'care, supervision or authority' in the defendant's capacity as a Commonwealth officer.
 - A derivative use immunity should be inserted at proposed section 273B.9 to cover material obtained as a result of answers given in accordance with questioning under proposed subsection 273B.5(5).
 - The Bill be amended to clearly state that it is not an offence under the relevant provisions for a lawyer to fail to disclose information the subject of legal professional privilege.
 - The offence specific defences listed in proposed subsection 273B.5(4) be amended so that the matters listed in paragraphs (a) to (d) be included as elements of the relevant offences.

Removal of mandatory minimum sentencing

6. The Law Council notes that unlike the lapsed Bill, the current Bill does not seek to create mandatory minimum sentences for any of the proposed offences. The Law Council is of the view that the Bill is significantly improved by the removal of these provisions.
7. The Law Council acknowledges and also agrees with the potential for serious social and systemic harms associated with child sex offences. These are serious offences which harm some of the most vulnerable members of our society. However, the Law Council continues to oppose the use of mandatory minimum sentences as a penalty for any type of criminal offence. 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.¹

Possession or control of child abuse material

Option for summary prosecution

8. The Law Council submits that, in line with possession of child abuse material offences in many state and territory jurisdictions, the proposed offences should be capable of summary prosecution in appropriate cases. For the offence to fall within the ambit of section 4J of the *Crimes Act 1914* (Cth) and be capable of summary disposal, it would require the maximum penalty to be 10 years imprisonment or less.
9. The Law Council notes that the current proposed maximum penalty for the offence is 15 years imprisonment. This penalty not only precludes possible summary disposal but is greater than the maximum penalty applicable in the state and territory jurisdictions for offences relating to the possession of child abuse material.² There should be consistency in the approach to sentencing.
10. The Law Council notes there can be a wide range of offending and in the assessment of the objective seriousness of an offence of this nature, depending on the number and nature of the images involved. For this reason the Law Council recommends the proposed new offence under section 474.22A (and perhaps offences of accessing such material), should be capable of being prosecuted summarily with the consent of the prosecutor and the defendant. This argument applies equally to the proposed new offence of possessing a child-like sex doll under proposed section 273A.1 discussed further below.

¹ Law Council of Australia, *Discussion Paper on Mandatory Sentencing* (May 2014) and Law Council of Australia, *Mandatory Sentencing Policy Statement* (May 2014) file:///S:/Policy%20development/Criminal%20Law/Mandatory%20Sentencing/LCA%20Mandatory%20Sentencing%20Policy%20and%20DP/MS_Discussion_Paper_Final_web.pdf and file:///S:/Policy%20development/Criminal%20Law/Mandatory%20Sentencing/LCA%20Mandatory%20Sentencing%20Policy%20and%20DP/MS_Policy_Position.pdf.

² Section 91H of the *Crimes Act 1900* (NSW) carries a maximum penalty of 10 years imprisonment, as does s 51G of the *Crimes Act 1958* (Vic), 125B(1) of the *Criminal Code Act 1983* (NT) and 130C of the *Criminal Code 1924* (Tas) is a summary offence. Only an aggravated offence carries a maximum penalty of 10 years under s 63A of the *Criminal Law Consolidation Act 1935* (SA). Section 220 of the *Criminal Code Compilation Act 1913* (WA) carries a maximum penalty of 7 years as does s 65 of the *Crimes Act 1900* (ACT). Section 288D *Criminal Code Act 1899* (Qld), carries a maximum penalty of 14 years imprisonment for the non-aggravated offence.

Recommendations:

- **The proposed possession offences for both child abuse material and a child-like sex doll should be able to be prosecuted summarily with the consent of the prosecutor and the defendant; and**
- **The maximum penalty for the offences should be reduced from 15 to 10 years imprisonment.**

Possession of child-like sex dolls

Fault element

11. Proposed paragraph 273A.1(c) as it relates to the offence of possessing a child-like sex doll appears to displace the ordinary fault elements for offences under section 5.6 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) by requiring that a reasonable person would consider it likely that the doll or other object is intended to be used by a person to simulate sexual intercourse, requiring an objective test.
12. The Law Council recommends that, should this offence proceed, subjective awareness of the sexual nature of the child-like doll or other sex object that resembles a child should be a key component of the proposed criminal culpability. The Law Council recommends that the person should be required to have actual knowledge that the child-like doll or object is a sex object before the person can be found guilty of the proposed offence.
13. Further, the Law Council notes the use of the term 'likely' in proposed paragraph 273A.1(c). The Commonwealth's *Guide to Framing Commonwealth Offences* states that the word 'likely' should 'generally not be used' as it 'may result in unintentionally creating a fault element'.³
14. The Law Council suggests that the use of the word 'likely' should be adequately justified given its potential to cause confusion and unintended consequences in the intersection with the fault element of the offence. This problematic term is also used in the proposed amendments to section 473.1 of the Criminal Code and subsection 233BAB(4) of the *Customs Act 1901* (Cth).

Recommendation:

- **Proposed section 273A.1 should be amended to require that there be proof of actual subjective knowledge by the offender of the sexual nature of the child-like doll or other sex object.**

³ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition, 31.

Maximum penalty

15. The maximum penalty of 15 years imprisonment for a doll possession offence based on negligence would mean that possession of a single doll would need to be prosecuted on indictment.⁴
16. Concerns about the maximum penalty for the offence of possession of a child-like sex doll were also raised by the Standing Committee for the Scrutiny of Bills (**Standing Committee**) when it reviewed the Bill, stating:

*..the Committee is concerned that the provision seeks to impose significant custodial penalties in relation to the mere possession of the prescribed dolls and objects, and that the offence would apply on the day after the bill receives royal assent.*⁵

17. The Standing Committee notes that a person who is currently in lawful possession of a such a doll or object will be immediately commit an offence punishable by up to 15 years imprisonment the day after the Bill receives royal assent. These concerns by the Standing Committee do not appear to have been taken into account in relation to the maximum penalty.

Failure to protect a child at risk of child sexual abuse and failure to report child sexual abuse

Absolute liability

18. In relation to proposed sections 273B.4 and 273B.5, there are difficulties with both the drafting of proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) and the breadth of the proposed application of absolute liability (proposed subsections 273B.4(2) and 273B.5(2)).
19. These proposed provisions relate to conduct alone whereas many child sexual abuse offences, and particularly more serious offences, have a requirement of knowledge or intention prior to the matter constituting a child sexual abuse offence. Further, the use of the word 'such conduct' refers back to proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) which provides that the 'defendant knows there is a substantial risk that a person (the potential offender) will engage in conduct in relation to the child'.
20. The Law Council suggests that proposed paragraphs 273B.4(1)(c) and 273B.5(1)(c) and (2)(c) should relate to the knowledge of the defendant and that proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) and (2)(d) should be amended. In each case, the conduct should be 'sexual conduct' and the prosecution should be required to prove that the accused knew the facts which would amount to a child sexual abuse offence. It should not be an offence if, for example, the accused wrongly believed that the sexual conduct was consensual between two 17 year olds but in fact the potential offender was 18 years old and the other person was in fact under the age of sixteen.

⁴ *Crimes Act 1914* (Cth) s 4J.

⁵ 4/19 – [1.52].

Recommendation:

- **Proposed paragraphs 273B.4(1)(d) and 273B.5(1)(d) should be amended so that the prosecution are required to prove that the accused knew the facts which would amount to a child sexual abuse offence.**

Definition of responsible person

21. The Law Council notes that proposed section 273B.4 (failing to protect a child at risk of a child sexual abuse offence) includes a requirement that the child be 'under the defendant's care, supervision **or authority**, in the defendant's capacity as a Commonwealth officer' (emphasis added). However, proposed section 273B.5 (failing to report child sexual abuse offence) only requires that the child be 'under the defendant's care or supervision, in the defendant's capacity as a Commonwealth officer'.
22. This inconsistency does not appear to have been explained in the Explanatory Memorandum. In the absence of justification in the Explanatory Memorandum, proposed section 273B.5 (failing to report child sexual abuse offence) should require that the child be 'under the defendant's care, supervision or authority, in the defendant's capacity as a Commonwealth officer'.

Recommendation:

- **In the absence of justification, proposed paragraph 273B.5(1)(b) should require that the child be under the 'care, supervision or authority' in the defendant's capacity as a Commonwealth officer.**

Self-incrimination

23. Proposed subsection 273B.5(5) provides that an individual is not excused from failing to disclose information relating to a child sexual abuse offence on the basis that to do so might tend to incriminate the individual or otherwise expose the individual to a penalty or other liability. This proposed subsection 273B.5(5) explicitly abrogates the privilege against self-incrimination.
24. The privilege against self-incrimination is recognised as a fundamental human right. Indeed, Article 14(3) of the ICCPR provides that in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.⁶ The rule against self-incrimination is a substantive common law right⁷ available to an accused in criminal proceedings as well as persons suspected of crime.⁸
25. To avoid casting an obligation on a person to self-report conduct that is allegedly criminal under the proposed sections, in defiance of fundamental canons of the criminal and

⁶See also United Nations Human Rights Committee, *CCPR General Comment No 13 on Article 14* (Administration of Justice), 21st sess (13 April 1984). Article 14 of the ICCPR provides for a number of fundamental rights including the right to a fair and public hearing, the presumption of innocence, legal representation as well as the privilege against self-incrimination.

⁷*Reid v Howard* (1995) 184 CLR 1, [8] (Toohey, Gaudron, McHugh and Gummow JJ). See [15] in relation to persons being questioned in civil proceedings.

⁸*Petty & Maiden v R* (1991) 173 CLR 95.

common law in this country, the Law Council suggests that the words 'a third person (the *potential offender*)' should be substituted for the words 'a person (the *potential offender*)' in proposed paragraph 273B.5(2)(c). Alternatively, paragraph (b) could simply read 'there is a person aged under 18...' and then paragraph (c) could read 'another person (the *potential offender*)'. This would avoid any confusion or attacks on the validity of the provision as presently drafted.

26. The Law Council notes that a direct use immunity is to apply under proposed subsection 273B.9(10), preventing this information from being used in any 'relevant proceedings' against the discloser. However, the Law Council is concerned that as currently drafted, should a person be compelled to disclose information despite it being self-incriminating, this may still be admissible where there is information obtained as an indirect consequence of the disclosure. Derivative use material is permitted to be used in subsequent criminal proceedings. The proposed subsection 273B.9(11) states that subsection 273B.9(10) does not 'affect the admissibility of evidence in any relevant proceedings of any information obtained as an indirect consequence of a disclosure of information that constitutes protected conduct'.

27. Concerns about the absence of a derivative use immunity have also been raised by the Standing Committee when it reviewed the Bill, stating:

The committee considers that any justification for abrogating the privilege will be more likely to be appropriate if accompanied by both a 'use' and a 'derivative use' immunity. In this respect, the committee notes that not including a 'derivative use' immunity can undermine the effectiveness of a 'use' immunity, as it allows investigators to disregard the usual features of the accusatorial justice system and compel a potential accused to provide information that could be indirectly used to incriminate them.⁹

28. The Law Council considers that should the offence in its current proposed form be retained, a witness should be entitled to both direct use and derivative use immunity with respect to any evidence or information that is provided in response to the application of questioning by law enforcement pursuant to proposed subsection 273B.5(5). Such an approach enables useful information to be obtained, indeed encouraging witnesses to provide full and frank disclosure while preserving the rights of witnesses to be treated the same as any other witness when it comes to protecting their right to a fair trial.

Recommendation:

- **A derivative use immunity should be inserted at proposed section 273B.9 to cover material obtained as a result of answers given in accordance with questioning under proposed subsection 273B.5(5).**

Protection from other laws and legal professional privilege

29. The Law Council is concerned with the current proposal under s 273B.9 which refers to 'protected conduct' but also provides in proposed subsection (4) that the section does not prevent a person from being liable in any relevant proceedings for conduct that is revealed by disclosure of information. This provision creates uncertainty in the scope and application of the protections said to be afforded by this provision.

⁹ 4/19 – [1.47].

30. For example proposed subsection 273B.9(5)(c) does not make clear whether it is proposed that legal professional privilege or client legal privilege is abrogated. It appears that the offence may unwittingly capture privileged communications between, for example, a child and a lawyer in circumstances where subsections (a) and (b) are satisfied and the child is seeking legal advice as to past conduct committed on themselves and does not wish for there to be disclosure.
31. It is vitally important that persons, especially children, be able to obtain legal advice and that lawyers do not become liable to report their clients in breach of legal professional privilege or client legal privilege. While the example given would be rare, the legislation should clearly state that it is not an offence under the relevant provisions for a lawyer to fail to disclose information the subject of legal professional privilege.

Recommendation:

- **The Bill be amended to clearly state that it is not an offence under the relevant provisions for a lawyer to fail to disclose information the subject of legal professional privilege.**

Reversal of evidential burden of proof

32. The Law Council notes that proposed subsection 273B.5(4) sets out a number of offence-specific defences. One of the defences is that under the proposed subparagraph 273.B.5(4)(d) 'the information is in the public domain'.
33. The Explanatory Memorandum stated the justification for reversing the evidential burden of proof was that the information to be proven would be peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.¹⁰
34. However the Standing Committee raised that it was not apparent to that committee that each of the matters in proposed subsection 273B.5(4) would be peculiarly within the knowledge of the defendant. They cite the example that information being in the public domain, as stated in subparagraph 273B.5(4)(d) 'would appear to be public knowledge'¹¹ as opposed to being peculiarly within the knowledge of the defendant.
35. Given that it is an important principle in the common law that the onus is on the prosecution to prove all the elements of the offence, the Law Council considers that it is not appropriate to shift the evidential burden to the accused in relation to the offence specific defences listed in proposed subsection 273B.5(4). This is especially the case where it is unclear that the matters listed in proposed subsection 273B.5(4) are in fact 'peculiarly within the knowledge of the defendant'.

Recommendation:

¹⁰ Explanatory Memorandum, Combatting Child Sexual Exploitation Legislation Amendment Bill 2019, pp 30-31.

¹¹ 4/19 – [1.61].

- **The offence specific defences listed in subsection 273B.5(4) be amended so that the matters listed in paragraphs (a) to (d) be included as elements of the relevant offences.**