

The Senate

Legal and Constitutional Affairs
Legislation Committee

Inquiry into the Combatting Child Sexual
Exploitation Legislation Amendment Bill
2019 [Provisions]

September 2019

© Commonwealth of Australia 2019

ISBN 978-1-76010-992-9

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:
<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

Printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members

Chair

Senator Amanda Stoker LP, QLD

Deputy Chair

Senator the Hon Kim Carr ALP, VIC

Members

Senator Claire Chandler LP, TAS

Senator Anthony Chisholm ALP, QLD

Senator Nick McKim AG, TAS

Senator David Van LP, VIC

Substituting member

Senator Alex Antic to replace Senator David Van for certain meetings from
19.08.2019 to 27.08.2019 LP, SA

Secretariat

Sophie Dunstone, Committee Secretary

Margie Morrison, A/g Principal Research Officer

Brooke Gay, Administration Officer

Jo-Anne Holmes, Administration Officer

Suite S1.61
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3560
Fax: (02) 6277 5794
Email: legcon.sen@aph.gov.au

Contents

Members	iii
Recommendation	vii
Chapter 1 – Introduction	1
Conduct of the inquiry	1
Acknowledgement.....	1
Note on references	1
Objectives of the bill	1
Key provisions of the bill	2
Consideration by other parliamentary committees	5
Previous version of the bill and past committee inquiry	6
Focus of this report	6
Chapter 2 – Key issues	7
Failure to protect a child at risk of, and failure to report, child sexual abuse	7
Possession of child-like sex dolls	14
Possession or control of child abuse material sourced using a carriage service	18
Forced marriage	19
Expanding the meaning of child abuse material	20
Committee view	21
Additional comments from Labor Senators	23
Australian Greens additional comments	25
Appendix 1 – Submissions and Answers to Questions on Notice	27
Appendix 2 – Hearing	29

Recommendation

Recommendation 1

2.59 The committee recommends that the Senate pass the bill.

Chapter 1

Introduction

- 1.1 On 1 August 2019 the Senate referred the provisions of the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 5 September 2019.¹
- 1.2 This followed a recommendation of the Selection of Bills Committee, which noted that the bill should be referred to allow 'further investigation into the legislation'.²

Conduct of the inquiry

- 1.3 Details of the inquiry were advertised on the committee's website. The committee received 12 submissions. These are listed on the committee's website and at Appendix 1. The committee held one public hearing on 27 August 2019 in Canberra. Witnesses who appeared at the hearing are listed at Appendix 2.

Acknowledgement

- 1.4 The committee thanks all submitters and witnesses for their participation in this inquiry.

Note on references

- 1.5 In this report, references to *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

Objectives of the bill

- 1.6 The bill seeks to protect children from sexual exploitation by improving the Commonwealth framework of offences relating to child abuse material, overseas child sexual abuse, forced marriage, failure to report child sexual abuse and failure to protect children from such abuse.³
- 1.7 The bill would implement a number of recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) as well as propose a 'suite of child protection measures to target

¹ *Journals of the Senate*, No. 11, 1 August 2019, p. 331.

² Selection of Bills Committee, *Report No. 4 of 2019*, 1 August 2019, [p. 5] and Appendix 1.

³ Explanatory memorandum to the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (explanatory memorandum), p. 2.

child exploitation that occurs both overseas and in Australia, enhancing investigation and prosecution outcomes at the Commonwealth level'.⁴

1.8 In his second reading speech the Hon Peter Dutton MP, Minister for Home Affairs, noted that the bill will increase the protection of children by:

- responding to key recommendations from the Royal Commission; and
- addressing operational difficulties faced by the Australian Federal Police, Australian Border Force and Commonwealth Director of Public Prosecutions in investigating and prosecuting new trends in child abuse.⁵

1.9 To achieve its objectives, the bill would amend the *Criminal Code Act 1995* (Criminal Code), the *Customs Act 1901* (Customs Act), the *Crimes Act 1914* (Crimes Act), the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

Key provisions of the bill

1.10 The bill comprises seven schedules. The key provisions are set out in the following sections.

Schedule 1 – Failure to protect children from, or to report, child sexual abuse offences

1.11 Schedule 1 would insert two new offences into the Criminal Code.

1.12 First, the bill would introduce a new offence for a Commonwealth officer who negligently fails to reduce or remove the risk of a child under their care, supervision or authority being sexually abused, if it is part of their actual or effective responsibilities as a Commonwealth officer to reduce or remove that risk.⁶

1.13 Second, the bill would introduce a new offence for failing to report a child sexual abuse offence. Under this offence, a Commonwealth officer who exercises care or supervision over children would be guilty of an offence if:

- they know of information that would lead a reasonable person to believe or suspect that another person has or will engage in conduct in relation to a child that constitutes a child sexual abuse offence, and
- they fail to disclose that information as soon as practicable to a police force or service of a state or territory or the Australian Federal Police.⁷

⁴ Explanatory memorandum, p. 2.

⁵ The Hon Peter Dutton MP, Minister for Home Affairs, *House of Representatives Hansard*, 24 July 2019, p. 822.

⁶ Explanatory memorandum, pp. 2–3.

⁷ Explanatory memorandum, p. 3.

Schedule 2 – Preventing the possession of child-like dolls

1.14 Schedule 2 of the bill would amend the Criminal Code to criminalise the possession of a child-like sex doll. Provisions in Schedule 2 would also, consequential to the expansion of the term ‘child abuse material’ in Schedule 7, make a child-like sex doll ‘child abuse material’ for the purposes of the Criminal Code and the Customs Act.

Schedule 3 – Possession or control of child abuse material that has been sourced using a carriage service

1.15 The bill would insert a new offence into the Criminal Code for the possession or control of ‘child abuse material’ in the form of data held in a computer or contained in a data storage device that was obtained or accessed via a carriage service. While existing offences criminalise other online dealings in child abuse material (including transmitting, accessing, distributing and soliciting material, and possessing child abuse material with the intention to deal with it over a carriage service) the new offence captures the act of possessing child abuse material obtained through a carriage service (such as the internet). This would ensure that possession itself is captured under Commonwealth criminal law.

Schedule 4 – Strengthening laws for overseas persistent child sexual abuse

1.16 Schedule 4 would strengthen existing laws for overseas persistent child sexual abuse by reducing the difficulties associated with distinguishing particular occasions of offending from repeated and regular child sexual abuse.

1.17 Currently, criminalised persistent sexual abuse of a child overseas requires proof of at least three underlying occasions of abuse overseas against the same child over any period of time. This existing offence, at section 272.11 of Criminal Code, carries a maximum penalty of 25 years’ imprisonment. The bill would lower the minimum number of underlying occasions of abuse from three to two.⁸

Schedule 5 – Expanding the definition of forced marriage

1.18 Schedule 5 would strengthen the forced marriage offences in the Criminal Code to increase the protections available for children against this form of exploitation.

1.19 Currently, a marriage is considered to be forced if it is entered into without consent, which must be full and free, and given without coercion, deception or threat. The explanatory memorandum states that in practice, this has meant that prosecuting forced marriage offences involving children is difficult:

⁸ Explanatory memorandum, p. 4.

Operational experience has shown that the majority of child victims have, on their own evidence, clearly demonstrated that they understood the nature and effect of the marriage ceremony, which is commonly expressed as resulting in an exclusive commitment for life, a sexual relationship, co-habitation and children. Paired with many victims' reluctance to give evidence against their own family or community members, the offences as currently drafted have made it difficult to prosecute forced marriage offences involving child victims.⁹

- 1.20 To address this, the bill would expand the definition of forced marriage to explicitly include all marriages involving children under 16 years. The explanatory memorandum explains that by explicitly criminalising underage marriages, the bill would reduce the need to call on already vulnerable children to give evidence in court.

Schedule 6 – Restricting the defence for overseas child sex offences based on a valid and genuine marriage

- 1.21 Travelling overseas to abuse and exploit children is a known practice of Australian offenders. This is most prevalent in overseas jurisdictions which have weak child protection frameworks, and where the offending behaviour is less likely to attract attention and investigation from local authorities
- 1.22 Although sexual offences committed overseas by Australians against children under 16 are already criminalised, the Criminal Code provides a defence if, at the time the offence was committed, there existed a valid and genuine marriage between the defendant and child. As the explanatory memorandum points out, this is problematic for a host of reasons, including that the legal age of marriage varies across international jurisdictions, with some permitting the marriage of children as young as ten. Similarly, many jurisdictions permit marriages where one party is younger than the minimum legal age by an order of the court.¹⁰
- 1.23 The bill would amend the Criminal Code to narrow the defence so that the existence of a marriage between a defendant and a child no longer constitutes a valid defence for otherwise criminal conduct, if the child is under the age of 16.¹¹

Schedule 7 – Expanding the meaning of child abuse material

- 1.24 Schedule 7 of the bill updates the terminology used for child sexual abuse offences in Commonwealth legislation. It does this to reflect the gravity of these crimes, the harm that is inflicted on the children involved, and shifts in national and international best practice.

⁹ Explanatory memorandum, pp. 5–6.

¹⁰ Explanatory memorandum, p. 6.

¹¹ Explanatory memorandum, p. 7.

1.25 Currently, the Criminal Code and other Commonwealth legislation distinguish between 'child abuse material' and 'child pornography material'. In recognition that the term 'child pornography material' is no longer considered appropriate or accepted terminology, the bill would repeal references to 'child pornography material' and reconstitute the current definitions of 'child abuse material' and 'child pornography material' into a single definition of 'child abuse material'. Amendments to the terminology are also reflected in Schedule 2.

Financial impact

1.26 The explanatory memorandum states that there would be limited increase in costs borne by state and Commonwealth agencies for investigating and prosecuting new offences and notes that these costs would be absorbed.¹²

Consideration by other parliamentary committees

1.27 At the time the committee adopted this report, the Parliamentary Joint Committee on Human Rights had not reported on the bill.

1.28 The Senate Scrutiny of Bills Committee (the Scrutiny Committee) raised scrutiny concerns in relation to the bill in its Scrutiny Digest tabled on 31 July 2019. A summary of the Scrutiny Committee's concerns is provided below.

Scrutiny of Bills Committee

1.29 The Scrutiny Committee raised concerns about the:

- privilege against self-incrimination;
- significant penalties in the bill;
- reversal of the evidential burden of proof; and
- reversal of the legal burden of proof.

1.30 With respect to its concerns, the Scrutiny Committee brought these to the attention of senators and has:

- left it to the Senate as a whole to determine the appropriateness of abrogating the privilege against self-incrimination in circumstances where a 'derivative use' immunity would not be available;
- requested the minister's more detailed advice regarding the justification for applying a significant custodial penalty to the proposed offence of possession of childlike sex dolls and other objects, and making current lawful possession unlawful from the day after the Act receives royal assent;
- requested the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences; and

¹² Explanatory memorandum, p. 7.

- requested the minister's advice as to why it is proposed to reverse the legal burden of proof in this instance and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.¹³

Previous version of the bill and past committee inquiry

- 1.31 Another bill, also called the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019, was introduced in the House of Representatives on 14 February 2019. The Senate referred that bill to this committee for inquiry and report by 22 March 2019. The committee received 13 submissions to that inquiry and tabled its report on 22 March 2019. The previous bill lapsed at prorogation of the 45th Parliament on 11 April 2019.
- 1.32 The bill currently before the committee is substantially the same, with some technical amendments and the addition of Schedule 7 which expands the definition of child abuse material.¹⁴

Focus of this report

- 1.33 Much of the evidence received for the current inquiry highlighted similar issues to those raised in the previous inquiry. While the focus of this report is on the issues raised in the current inquiry, the committee was also able to consider submissions provided to its previous inquiry. Key issues raised in evidence are discussed in the next chapter.

¹³ Scrutiny of Bills Committee, *Scrutiny Digest 4/19*, 31 July 2019, pp. 13–21.

¹⁴ Department of Home Affairs and the Attorney-General's Department, *Submission 10*, p. 3.

Chapter 2

Key issues

2.1 In its March 2019 report on the previous iteration of the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 (the bill), the Legal and Constitutional Affairs Legislation Committee (the committee) reported that submitters supported the objectives of the bill and welcomed its introduction, but also proposed some amendments and highlighted certain key issues. Similarly, while the evidence received for this inquiry indicated broad support for the objectives of the bill,¹ submitters and witnesses again suggested some amendments and highlighted a number of issues, as set out in the following sections.

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

2.2 The introduction of new offences for Commonwealth officers was broadly supported.² It was recognised that the offences and associated duties 'will raise community awareness of child sex abuse, prevent abuse from occurring and limit ongoing instances of abuse'.³ Similarly, knowmore, an independent community legal centre, submitted that the failure to protect offence 'will help to encourage organisations to implement effective systems to prevent and respond to allegations of institutional child sexual abuse' and will also place 'additional responsibility on staff with leadership roles to foster an effective organisational culture in this area'.⁴

2.3 Legal Aid New South Wales submitted a different perspective and expressed concerns about the scope of the failure to protect and failure to report offences. In its view, the offences have been drafted too broadly and are inconsistent with the recommendations of the Royal Commission. It proposed a number of amendments to achieve consistency with the Royal Commission's recommendations.⁵

¹ See, for example, Good Shepherd Australia and New Zealand, *Submission 3*, [p. 2]; knowmore, *Submission 7*, previous committee inquiry into the Combatting Child Sexual Exploitation Legislation Amendment Bill 2019 [Provisions] (previous committee inquiry), p. 2; Law Council of Australia, *Submission 9*, p. 5.

² See for example, Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 7*, p. 1; Royal Australian and New Zealand College of Psychiatrists, *Submission 6*, [p. 1].

³ Royal Australian and New Zealand College of Psychiatrists, *Submission 6*, [p. 1].

⁴ knowmore, *Submission 7* (previous committee inquiry), p. 3.

⁵ Legal Aid New South Wales, *Submission 12*, pp. 5–8.

- 2.4 Mr Hamish Hansford, First Assistant Secretary at the Department of Home Affairs, emphasised the importance of the new offences:

The premise of this bill...is: if the offences that are in schedule 1 of the bill had existed 40 years ago, would Australia have had such an extent of child exploitation uncovered through the royal commission? The government has accepted the royal commission's findings on the basis of that extensive evidence and has outlined that these two offences can make a strong contribution to changing the culture within agencies at state and territory level and, in this case, at the Commonwealth level.⁶

- 2.5 Although broadly supported, some issues and possible amendments to the proposed new offences in schedule 1 were raised with the committee which are described in more detail below.

Definition of Commonwealth officers

- 2.6 The committee discussed the scope of the definition with departmental officers who confirmed that the definition of Commonwealth officer in the bill is intended to be 'expansive' and covers a range of groups including ministers, members of parliament, contractors and subcontractors to the extent that they have 'care, supervision and authority' over children.⁷
- 2.7 Knowmore raised concerns with a particular part of the definition. Knowmore observed that the definition of 'Commonwealth officer' in proposed section 273B.1 is not limited to adults. While it was acknowledged that in practice only a small number of people under 18 would be engaged in roles encompassed by the definition, knowmore recommended that consideration be given to limiting the definition to adults.⁸

Failure to report

- 2.8 The Australian Lawyers Alliance submitted that responsibility for failing to report sexual abuse should be extended to include institutions:

The history of cover-up in institutions strongly suggests that the criminal offence should apply not just to individuals but to the institutions which have failed victims by exposing them to abuse and then, too often, by protecting their abusers.⁹

- 2.9 Knowmore suggested that consideration be given to establishing an end date for a failure to report offence of 10 years, 'where the relevant knowledge is

⁶ Mr Hamish Hansford, First Assistant Secretary, National Security and Law Enforcement Policy, Department of Home Affairs, *Committee Hansard*, 27 August 2019, p. 27.

⁷ Mr Hamish Hansford and Ms Ciara Spencer, Assistant Secretary, Law Enforcement Policy, Department of Home Affairs, *Committee Hansard*, 27 August 2019, pp. 22–23.

⁸ knowmore, *Submission 7* (previous committee inquiry), p. 3.

⁹ Australian Lawyers Alliance, *Submission 1*, p. 7.

gained or the suspicion is or should have been formed after the failure to report offence commences'.¹⁰

- 2.10 Another matter discussed in relation to reporting requirements was the need for protection of whistleblowers. Mr Warren Strange, Executive Officer, knowmore explained:

We have seen instances of people within institutions who want to come forward and disclose their knowledge of child sexual abuse occurring at the institution. The risk of reprisals against those people is quite significant. On that basis, we think the more robust the legislative protections are, the more that is going to encourage a climate where whistleblowers believe that protection will be available, will be genuine, and will encourage reporting and cooperation.¹¹

- 2.11 Mr Strange noted that although there may already be some protections under other legislation such as industrial laws or unfair dismissal, the inclusion of appropriate protections in the bill would send 'an important message to institutions and to people within those institutions who might be minded to try and do the right thing but who might face some institutional barriers'.¹²
- 2.12 On this issue, the Uniting Church in Australia, Synod of Victoria and Tasmania, drew the committee's attention to the *Public Interest Disclosure Act 2013* for Commonwealth employees, as well as state whistleblower protections and associated legislation, and noted that further discussion would be necessary to ascertain to what degree 'those various pieces of legislation would provide sufficient coverage for someone reporting knowledge of child sexual abuse against retaliation and protect them in those circumstances'.¹³

Absolute liability

- 2.13 Submissions from the Law Council of Australia and Legal Aid NSW highlighted concerns with the drafting of proposed sections 273B.4 and 273B.5 and the breadth of the proposed application of absolute liability.
- 2.14 Legal Aid NSW discussed subsection 273B.4(2) which applies absolute liability 'in relation to the element of the offence which requires that the conduct of the potential offender, if engaged in, would constitute a child sexual abuse offence'.¹⁴ Legal Aid NSW was concerned that the provision 'makes it

¹⁰ knowmore, *Submission 7* (previous committee inquiry), pp. 5–6.

¹¹ Mr Warren Strange, Executive Officer, knowmore, *Committee Hansard*, 27 August 2019, p. 12.

¹² Mr Warren Strange, *Committee Hansard*, 27 August 2019, p. 13.

¹³ Dr Mark Zirnsak, Senior Social Justice Advocate, Uniting Church in Australia, Synod of Victoria and Tasmania, *Committee Hansard*, 27 August 2019, p. 13.

¹⁴ Legal Aid New South Wales, *Submission 12*, p. 6.

irrelevant whether the defendant knew that the conduct in question would constitute a child sexual abuse offence'.¹⁵

2.15 The Law Council detailed its concerns about the absolute liability provision:

There is a fundamental problem with the fault elements for both of these offences. It's a fundamental principle of criminal law and just a fundamental principle of blaming generally that there be a criminal intent. And, at the heart of the matter, there must be something which the person themselves knows to be something which would fall within that ambit. What subsection (d), in the rendering of it as an absolute liability, seeks to do is to take that out of the requirements for the offence.¹⁶

2.16 Further to this, the Law Council identified perceived issues with provisions that relate to conduct alone, pointing out that many child sexual abuse offences 'have a requirement of knowledge or intention prior to the matter constituting a child sexual offence'. The Law Council also suggested that clarification around 'conduct' and 'sexual conduct' in relation to a child was needed.¹⁷

2.17 To address these concerns, the Law Council argued that 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'.¹⁸

2.18 The Department of Home Affairs and Attorney-General's Department submitted that the application of absolute liability of the 'proposed offences is appropriate to ensure compliance with the reporting regime to report child sexual abuse'.¹⁹ Ms Ciara Spencer provided further evidence at the hearing:

Officers with care, supervision or authority over children are obliged to report conduct or take the action, regardless of whether the elements of the child abuse offence are outlined. If we had done it any other way, you would almost have to prove the elements of the child offending before you were able to look at anyone for failure to report. What we want to do is make sure that we're getting reporting. For example, grooming is a relatively new form of child abuse, and not every member of the public would have understanding of what the elements of the offence of grooming are. We don't want that to limit the reporting that we're getting about concerns around child welfare.²⁰

¹⁵ Legal Aid New South Wales, *Submission 12*, p. 6.

¹⁶ Dr David Neal SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 27 August 2019, p. 2.

¹⁷ Law Council of Australia, *Submission 9*, p. 8.

¹⁸ Law Council of Australia, *Submission 9*, p. 5.

¹⁹ Department of Home Affairs and Attorney-General's Department, *Submission 10*, p. 4.

²⁰ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 23.

- 2.19 When asked about the Law Council's concern that the provisions in the bill are significantly broader than existing state provisions relating to knowledge of an offence, Ms Spencer advised that the proposed offences are consistent with the Attorney-General's Department document, *A guide to framing Commonwealth offences, infringement notices and enforcement powers*. She also noted that there are a number of safeguards in place, such as the requirement to obtain the consent of the Attorney-General for any prosecution for the failure to report and the failure to protect offences.²¹

Self-incrimination

- 2.20 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 ground that disclosing the information might incriminate the individual. The Law Council submitted:

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 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.

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'.²²

- 2.21 The joint submission from the departments stated that the abrogation of the privilege against self-incrimination 'is necessary to ensure that all Commonwealth officers covered by the related offence provisions report abuse or take action to protect against abuse'. The departments also advised that a number of safeguards are in place to 'ensure the offence does not go beyond its

²¹ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 23.

²² Law Council of Australia, *Submission 9*, pp. 9–10.

stated purpose and unnecessarily infringe on the privilege against self-incrimination'.²³

- 2.22 When asked to reflect on the Law Council's suggestion that there is a contradiction in the drafting of the bill in relation to self-incrimination, the Department of Home Affairs advised that the bill reflects the 'government's intention to provide immunity to the extent that it is proportionate but not beyond that'. In addition:

The person is immune from liability for genuine and proportionate attempts to report or prevent abuse, and information to disclose, in doing so, can't be used against them in proceeding. I know the Law Council today used the example of a group of offenders and one potentially reporting and having immunity for that reporting. Obviously it's a matter that's determined on a case-by-case basis, but where we would see, for example, that that person reported one instance of child abuse and then the members of the group come forward and say, 'Well, actually, there were 20 children or a continued pattern of abuse,' that immunity would no longer apply, because it wasn't appropriate and proportionate to the report that they made.²⁴

Legal professional privilege

- 2.23 The Law Council expressed concern with section 273B.9 which refers to protected conduct but also provides, in 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. In the view of the Law Council, this provision 'creates uncertainty in the scope and application of the protections said to be afforded by this provision'.²⁵ The Law Council outlined an example whereby an individual may seek legal advice in relation to issues or conduct that could engage the new reporting requirements in the bill:

Under this bill, if the lawyer also happens to be a Commonwealth officer, they would be obliged to report that. We say that legal professional privilege should stand outside this bill and it should not be included. We can't have a situation where legal professional privilege is being broken in that way, even with the protections in the bill, which would protect the lawyer from being sued but wouldn't protect the client's confidentiality.²⁶

- 2.24 The departments advised that the new offences 'do not require a person to breach legal professional privilege or any other legal obligation of confidentiality'. In the event that a person chooses to breach those obligations

²³ Department of Home Affairs and Attorney-General's Department, *Submission 10*, p. 6.

²⁴ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 28.

²⁵ Law Council of Australia, *Submission 9*, p. 10.

²⁶ Dr David Neal SC, *Committee Hansard*, 27 August 2019, p. 3.

'to genuinely and proportionately avoid liability for the offences, they will not be liable for any breach of their legal obligations in doing so'.²⁷

2.25 The Department of Home Affairs further explained:

There are provisions in the bill which make it clear, if a person chooses to breach their professional obligations in order to report offending, that they would not be liable for their breach of legal obligations in doing that. The explanatory memorandum for the bill makes it clear that it is open to lawyers and others with professional obligations to rely on those obligations to not report, but the bill explicitly leaves it open to them to not have an impact if they do choose to report—to not be liable if they do choose to report. But they are still able to rely on the privilege if they so wish.²⁸

Provision of training and support

2.26 The Royal Australian and New Zealand College of Psychiatrists (RANZCP) argued that in order to fulfil the protection and reporting obligations in the bill, Commonwealth officers 'will require support to ensure their new duties can be appropriately carried out'.²⁹ In particular, this training should assist officers to 'identify that child sex abuse is occurring or has occurred and how to manage any imminent threats'.³⁰ Furthermore:

They should also have access to professional services to ensure that they are supported through the experience of having witnessed grooming behaviour or child sex abuse to avoid possible trauma. This support should be ongoing, comprehensive and readily available.³¹

2.27 The RANZCP also discussed the need for providing appropriate therapeutic support, including psychiatric services, to victims and their families who may be assisting an investigation.³²

2.28 The Uniting Church in Australia, Synod of Victoria and Tasmania emphasised the importance of Commonwealth officers having 'the authority and resources to reduce or remove risks of sexual abuse' and recognised that Commonwealth officers will need appropriate training and support.³³ Dr Mark Zirnsak, Senior Social Justice Advocate for the Uniting Church in Australia, Synod of Victoria and Tasmania also observed that there is a 'danger of encouraging

²⁷ Department of Home Affairs and Attorney-General's Department, *Submission 10*, p. 6.

²⁸ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 28.

²⁹ Royal Australian and New Zealand College of Psychiatrists, *Submission 6*, [p. 1].

³⁰ Royal Australian and New Zealand College of Psychiatrists, *Submission 6*, [p. 1].

³¹ Royal Australian and New Zealand College of Psychiatrists, *Submission 6*, [p. 1].

³² Royal Australian and New Zealand College of Psychiatrists, *Submission 6*, [p. 2].

³³ Dr Mark Zirnsak, *Committee Hansard*, 27 August 2019, p. 18.

over-reporting' which may impact the care and support being provided to children:

Potentially you are creating an environment in which staff who are supposed to care for children actually keep their distance and don't provide children with a supportive environment because they are so afraid that they are going to be reported on. There is a balance to be struck in creating a safe environment for children that is also nurturing and caring and provides the developmental support that children need. That is the balance that needs to be struck.³⁴

2.29 The Department of Home Affairs advised that the failure to report and the failure to protect offence do not commence until proclamation which will enable them to 'work with the rest of the Commonwealth to deliver appropriate training material and education to ensure that all Commonwealth officers are aware of their responsibilities'. It was also noted that there are already a range of frameworks in place as most of the obligations are already covered in state and territory legislation.³⁵

Possession of child-like sex dolls

2.30 Proposed sections 273A.1 and 273A.2 of the Criminal Code would criminalise the possession of a child-like sex doll and set a maximum penalty of 15 years' imprisonment for the offence. Proposed paragraph 273A.1(c) details that a person would commit an offence 'if 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'.

2.31 The creation of an offence for the possession of child-like sex dolls was generally supported.³⁶ However, some amendments to this section were also put to the committee and these are discussed in the following sections.

Maximum penalty

2.32 The Law Council argued for a reduction in the maximum penalty from 15 to 10 years on the grounds that this is a possession offence. It posited that 15 years is disproportionate when compared with maximum penalties for other offences, such as sexual activity with a child under 16 outside Australia (which attracts a maximum of 15 years). The Law Council also drew attention to the possible cost to the criminal justice system and called for there to be 'care for the criminal justice system'.³⁷

³⁴ Dr Mark Zirnsak, *Committee Hansard*, 27 August 2019, p. 29.

³⁵ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 24.

³⁶ Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 7*, pp. 2–5.

³⁷ Dr David Neal SC, *Committee Hansard*, 27 August 2019, p. 4.

2.33 The Department of Home Affairs advised that a maximum penalty of 15 years would be consistent with other Commonwealth offences currently in place around possession of child abuse material. The Department of Home Affairs remarked that lowering the penalty would differentiate these possession offences from any other Commonwealth child abuse offences.³⁸

Fault element

2.34 The Law Council submitted that the reasonable person test provided for in paragraph 273A.1(c):

...appears to displace the ordinary fault elements for offences under section 5.6 of the 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.³⁹

2.35 Dr Neal SC, Co-Chair, National Criminal Law Committee, Law Council of Australia explained:

In relation to the childlike sex dolls, again, a similar point about criminal intent...If you look at 273A.1—this is the possession of the childlike sex doll—in subparagraph (c):

(c) 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.

We say that should be, that the person knows it's to be used for sexual intercourse. Again, it's that fundamental thing: it's not what the reasonable person knows; it's what the person who's doing the activity knows. Again, it is perfectly consistent with all of the sexual offences...It needs to be the defendant who knows those things.⁴⁰

2.36 To address this, the Law Council suggested that the section 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.⁴¹

2.37 A representative of the Department of Home Affairs responded:

During the consultation with law enforcement agencies and, obviously, the Director of Public Prosecutions, there was a view provided by the Director of Public Prosecutions that it does create difficulties in proving the offence. On the face of the bill, we require that a reasonable person would form the view that it would be used for sexual intercourse. In the Law Council's evidence this morning, as well, I think they made the point that, in practical terms, generally that equates to the similar test that if a reasonable person would view that it would be used for that purpose then that would also be the view of the offender. But it is very difficult proving intent in these cases. There is a range of evidence that people call, for example, and I

³⁸ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 23.

³⁹ Law Council of Australia, *Submission 9*, p. 7.

⁴⁰ Dr David Neal SC, *Committee Hansard*, 27 August 2019, pp. 5–6.

⁴¹ Law Council of Australia, *Submission 9*, p. 7.

think the Law Council outlined this as well. There's the kind of material that they've been searching for, what's on the shipping notice—a whole range of things. But, yes, why we have gone with the reasonable person test is on the basis of that advice.⁴²

Scope of the offence

2.38 Some concerns were raised that the possession offence may only apply to child-like dolls that simulate sexual intercourse. Knowmore observed that the possession offence is drafted in a 'limited form' and suggested the bill be amended to include a broader definition such as 'for use in sexual acts'.⁴³ The Uniting Church in Australia, Synod of Victoria and Tasmania noted that this may result in doll manufacturers designing them differently 'as a way to circumvent the provision'.⁴⁴

2.39 The committee sought clarification from the Department of Home Affairs which advised that the existing definition of sexual intercourse in the Criminal Code would apply.⁴⁵ The explanatory memorandum also states that the definition of sexual intercourse in the bill reflects the definition in section 272.4 of the Criminal Code:

272.4 Meaning of sexual intercourse

(1) In this Code, *sexual intercourse* means:

- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person; or
- (b) the penetration, to any extent, of the vagina or anus of a person, by an object, carried out by another person; or
- (c) fellatio; or
- (d) cunnilingus; or
- (e) the continuation of any activity mentioned in paragraph (a), (b), (c) or (d).

(2) In this Code, sexual intercourse does not include an act of penetration that:

- (a) is carried out for a proper medical or hygienic purpose; or
- (b) is carried out for a proper law enforcement purpose.

(3) For the purposes of this section, vagina includes:

- (a) any part of a female person's genitalia; and
- (b) a surgically constructed vagina.

⁴² Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 26.

⁴³ knowmore, *Submission 7* (previous committee inquiry), pp. 8–9.

⁴⁴ Dr Mark Zirnsak, *Committee Hansard*, 27 August 2019, p. 9.

⁴⁵ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 28.

which, as noted at the hearing, 'explicitly limits it to the use for sexual intercourse, which is oral, vaginal or anal penetration'.

Offences to manufacture and traffic child-like sex dolls

2.40 The committee discussed with witnesses whether the manufacture and trafficking of child-like sex dolls would be captured as an offence in the bill.⁴⁶

2.41 The Law Council opined that manufacturing and importing such products would be in the worst category of offending—especially production on a large commercial scale—and suggested that amendment of the bill in this regard may be warranted.⁴⁷

2.42 The Uniting Church in Australia, Synod of Victoria and Tasmania advocated for the bill to be amended to include a strict liability offence for an online platform that allows the sale of childlike sex dolls, stating:

This particularly comes from the numerous examples of Amazon having had advertisements for childlike sex dolls on their platform repeatedly. You don't see that in newspapers. A newspaper doesn't set up their business model. They actually have people who screen ads before they get placed. Amazon and these kinds of online platforms want to say, 'Our business model works on the fact that we don't take responsibility for whatever gets posted and then we only correct after it gets pointed out to us that these kinds of things have happened,' and I think there's a need to deter that behaviour and to get them to take some responsibility about not allowing these things to be marketed.⁴⁸

2.43 The Uniting Church in Australia, Synod of Victoria and Tasmania recommended that:

The offence should include a defence that the platform took all reasonable steps to ensure childlike sex dolls could not be sold on their platform. Such a measure is needed to ensure that companies like Amazon are required to screen advertisements they host to prevent the sale of childlike sex dolls.⁴⁹

2.44 Departmental officials explained that the addition of 'child-like sex dolls' to the definition of 'child abuse material' in the Criminal Code would criminalise 'all dealings with childlike sex dolls in the same manner as child abuse material is currently prohibited' including 'control, production and distribution'.⁵⁰

⁴⁶ Dr David Neal SC, *Committee Hansard*, 27 August 2019, p. 8; Dr Mark Zirnsak, *Committee Hansard*, 27 August 2019, pp. 14–15.

⁴⁷ Dr David Neal SC, *Committee Hansard*, 27 August 2019, p. 7.

⁴⁸ Dr Mark Zirnsak, *Committee Hansard*, 27 August 2019, p. 9.

⁴⁹ Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 7*, p. 2.

⁵⁰ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, pp. 28–29.

Possession or control of child abuse material sourced using a carriage service

- 2.45 Schedule 3 of the bill would introduce a new offence for the possession and control of child abuse material. For conduct to constitute an offence, the relevant material must be in the form of data held in a computer or data storage device, and must have been obtained via a carriage service (such as the internet).
- 2.46 International Justice Mission (IJM) supported this new offence but also questioned the extent to which live-streamed child abuse is captured under legislation.⁵¹ With reference to the overall federal criminal legislation, IJM told the committee it still has concerns that the commissioning of child abuse by online media is not adequately covered.⁵²
- 2.47 Legal Aid NSW opposed the new offence because, in its view, the offence is unnecessary and duplicative, the penalty is not proportionate, the fault element of the offence is unclear and the presumption may operate unfairly.⁵³

Summary prosecution

- 2.48 The Law Council submitted 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'. The Law Council highlighted that in order for the offence to be capable of summary disposal, the maximum penalty would need to be 10 years' imprisonment or less. The current maximum penalty of 15 years means that summary disposal would preclude the option of summary prosecution.⁵⁴
- 2.49 Dr Neal SC stated that 'the proposed possession offences for both child-abuse material and a childlike sex doll, the offences should be able to be prosecuted summarily with the consent of the prosecutor'⁵⁵ because such an approach would be a more efficient use of resources and the court's time.⁵⁶
- 2.50 The Department of Home Affairs and Attorney-General's Department advised that under section 4J of the Crimes Act, certain indictable offences may be dealt with summarily, if the offence is punishable by imprisonment for a period not exceeding ten years. Noting that the proposed offences for possession of child-like sex dolls and possession or control of child abuse material would

⁵¹ Ms Caroline Best, Director of Corporate and Legal, International Justice Mission Australia, *Committee Hansard*, p. 17.

⁵² International Justice Mission, *Submission 8*, p. 2.

⁵³ Legal Aid New South Wales, *Submission 11*, pp. 9–10.

⁵⁴ Law Council of Australia, *Submission 9*, p. 6.

⁵⁵ Dr Neal SC, *Committee Hansard*, 27 August 2019, p. 1.

⁵⁶ Dr Neal SC, *Committee Hansard*, 27 August 2019, p. 7.

both carry a maximum penalty of 15 years' imprisonment to reflect the seriousness of the misconduct, the departments submitted that the offences are not capable of being prosecuted summarily⁵⁷ and stated that the government is not comfortable with reducing the penalty.⁵⁸

Forced marriage

2.51 Good Shepherd Australia and New Zealand advocated for the definition of family violence to be expanded to include forced marriage, in recognition of 'the explicit link between forced marriage and family violence'.⁵⁹ Good Shepherd also submitted that the minimum age of marriage should be raised to 18 without exception:

The assertion around having a minimum age of marriage at 18 years is really about bringing Australia into line with our international obligations on what we are defining as a child: firstly, the Convention on the Rights of the Child, which identifies a person under the age of 18 years as a child; and, secondly, the resolution that Australia co-sponsored at the Human Rights Council earlier this year around evidenced based measures which do prevent the marriage of children.

I acknowledge that the law alone is not a tool that is going to prevent child and forced marriage from occurring, and I recognise that marriages do occur in religious, cultural and traditional senses that the law doesn't have necessary visibility over. I think the move to create a minimum age of marriage at 18 is a principled measure and it also removes any ambiguity around the unusual, or unique, circumstances where somebody may consent to marriage under the age of 18.

In my experience of working with young people who are facing marriage, it is not my view that individuals under the age of 18 really do understand the nature of marriage and the extent of their responsibilities in that kind of relationship. Developmentally and from a child psychology perspective, there's also no evidence to suggest that a person under the age of 18 can consent fully with full knowledge of the extent and nature of marriage taking place.⁶⁰

2.52 Good Shepherd also advocated for the legislative amendments to be accompanied by other complementary measures to support vulnerable and at-risk individuals, including resourcing a preventative program and building capacity of mainstream and specialist workforces.⁶¹

⁵⁷ Department of Home Affairs and Attorney-General's Department, *Submission 10*, pp. 7–8.

⁵⁸ Ms Ciara Spencer, *Committee Hansard*, 27 August 2019, p. 26.

⁵⁹ Good Shepherd Australia and New Zealand, *Submission 3*, [p. 4].

⁶⁰ Ms Laura Vidal, Strategic Projects Manager, Good Shepherd Australia and New Zealand, *Committee Hansard*, 27 August 2019, p. 18.

⁶¹ Good Shepherd Australia and New Zealand, *Submission 3*, [p. 2, 6].

2.53 The Uniting Church in Australia, Synod of Victoria and Tasmania voiced its support for the proposed amendments relating to forced marriage and suggested that more could be done to address the issue, including greater emphasis on prevention, rather than prosecution.⁶²

Expanding the meaning of child abuse material

2.54 Evidence to the inquiry supported the amendments in the bill to replace existing references to 'child pornography material' with 'child abuse material'.⁶³ Knowmore stated that the amendments will increase consistency across jurisdictions where the legislation generally refers either to child abuse material (as in New South Wales, Victoria and the Northern Territory) or child exploitation material (as in the other four states and the ACT).⁶⁴

2.55 Knowmore also observed that 'child abuse material is generally considered a narrower term than child exploitation material'. In this context it was suggested that further consideration be given to whether material described as 'child abuse material' would be better described in legislation as 'child exploitation material'.⁶⁵

2.56 The Department of Home Affairs and Attorney-General's Department explained that 'child pornography material' is no longer an appropriate term and that the term 'child abuse material' is the most 'encapsulating term':

The current international definition of 'child pornography' is nearly twenty years old and was introduced when the internet was in its infancy, at a time when online adult pornography was still novel and retained its social stigma. Due to the increasing normalisation of legal adult pornography in modern society, there is a concern that the term 'child pornography' may inadvertently legitimise that material by associating it with consenting subjects participating in legal behaviour, which is entirely inappropriate where the behaviour depicted involves the abuse of children who are incapable of legally consenting to such abuse.

...

The term 'child abuse material' is arguably the most encapsulating term as it builds upon the broad ambit of the 'child exploitation' definition, without applying the implication of a transaction of benefit to a child for partaking in the acts. It also reflects the Australian Government's intention to ensure the definition captures material that depicts other forms of child abuse, including torture, cruelty and physical abuse.⁶⁶

⁶² Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 7*, p. 5.

⁶³ See for example, knowmore, *Submission 4*, [p. 2]; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 7*, p. 2; International Justice Mission, *Submission 8*, p. 2.

⁶⁴ knowmore, *Submission 4*, [p. 2].

⁶⁵ knowmore, *Submission 4*, [p. 2].

⁶⁶ Department of Home Affairs and Attorney-General's Department, *Submission 10*, p. 9.

Committee view

2.57 The committee welcomes the Australian government's commitment to implement recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and acknowledges that the bill gives effect to some of those recommendations.

2.58 Submitters and witnesses to this inquiry were overwhelmingly supportive of the bill, but the committee notes that some issues were raised and some amendments were proposed. The committee is satisfied that the responses by the Department of Home Affairs, Attorney-General's Department and the Australian Federal Police to these issues and proposed amendments clarified the intent and operation of the bill.

Recommendation 1

2.59 The committee recommends that the Senate pass the bill.

Senator Amanda Stoker
Chair

Additional comments from Labor Senators

- 1.1 Labor senators strongly support the objectives of this bill, which implements several recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and builds on reforms and policies implemented under Labor governments.
- 1.2 The bill, which reintroduces a bill that lapsed at the dissolution of the 45th Parliament, seeks to amend several Acts to strengthen the Commonwealth's framework of offences relating to: child exploitation material; child sexual abuse, including abuse overseas; failing to report child sexual abuse; failing to protect children from abuse; and forced marriage.
- 1.3 As noted in the Labor senators' additional comments to the committee's report on the lapsed bill, it is vital that this legislation be as effective as possible.
- 1.4 For that reason, it is appropriate that this bill does not include the minimum mandatory sentencing provisions included in the lapsed bill.
- 1.5 The problems created by removing judicial discretion in sentencing are well attested. As the Law Council of Australia stated in its *Discussion Paper on Mandatory Sentencing* (May 2014) there is very little evidence that mandatory sentencing increases public safety. On the contrary, the evidence is that it may have the opposite effect. Mandatory sentencing increases the incentive for defendants to fight charges and may increase the risk of recidivism.
- 1.6 The mandatory sentencing provisions in the lapsed bill were contingent on passage of the Crimes Legislation Amendment (Sexual Offences Against Children and Community Protection Measures) Bill 2017, which did not reach the Senate and which also lapsed at the dissolution of the 45th Parliament.
- 1.7 Although mandatory sentencing provisions are not included in this bill, the joint submission to the inquiry by the Attorney-General's Department and the Department of Home Affairs states that the Government remains committed to introducing mandatory minimum penalties for the most serious and repeated child sex offences.¹
- 1.8 Labor Senators note the concern raised by the Law Council with regard to the application of absolute liability for committing the offences created by the bill. As Dr David Neal SC, co-chair of the Law Council's National Criminal Law Committee, stated in giving evidence to the inquiry: "It's a fundamental principle of criminal law, and just a fundamental principle of blaming generally, that there be a criminal intent ... What subsection (d), in the rendering of it as an

¹ Department of Home Affairs and Attorney-General's Department, *Submission 10*, p. 7.

absolute liability, seeks to do is to take that out of the requirements for the offence".²

- 1.9 We provisionally accept, however, the response of the Department of Home Affairs and the Attorney-General's Department that application of absolute liability is "appropriate to ensure compliance with the reporting regime".³ We urge that when enacted the operation of this legislation should be closely monitored to ensure that there is no erosion of appropriate safeguards for the rights of accused persons.
- 1.10 Similarly, we provisionally accept the response of the two departments to a concern raised by the Law Council, and by the Senate's Scrutiny of Bills Committee, regarding the bill's provision that an individual is not excused from failing to disclose information relating to child sexual abuse on grounds on possible self-incrimination.
- 1.11 Labor senators support the additional measures in the bill to target child sexual exploitation, and the expanded definition of forced marriage.
- 1.12 With regard to forced marriage, we note the submission by Good Shepherd Australia New Zealand that the minimum age of marriage should be 18 without exception. However, we also note the response of the Attorney-General's Department, in the inquiry's public hearing, that 18 is already the minimum age of marriage, but there are exceptional cases where someone aged from 16 to 18 could take the matter to a judge and be authorised to marry.⁴ Labor senators support the continuation of the possibility of judicial discretion in this matter.

Senator the Hon Kim Carr
Deputy Chair

Senator Anthony Chisholm
Labor Senator for Queensland

² Dr David Neal SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 27 August 2019, p. 2.

³ Department of Home Affairs and Attorney-General's Department, *Submission 10*, p. 4.

⁴ Ms Erin Wells, Acting Assistant Secretary, International Cooperation Unit, International Division, Attorney-General's Department, *Committee Hansard*, 27 August 2019, p. 25.

Australian Greens additional comments

- 1.1 The Australian Greens thank everyone who made a public submission and/or public representation to this inquiry.
- 1.2 The Australian Greens generally support the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, and the *Combatting Child Sexual Exploitation Legislation Amendment Bill 2019* (the Bill), which seeks to implement some of these recommendations.
- 1.3 The Australian Greens welcome the Government's decision to remove mandatory sentencing from the Bill.
- 1.4 However, the Australian Greens hold several concerns regarding definitions in, and scope of, the Bill. These include substantive concerns regarding legal professional privilege, and privilege against self-incrimination.
- 1.5 As noted by the Law Council of Australia, the privilege against self-incrimination is recognised as a fundamental human right. This right is abrogated in s 273B.5(5) of the Bill. As such, the Australian Greens support the Law Council of Australia's recommendation on this matter.

Recommendation 1

- 1.6 **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).**
- 1.7 There is uncertainty regarding s 273B.9, and whether this section would deny legal professional privilege in certain circumstances. As legal professional privilege is a fundamental common law right in relation to legal advice and litigation in Australia, it must be clearly protected in this bill.

Recommendation 2

- 1.8 **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, which is the subject of legal professional privilege.**
- 1.9 The explanatory memorandum identifies a reversing of the evidential burden of proof in this Bill in s 273B.5, and defends this reversal of a key principle in common law by arguing 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. The Standing Committee however said it was not apparent that each of the matters would be peculiarly within the knowledge of the defendant. Regardless, the

Australian Greens believe the principle of evidential burden of proof should always be protected in Australian law.

Recommendation 3

1.10 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.

Recommendation 4

1.11 The recommendation of the Australian Greens is that the bill be passed with the above amendments made.

**Senator Nick McKim
Greens Senator for Tasmania**

Appendix 1

Submissions and Answers to Questions on Notice

Submissions

- 1 Australian Lawyers Alliance
- 2 Northern Territory Legal Aid
- 3 Good Shepherd Australia New Zealand
- 4 knowmore
- 5 ACT Law Society
- 6 Royal Australian and New Zealand College of Psychiatrists
- 7 Uniting Church in Australia, Synod of Victoria and Tasmania
- 8 International Justice Mission Australia
- 9 Law Council of Australia
- 10 Department of Home Affairs and Attorney-General's Department
- 11 Legal Aid NSW
- 12 Ms Christabel Chamarette, Fremantle Women's Support Group

Answers to Question on Notice

- 1 knowmore, answers to questions on notice taken on 27 August 2019 (received 2 September 2019)
- 2 Department of Home Affairs, answers to questions on notice taken on 27 August 2019 (received 2 September 2019)
- 3 Attorney-General's Department, answers to questions on notice taken on 27 August 2019 (received 2 September 2019)
- 4 Uniting Church in Australia, Synod of Victoria and Tasmania, answers to questions on notice taken on 27 August 2019 (received 2 September 2019)
- 5 Law Council of Australia, answers to questions on notice taken on 27 August 2019 (received 3 September 2019)

Appendix 2

Hearing

Tuesday, 27 August 2019
Committee Room 2S1
Parliament House
Canberra

Law Council of Australia

- Dr David Neal, SC, Co-Chair, National Criminal Law Committee
- Mr Christopher Brown, Senior Policy Lawyer

knowmore

- Mr Warren Strange, Executive Officer
- Ms Lauren Hancock, Law Reform and Advocacy Officer

Royal Australian and New Zealand College of Psychiatrists

- Dr Denise Riordan, Member of the RANZCP Faculty of Child and Adolescent Psychiatry and RANZCP Fellow

Uniting Church in Australia, Synod of Victoria and Tasmania

- Dr Mark Zirnsak, Senior Social Justice Advocate

Good Shepherd Australia New Zealand

- Mr Jeremy Levine, General Manager, Innovation, Impact and Advocacy
- Ms Laura Vidal, Strategic Projects Manager

International Justice Mission Australia

- Ms Caroly Houmes, Chief Executive
- Ms Caroline Best, Director of Corporate and Legal

Department of Home Affairs

- Mr Hamish Hansford, Assistant Secretary, National Security and Law Enforcement Policy
- Ms Ciara Spencer, Assistant Secretary, Law Enforcement Policy

Attorney-General's Department

- Ms Erin Wells, Acting Assistant Secretary, International Cooperation Unit, International Division

Australian Federal Police

- Commander Justine Gough, Manager, Child Protection
- Mrs Susan Williamson-Devries, Manager, Strategic Engagement

Australian Border Force

- Ms Kaylene Zakharoff, Group Manager, Immigration Detention