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**LEGISLATIVE ASSEMBLY FOR THE  
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**ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL  
2019**

**EXPLANATORY STATEMENT**

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## Introduction

This Explanatory Statement relates to the *Royal Commission Criminal Justice Legislation Amendment Bill 2019* (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Explanatory Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

## Purpose of the Bill

The policy objectives of the Bill are to:

1. implement a number of recommendations made by the *Royal Commission into Institutional Responses to Child Sexual Abuse* (the Royal Commission) in its Criminal Justice Report<sup>1</sup>, and
2. make related amendments to the mandatory reporting and reportable conduct schemes to enhance the protection of children from abuse more broadly.

The Bill will address the following Royal Commission recommendations:

- Recommendation 33 of the Criminal Justice Report which recommends the creation of a new offence of failure to report child sexual abuse;
- Recommendation 34 of the Criminal Justice Report which recommends amendments to ensure reports of child sexual abuse made through the mandatory reporting and reportable conduct schemes are referred to police, and to avoid duplication of reporting under these schemes and the failure to report offence;
- Recommendation 35 of the Criminal Justice Report which recommends the application of the failure to report offence to information disclosed in, or in connection with, a religious confession;
- Recommendation 7.3(e) of the Royal Commission's Final Report<sup>2</sup> (the Final Report) which recommends amendment of mandatory reporting legislation to include people in religious ministry as mandated reporters;

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<sup>1</sup> Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report*. Available at: <https://www.childabuseroyalcommission.gov.au/policy-and-research/our-policywork/criminal-justice>

<sup>2</sup> Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report*. Available at: <https://www.childabuseroyalcommission.gov.au/recommendations>

- Recommendation 7.4 of the Final Report which recommends the amendment of mandatory reporting legislation so that religious ministers are not exempt from making reports about child abuse disclosures made during confession;
- Recommendation 30 of the Criminal Justice Report, which recommends the removal of any remaining limitation periods or immunities for child sexual offences;
- Recommendation 78 of the Criminal Justice Report which recommends that special measures available to witnesses in proceedings are extended to victims making victim impact statements; and
- Recommendation 83 of the Criminal Justice Report which recommends the repeal of the presumption a male under 14 years is ‘incapable’ of having sexual intercourse.

In summary, the Bill will:

- a) Add ministers of religion to the list of mandated reporters at section 356(2) of the *Children and Young People Act 2008*;
- b) create a new offence in the *Crimes Act 1900* of failure to report a sexual offence committed against a child;
- c) amend the *Crimes Act 1900* to remove the presumption that, prior to 1985, a male under 14 years was ‘incapable’ of having sexual intercourse;
- d) retrospectively amend section 70 of the *Crimes Act 1900* to rectify a technical inconsistency in the availability of alternative verdicts for child sexual abuse;
- e) amend the *Crimes (Sentencing) Act 2005* to extend special measures available to witnesses in proceedings to a person making a victim impact statement;
- f) amend the *Ombudsman Act 1989* to clarify the application of the reportable conduct scheme to information disclosed in a religious confession; and
- g) make other minor technical amendments to the *Ombudsman Act 1989* relating to the application of the reportable conduct scheme to religious bodies.

The overriding purpose of the Bill is to enhance the protection of children from abuse and improve the justice system’s response to abuse.

### **Human Rights Considerations**

The Royal Commission was established in January 2013 to investigate institutions that have failed to protect children or respond to allegations of child sexual abuse. The Royal Commission showed that countless children have been sexually abused in many institutions in

Australia, and that society's institutions have failed to protect them and hold perpetrators to account. The Royal Commission found that<sup>3</sup>

*The impacts of child sexual abuse are different for each victim. For many victims, the abuse can have profound and lasting impacts. They experience deep, complex trauma, which can pervade all aspects of their lives, and cause a range of effects across their lifespans. Other victims do not perceive themselves to be profoundly harmed by the experience.*

*Some impacts on victims are immediate and temporary, while others can last throughout adulthood. Some emerge later in life; others abate only to re-emerge or manifest in response to triggers or events. As victims have new experiences or enter new stages of development over their life courses, the consequences of abuse may manifest in different ways.*

[ ... ]

*While the impacts of child sexual abuse in institutional contexts are similar to those of child sexual abuse in other settings, we learned that there are often particular effects when a child is sexually abused in an institution.*

The issue of child sexual abuse raises important human rights issues, and engages many rights under the *Human Rights Act 2004* (HR Act). Child sexual abuse violates children's most basic rights including the right to protection from torture and cruel, inhuman or degrading treatment (s 10 HR Act), the right to protection of family and children (s 11 HR Act), and the right to liberty and security of person (s 12 HR Act).

It is incumbent on all parts of society to do what they can to protect children from abuse. The Royal Commission made recommendations for legislative change to improve the criminal justice system and society's response to child sexual abuse. A number of recommendations were designed, and have been legislated, to go beyond institutional child sexual abuse to recognise that while there are particular harms that stem from institutionalised abuse, any child sexual abuse is unacceptable in today's society. This Bill implements a number of those recommendations. In doing so, the Bill engages and places limitations on a number of human rights in the HR Act. These limitations are appropriate having regard to the human rights of children to safety, protection and justice.

Broadly, the Bill places limitations on the following HR Act rights:

- Section 8 – Recognition and equality before the law;
- Section 12 – Right to privacy and reputation;

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<sup>3</sup> Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report*, Volume 3, Impacts, p. 9-11. Available at: <https://www.childabuseroyalcommission.gov.au/impacts>

- Section 14 – Right to freedom of religion;
- Section 21 – Right to a fair trial; and
- Section 25 – Retrospective criminal laws.

The Bill also supports the following HR Act rights:

- Section 10 – Protection from torture and cruel, inhuman or degrading treatment;
- Section 11 – Protection of family and children;
- Section 18 – Right to liberty and security of person; and
- Section 21 – Right to a fair trial.

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves. The obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators. The obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights (ECHR) has considered, in depth, the positive obligation of governments to uphold rights, noting government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.<sup>4</sup>

The ECHR has held that the positive obligation on States extends to imposing a duty to protect children from sexual abuse under Article 3 of the European Convention on Human Rights (the Convention) (the right to protection from torture and cruel, inhuman or degrading treatment). In particular, in the case of *E and Others v. the United Kingdom*<sup>5</sup>, the ECHR found that prolonged sexual abuse meets the threshold of an Article 3 violation, and that “a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”.

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<sup>4</sup> Colvin, M & Cooper, J, 2009 *Human Rights in the Investigation and Prosecution of Crime* Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 *Positive obligations under the European Convention on Human Rights*, Council of Europe.

<sup>5</sup> No. 33218/96, 26 November 2002

In *O’Keefe v Ireland*, the ECHR considered the case of a teacher abusing children in a state funded, privately run school. A complaint was made by the student’s family against the teacher who resigned and moved to another school to teach, and subsequently continued to abuse other children. The ECHR held that the consequences of a failure by non-State institutions to act on prior complaints of sexual abuse, followed by later abuse of other children was found to be a violation of Article 3 of the Convention. The ECHR held that “the State must be considered to have failed to fulfil its positive obligation to protect the current applicant from the sexual abuse to which she was subjected”<sup>6</sup>.

The Convention on the Rights of the Child (CRC), to which Australia is a signatory, further articulates States’ human rights obligations to protect children. Article 34 of the CRC states that:

*States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.*

Article 19 of the CRC further states that:

*(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

*(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

## **Detailed human rights discussion**

### **Rights engaged and supported**

The primary purpose of the Bill is to ensure the protection and safety of children and to deter child sexual abuse. This purpose supports the right to protection from torture and cruel, inhuman or degrading treatment (s 10 HR Act), the right to protection of family and children (s 11 HR Act), and the right to liberty and security of person (s 18 HR Act). The Bill gives effect to these rights by creating offences to compel reporting to police by an adult who believes a child has been sexually abused, as well as by making a number of amendments that assist victims of child sexual abuse to seek justice.

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<sup>6</sup> No. 35810/09, 28 January 2014



In addition, the Bill makes a number of amendments that engage and support the right to a fair trial (s 21 HR Act). The right to a fair trial has been found to include a ‘triangulation of interests’ which include those of the accused, the victim and his or her family, and the public.<sup>7</sup> The Bill gives effect to this right by extending the application of existing special measures to people making a victim impact statement.

### **Rights engaged and limited**

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*<sup>8</sup>. A party must show that:

*[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”<sup>9</sup>.*

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of protecting children, victims of child sexual abuse, and witnesses in child sexual abuse cases.

The amendments in the Bill primarily engage and limit the right to freedom of thought, conscience, religion and belief (s 14 HR Act) and rights in criminal proceedings (s 22 HR Act). These limitations are discussed in detail below.

Other rights engaged and limited are discussed briefly below, with reference to specific legislative amendments contained in the Bill.

### ***Section 14 HR Act – Freedom of thought, conscience, religion and belief***

Section 14 of the HR Act states that:

*(1) Everyone has the right to freedom of thought, conscience and religion. This right includes—*

*(a) the freedom to have or to adopt a religion or belief of his or her choice; and*

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<sup>7</sup> *Ragg v Magistrates’ Court of Victoria and Corcoris* [2008] VSC 1 (24 January 2008) (Bell J)

<sup>8</sup> [1986] 1 S.C.R. 103.

<sup>9</sup> *R v Oakes* [1986] 1 S.C.R. 103.

*(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.*

*(2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.*

### **The nature of the right affected (s 28 (2) (a))**

The right to freedom of thought, conscience, religion and belief in section 14 of the HR Act is drawn from Article 18 of the International Covenant on Civil and Political Rights (ICCPR). The UN Human Rights Committee has confirmed that the right to freedom of thought, conscience and religion “is far reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religious or belief, whether manifested individually or in community with others.”<sup>10</sup>

The right to have or adopt a religion or belief is a matter of individual thought and conscience, considered to be absolute and unqualified in international law, and no limitation of this aspect of the right would be considered reasonable. However, the right to ‘manifest’ or ‘demonstrate’ religion or belief, which would include the sacrament of confession, may impact on others and may thus be subject to reasonable limitation.<sup>11</sup> Protection of this element will not extend to every act or omission which is in some way inspired, motivated or influenced by religious belief.<sup>12</sup>

### **The importance of the purpose of the limitation (s 28 (2) (b))**

Clauses 4, 7, and 14 explicitly require the reporting of information relating to child sexual abuse disclosed within the context of a religious confession. In the case of the *Children and Young People Act 2008* and the *Ombudsman Act 1990* (clauses 4 and 14 respectively) information relating to physical abuse must also be disclosed. The purpose of this limitation is to protect the safety of children. This purpose supports the right to protection from torture and cruel, inhuman or degrading treatment (s 10 HR Act), the right to protection of family and children (s 11 HR Act), and the right to liberty and security of person (s 12 HR Act). This purpose is especially important taking into consideration the vulnerability of children and their reduced capacity to protect themselves from the harms of sexual and physical abuse.

### **The nature and extent of the limitation (s 28 (2) (c))**

The right to freedom of religion is limited by the requirement to report information about child sexual abuse that is disclosed in a religious confession. In some faiths, most notably Roman Catholicism and Orthodox Christianity, disclosures in religious confessions are protected by a

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<sup>10</sup> UN Human Rights Committee General comment No. 22 (48) (art. 18) CCPR/C/21/Rev.1/Add.4, 27 September 1993.

<sup>11</sup> Article 18(3) ICCPR; *Eweida and ors v United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 15 January 2013, 30.

<sup>12</sup> *Ibid.*

requirement of strict and unconditional confidence. Failure to observe that confidence may result in excommunication from the faith community.

### **Relationship between the limitation and its purpose (s 28 (2) (d))**

The Royal Commission considered, in great detail, whether disclosures about child sexual abuse made in religious confessions should be reported to authorities. The Royal Commission heard evidence that both survivors and perpetrators had made disclosures to priests in religious confessions and that these disclosures were not reported by the member of clergy hearing the confession.<sup>13</sup>

In a study conducted in Ireland on child sexual abuse in the Catholic Church, eight out of nine perpetrators of child sexual abuse had disclosed their acts of abuse in religious confessions. The study found that the very process of confession itself might have enabled the abuse to continue as the perpetrators used the confession to resolve issues of guilt. The confession ‘externalised’ the issue of their abusing, and contained the problem within the walls of the confession.<sup>14</sup>

Dr Geraldine Robinson—a psychologist that has treated 60 to 70 Catholic clergy child sex offenders—gave evidence before the Royal Commission that a significant proportion of the offenders she treated had disclosed their offending in religious confessions. Dr Robinson described a pattern whereby some clergy offenders would “offend against a child victim, go to confession and feel absolved, and do the exact same thing again.”<sup>15</sup>

The Royal Commission noted that the proactive reporting of child sexual abuse, including abuse that is disclosed in confessions, is important for the following reasons:<sup>16</sup>

- It is difficult for victims to disclose or report the abuse at the time, or even soon after it has occurred. If persons other than the victim do no report, the abuse—and the perpetrator—may go undetected for years;
- Children are likely to have less ability to report the abuse to police or other authorities, or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of adults;
- Those who commit child sexual abuse offences may have multiple victims and may offend against particular victims over lengthy periods of time. A failure to report may leave the particular child exposed to repeated abuse, and may expose other children to abuse.

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<sup>13</sup> *Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report, Parts III-VI*, p. 202. Available at: <https://www.childabuseroyalcommission.gov.au/policy-and-research/our-policywork/criminal-justice>

<sup>14</sup> *Ibid*, p. 203

<sup>15</sup> *Ibid*, pp. 203-204.

<sup>16</sup> *Ibid*, p. 133.

In summary, the Royal Commission found the confession was clearly a forum in which both the abused and abusers disclosed child sexual abuse, and that had that abuse been reported at the time, it could have prevented further abuse.<sup>17</sup>

The amendments to the *Children and Young People Act 2008* and the *Ombudsman Act 1989* require the reporting of ‘non-accidental physical injury’ disclosed in the context of religious confessions, in addition to child sexual abuse.

The Royal Commission’s terms of reference were limited to the consideration of child sexual abuse, and as such, do not comment on the appropriateness of limiting the confessional seal in the context of physical abuse. However, like child sexual abuse, many instances of physical abuse against children occur in private, cause substantial harm to extremely vulnerable children, and are unlikely to be brought to the attention of authorities.<sup>18</sup> Laws requiring the reporting of abuse draw on the capacity of those who typically deal with children in the course of their work, and who encounter cases of serious child abuse and neglect, to report these situations to the appropriate authorities.<sup>19</sup>

Ministers of religion are likely to be the recipients of information relating to both the sexual and physical abuse of children. Physical abuse can be damaging and abhorrent. The imposition of different reporting requirements within the Mandatory Reporting and Reportable Conduct schemes for information disclosed in a confession as opposed to information disclosed outside a confession would be logically inconsistent and morally objectionable. For this reason, where a minister of religion is a mandatory reporter or subject to the reportable conduct scheme, both forms of abuse disclosed in a confession will need to be reported. This enhances the capacity of Mandatory Reporting and Reportable Conduct schemes to better protect both the physical and sexual safety of children.

Fundamentally, the amendments affecting the confessional seal all serve the purpose of deterring child abuse, and ensuring that children are protected from both physical and sexual abuse.

### **Any less restrictive means to achieve the purpose**

Many arguments were put before the Royal Commission claiming that continuing to protect disclosures made in confessions would be a more effective, and certainly a less restrictive, means to protect child safety. The most notable argument was that in removing any protection for religious confessions, perpetrators would be deterred from confessing to child sexual abuse, and those who would otherwise have had an opportunity to intervene would no longer be able to intervene. However, the Royal Commission found that any mechanism that relies on

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<sup>17</sup> Ibid, p. 216.

<sup>18</sup> Ben Mathews, Leah Bromfield, Kerryann Walsh, and Graham Vimpani (2015), *Child Abuse and Neglect: A Socio-legal Study of Mandatory Reporting in Australia – Report for ACT Community Services Directorate (Children, Youth and Families)*, p. 11.

<sup>19</sup> Ibid, p. 11

guidance or encouragement to self-report was insufficient to protect children from the risk of harm.

The same argument was put before The Hon. Justice Julie Dodds-Streeton who was commissioned by the ACT Government to consult with key stakeholders and provide advice on how best to implement the Royal Commission recommendations regarding child sexual abuse which have implications for the confessional seal.

The less restrictive option involves reliance on members of the clergy to voluntarily take proactive steps to either report the information disclosed in the confession, or to procure further disclosures outside the confession so that reports can be made without violating the confessional seal. The only stakeholders that have advocated for this option have been members of the Catholic clergy. Clergy representatives of other denominations have not opposed the approach to the confessional seal in the Bill as they do not face the same conflict due to the absence of a strict confessional seal in their denomination.

The Catholic clergy representatives seeking one of these less restrictive means, simultaneously put forward two contradictory positions which can be summarised thus:

- (1) Reliance on voluntary reporting would be a less restrictive and more human rights compliant way to achieve the purpose of the recommendation;
- (2) It is impermissible to repeat what has been disclosed in a confession, and many clergy would refuse to disclose even if a law was enacted to force them to do so.

It is contradictory to accept a proposition from representatives of the clergy that the law should trust them to voluntarily make efforts to report the information, when the same representatives also admit that Catholic priests would be unlikely to report information disclosed in a confession neither voluntarily, nor in the face of a law requiring them to do so. The inappropriateness of relying on voluntary reports is further exacerbated by the findings of the Royal Commission which found that these institutions had failed to proactively protect children in their care.

Moreover, the approach recommended by the Royal Commission—that is to encroach on the confessional seal—is supported by extensive and sound research. In contrast, the alternative less restrictive means of relying on voluntary reporting, is not based on a comparable body of research and has not been empirically tested. To the contrary, reliance on voluntary reporting of disclosures made in confessions is the approach that has been taken by the law to date. The Royal Commission clearly showed the serious failings of that approach. Those failings have been described above.

Requiring by law that the confessional seal be broken will still have its shortfalls. For example, clergy members may choose to violate the law. In addition, Justice Dodds-Streeton’s report

highlights the barriers to investigating, charging and prosecuting the offence. However, as Justice Dodds-Streeton explains, at the very least this approach will:<sup>20</sup>

- increase the likelihood that disclosures made by victims in confessions will be disclosed to authorities;
- increase the likelihood that at least some priests will comply with their statutory obligation to report;
- decrease the likelihood that people will engage in repeat child sexual abuse due to the comfort of absolution under the confessional rite;
- have deterrent and educative effects and contribute to cultural change

While many cases may continue to go undetected under these new laws, the new laws may result in the detection of at least some cases. Even if only one case of child sexual abuse is detected or prevented, the amendments would be proportionate.<sup>21</sup>

In the absence of being able to rely on clergy to volunteer the information, there is no less restrictive means than imposing a legal obligation to disclose relevant information to authorities.

Notwithstanding this, the amendments still seek to minimise the extent of the limitation on the human rights of members of the clergy to the greatest extent possible. This has been done by:

- Using an objective mental state in the relevant provisions, including in the failure to report offence. This is a departure from the Royal Commission’s recommendation which recommended a *subjective* mental element;
- Including a provision requiring the review of the failure to report offence;
- Confining the scope of the failure to report offence to child sexual abuse; and
- Confining the scope of information disclosed in confessions required to be reported under the reportable conduct scheme to information that relates to child sexual abuse or non-accidental physical injury (in contrast to the broader scope of information that generally constitutes ‘reportable conduct’ under the scheme).

The approach to the confessional seal taken by this Bill reduces the impact on the right to freedom of religion to the greatest extent possible, while still achieving its purpose of deterring child abuse and ensuring children are protected from abuse.

### ***Section 25 HR Act – Retrospective criminal laws***

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<sup>20</sup> The Hon. Justice Julie Dodds-Streeton and Jack O’Connor (2019), *Analysis Report: Implementation of Royal Commission Into Institutional Responses to Child Sexual Abuse Recommendations Regarding the Reporting of Child Sexual Abuse with Implications for the Confessional Seal*, pp. 43-46.

<sup>21</sup> *Ibid*, p. 45.

Section 25 of the HR Act states that:

*(1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.*

*(2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.*

### **The nature of the right affected (s 28 (2) (a))**

The European Court of Human Rights has held that the protection from retrospective criminal laws “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty...and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy” (*Kokkinakis v Greece* (1993) 17 EHRR 397).

Article 15 (2) of the International Covenant on Civil and Political Rights (ICCPR) states that ‘nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations’.

Article 15 (2) is also mirrored in Article 7 of the European Convention on Human Rights which states:

*(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

*(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised norms.*

Article 7 is a non-derogable right under the ECHR, however, the HR Act allows for any right to be limited.

The purpose of the right is to protect an important element of the rule of law, that is, laws must be capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. Laws should not retrospectively change legal rights and obligations, or create offences with retrospective application. The principle that a person should not be prosecuted for conduct that was not an offence at the time the conduct was committed is sometimes known as *nulla crimen, nulla poena sine lege*, or ‘no punishment without law’.<sup>22</sup>

In *Polyukhovich v Commonwealth (Polyukhovich)*, Toohey J said:

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<sup>22</sup> Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010).

*All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.*<sup>23</sup>

Article 7 does not require a restrictive reading of the criminal law<sup>24</sup>, and States may adopt an extensive interpretation of an offence if necessary to allow adaptation to developments of society. Any such adaptations must also be foreseeable by the citizens<sup>25</sup>. In the case of *SW v United Kingdom*, the ECHR considered issues of retrospectivity in relation to marital rape, based on a common law principle which also originated from Sir Hale. In that case, the applicant argued that he could not be convicted of an offence of marital rape in light of Sir Hale's common law principle that a husband 'cannot be guilty of rape committed by himself upon his lawful wife' due to the 'matrimonial consent' that the wife 'cannot retract'<sup>26</sup>. The applicant argued that at the time of the commission of the offence, there was still an exception at common law in the criminal law. The ECHR noted that<sup>27</sup>:

*It is to be observed that a crucial issue in the judgment of the Court of Appeal in R. v. R. ... related to the definition of rape in section 1 (1) (a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it". The question was whether "removal" of the marital immunity would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful".*

The ECHR found that (emphasis added)<sup>28</sup>:

*...the word "unlawful" in the definition of rape was merely surplusage and did not inhibit [the removal of] a common law fiction which had become anachronistic and offensive and from declaring that that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.*

The Court went on to state that (emphasis added)<sup>29</sup>:

*The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 34 above). What is more, the abandonment of the*

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<sup>23</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

<sup>24</sup> ECHR Application No.00008710/79 DR 28

<sup>25</sup> ECHR Application No.00013079/87 60 DR 256

<sup>26</sup> M Hale, *The history of the pleas of the Crown*, 1736

<sup>27</sup> *CR v United Kingdom* (1995) 21 EHRR 363, [41]

<sup>28</sup> *CR v United Kingdom* (1995) 21 EHRR 363, [42]

<sup>29</sup> *CR v United Kingdom* (1995) 21 EHRR 363, [44]



*unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.*

The Court ultimately found that, despite the existence of a common law immunity proposed by Sir Hale, the applicant could not escape conviction of an offence in 1990, and that his sentence in contravention of the common law immunity “did not give rise to a violation of the applicant’s rights under Article 7 para. 1 (art. 7-1) of the Convention”<sup>30</sup>.

### **The purpose of the limitation (s 28 (2) (b))**

The amendment at clause 8 of the Bill, amends section 68 of the *Crimes Act 1900* (Crimes Act) to retrospectively repeal the common law presumption that a boy under 14 years of age was ‘incapable’ of having sexual intercourse. The purpose of the retrospective repeal is to remove a technical and non-essential element of a common law presumption relating to specific criminal offences.

It is important to understand the context in which the retrospectivity is raised. In this instance, the proposed amendment retrospectively amends a common law presumption (not a legislative mechanism) that a boy under the age of 14 years of age was incapable of having sexual intercourse. This presumption originated from an understanding of medical and scientific knowledge about male maturity that has advanced significantly in the last 500 years. It is noteworthy that there is also some evidence to suggest that the origins of the presumption stems from around 520 AD. If this was the case, the presumption is based on medical knowledge that is 1,500 years old.

The Royal Commission noted that the origin of the presumption can be traced to English common law, with reference made in *Hale’s pleas of the Crown*<sup>31</sup> to the presumption that ‘an infant under the age of 14 years’ is presumed by the law as ‘impotent, as well as wanting discretion’.

The British Medical Journal *Medico-Legal*<sup>32</sup> noted in 1963 that this presumption could be traced to Ancient Roman (around 520 AD) origins:

*It seems to have its origin in English law in the ancient writings of Hale, who probably took it from the writings of Justinian. Before the time of Justinian there were two schools of thought among the jurists on this matter. The Proculians held that all boys became pubes at the fixed age of 14; the Sabinians said that it depended on the physical*

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<sup>30</sup> *CR v United Kingdom* (1995) 21 EHRR 363, [47]

<sup>31</sup> M Hale, *The history of the pleas of the Crown*, vol 1, 1736, c 58, p 630 (mispaginated in the original as 730) as cited in *PGA v The Queen* [2012] HCA 21, [214]; (2012) 245 CLR 355, 433. Sir Matthew Hale died in 1676 and it took until 1736 for the London publisher Sollom Emlyn to edit and publish Hale’s manuscripts relating to Crown Law.

<sup>32</sup> *Medico-Legal*, 27 April 1963 at 1170-1171

*maturity of the individual. Justinian adopted the former rule, giving as his reason the indecency of the inspection of the body.*

The Royal Commission stated:

*This ‘rule of law’ has its origins in English case law. In the 1892 case of *R v Waite*, the accused, aged 13, was convicted of the felony of carnal knowledge of a girl under 13 years of age (the complainant was eight years of age). The Queen’s Bench unanimously found that the conviction should be quashed and upheld the presumption. Lord Coleridge CJ stated:*

*The rule at common law is clearly laid down by Lord Hale, that in regard to the offence of rape militia non supplet aetatem; a boy under fourteen is under a physical incapacity to commit the offence. That is a presumptio juris et de jure, and judges have time after time refused to receive evidence to shew that a particular prisoner was in fact capable of committing the offence. That is perfectly clear, and therefore, unless the Criminal Law Amendment Act has altered the common law, which cannot be successfully contended, this prisoner has not committed the felony charged.*

The Royal Commission considered the case of *R v RL (No 1)*, in which the complainant alleged that the accused, her brother, committed a number of offences against her when she was aged between five and 15 years. The complainant was 62 at the time the allegations were heard, and the offences were alleged to have occurred before NSW repealed the presumption. Counts one and three on the indictment occurred when the accused was under 14, and were for ‘carnal knowledge’ or ‘penile/vaginal’ intercourse. In his reasons, Judge Berman stated:

*I want to therefore emphasise that the failure of the Crown to prove counts 1, 3, 5 and 6 beyond reasonable doubt is not because I do not believe the complainant. It is because of the operation of 2 legal rules, one now repealed, which govern the criminal liability of children, and the application of those rules to the evidence called in this trial by the Crown.<sup>33</sup>*

The issue that must be considered is whether there is a material alteration of the penalty, elements of the offence, or the laws that applied prior to the repeal of the common law presumption.

In the case of *R v Moody*<sup>34</sup>, the Full Court of Appeal in Queensland considered the issue of how Hale’s Laws relating to the presumed impotence of boys under 14 applied to the elements of offences. Griffith CJ found that sexual capacity on the part of the offender is an essential element of any offence involving carnal knowledge, as the proof required was evidence of penetration. In that case, the Court found that the presumption of impotence applied to remove the ability to prove the element of penetration and therefore the accused could not be found

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<sup>33</sup> *R v RL (No 1)* [2016] NSWDC 162, [134]

<sup>34</sup> *R v Moody* (1897) 8 QLJ 102

guilty of the offence. It is worth noting that Griffith CJ also considered that irrespective of the presumption of impotence, the accused could have been found guilty of attempt to commit the offence of carnal knowledge.

This case demonstrates that an essential element of the offence of carnal knowledge was penetration. As a matter of law, boys under 14 were presumed incapable of penetration, and penetration itself is an essential element of the offence. The circumstances as to whether a person is capable of penetration is a matter of evidence. In the case of *R v Moody*, the Court considered that the presumption meant that there was insufficient evidence that could be brought to disrupt the common law principle that a boy was considered, by law, to be ‘incapable’.

There is more recent case law, as noted above, to indicate that any such common law presumptions can be considered a common law fiction which have become anachronistic and offensive and that they can, and should, be amended to better align with respect for human dignity and human freedom.

#### **Nature and extent of the limitation (s 28 (2) (c))**

This presumption was abolished in the ACT in 1985. The *Crimes (Amendment) Act No 62 1985* inserted previous s 92Q (now renumbered as s 68 Crimes Act), the purpose of which was to ‘abolish the irrebuttable common law presumption that a boy under the age of fourteen is incapable of carnal knowledge’<sup>35</sup>. However, the presumption was not abolished retrospectively, with the effect that there is a potential to cause ‘real injustice to a complainant’.<sup>36</sup> The Royal Commission likened the effect to something similar to limitation periods where a complainant is denied the opportunity to have the perpetrator charged and the case determined on the evidence. In 2013, the ACT Government passed legislation to retrospectively repeal the time limits on prosecutions for child sexual offences alleged to have been committed between 1951 and 1985.<sup>37</sup>

#### **Relationship between the limitation and its purpose (s 28 (2) (d))**

As noted above, the purpose of the limitation is to retrospectively remove a common law immunity relating to existing offences. The offences on the statute book, both current and historical are not being amended.

There is no legislative requirement in any historic sexual offence to presume a boy aged 14 or under as incapable of sexual offences. There is no proposal to amend such legislation if it were already enshrined in legislation. There is no proposal to amend any legislative terminology of any element of any historic sexual offence. Nor does the amendment alter the maximum sentence, the elements of any of the offences or the ultimate penalties. It does, however, remove

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<sup>35</sup> Available online at: [http://www.legislation.act.gov.au/es/db\\_37105/19851128-42652/pdf/db\\_37105.pdf](http://www.legislation.act.gov.au/es/db_37105/19851128-42652/pdf/db_37105.pdf)

<sup>36</sup> *Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report*, Parts VII-X, p. 419. Available at: <https://www.childabuseroyalcommission.gov.au/policy-and-research/our-policywork/criminal-justice>

<sup>37</sup> *Crimes Legislation Amendment Act 2013* (ACT)

an ‘anachronistic and offensive’ ‘common law fiction’ to better ensure evidence can be presented to prove or disprove elements of historic sexual offences.

The limitation (retrospectively removing a common law presumption) promotes a number of rights for victims of sexual assault where the offender was under the age of 14, and the offence occurred prior to 1985, including the right to equality before the law and the right to security of person.

**Any less restrictive means reasonably available to achieve the purpose (s 28 (2) (e))**

The amendment appears to represent a reasonable and justifiable limitation on the right in section 25 of the HR Act, having regard to the importance of improving access to justice for survivors of child sexual abuse. The repeal of the common law immunity was made in 1985, and will therefore only apply only to men who committed sexual assault against another person while they were 14 years or younger. The limitation did not exist for women. This amendment therefore affects a very limited number of people who would, but for this common law presumption, have committed an offence against law.

These restrictions are proportionate to the aim of rectifying an offensive common law principle so as to achieve justice for victims, and are the least restrictive means possible in the circumstances.

**Other rights engaged and limited**

***Section 8 HR Act – Recognition and equality before the law***

The right to recognition and equality before the law is contained in section 8 of the HR Act and states that everyone has the right to equal and effective protection against discrimination on any ground.

The reporting requirements implemented in this Bill explicitly state that a person is not entitled to refuse to disclose information because the information was communicated during a religious confession. In Australia, religious confession is a sacrament mostly exercised by Christian churches, and the invocation of the confessional seal to protect disclosures made in a religious confession is primarily a feature of Catholic and Orthodox churches. On its face, these amendments may appear to target adherents of a particular faith, and especially the Catholic and Orthodox denominations.

However, viewed in the context of section 66AA overall, the provision is not discriminatory. To the contrary, 66AA applies to all people and is therefore notably *indiscriminate* in its application. In fact, the protection of a privilege for information disclosed in the context of a religious confession would discriminate against other worthy confidential relationships, such as doctor-patient. Moreover, in being structured around a notably Christian, and particularly Catholic/Orthodox concept, the protection of the privilege would appear to discriminate in favour of some religions or denominations over others. Thus, subsection (3) does not

discriminate against adherents of particular faiths, so much as it clarifies that all people are to be treated equally under this new law.

Notwithstanding the indiscriminate application of the offence, there are a limited number of exceptions, including for other privileges recognised at law. On one interpretation, the offence could be considered discriminatory insofar as some privileges are protected, but a privilege relating to information disclosed in the context of a confession is not. However, even on this interpretation, the limitation is the least restrictive means possible to achieve the purpose of protecting children and giving effect to their rights.

Both the physical and sexual abuse of children are fundamental breaches of children's human rights. In the case of sexual abuse, the Royal Commission considered the issue of disclosures in the context of religious confessions in detail. The Royal Commission concluded on the basis of extensive research and analysis of voluminous evidence that the removal of any protection for information in religious confessions would materially contribute to the detection, prevention and deterrence of child sexual abuse.<sup>38</sup>

### ***Section 12 HR Act – Right to privacy and reputation***

The right to privacy and reputation is contained in section 12 of the Human Rights Act and states that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. However, the nature of the right is not absolute. The term 'arbitrary interference' is described as intending to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.<sup>39</sup> Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary (reasonable in the circumstances). The right is engaged by the Bill as it requires individuals, in certain circumstances, to take action to protect children when they obtain information regarding child sexual abuse or, in certain circumstances, physical abuse, even if those disclosures were made in the course of confidential communications.

The purpose of the limitation is to prevent the concealment of child abuse. The nature and extent of the limitation is to compel a person who has obtained information regarding the abuse to take action to protect a child against the continuation of that abuse in certain circumstances. The limitation is the least restrictive means possible to achieve a balance between the rights of the person disclosing abuse or receiving a disclosure, and the abused child. This is because evidence shows that, unlike other categories of crime, child abuse is not often reported and stopped at the time of the abuse because child victims face such difficulties in disclosing or

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<sup>38</sup> The Hon. Justice Julie Dodds-Streton and Jack O'Connor (2019), *Analysis Report: Implementation of Royal Commission Into Institutional Responses to Child Sexual Abuse Recommendations Regarding the Reporting of Child Sexual Abuse with Implications for the Confessional Seal*, p. 44.

<sup>39</sup> (Communication no. 456/1991 Ismet Celepli v Sweden) Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration.

reporting abuse. Further, a failure to protect against abuse could result in the continued abuse of the victim and potentially other children.

***Section 21 HR Act – Right to a fair trial***

The right to a fair trial includes all proceedings in a court or tribunal and all stages of proceedings. It is concerned with procedural fairness, that is, the right of all parties in proceedings to be heard and respond to any allegations, and the requirement that the court be unbiased and independent. The nature of the right may be absolute in itself, in that it can never be justified to hold an unfair trial, but many of the principles that characterise a fair trial are not absolute<sup>40</sup>. A component of the right to fair trial is that the accused has the opportunity to cross-examine the complainant's evidence. While a victim may now have access to protections that are available in the *Evidence (Miscellaneous Provisions) Act 1991*, the right to a fair trial is not engaged by the amendments at part 4 as the amendments only apply to sentencing proceedings, and relate to the manner in which a sentencing statement is provided to the court. It is noted that these statements can already be provided in written form.

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<sup>40</sup> *Brown v Stott* (2003) 1 AC 681

# Royal Commission Criminal Justice Legislation Amendment Bill 2019

## Detail

### Part 1 – Preliminary

#### Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Royal Commission Criminal Justice Legislation Amendment Act 2019*.

#### Clause 2 — Commencement

This clause provides that section 15 of the Act will commence on the day after its notification day.

The remaining provisions will commence on a day fixed by the Minister by written notice.

As indicated in Note 3, if a provision has not commenced within 6 months of the notification day, the provision will commence the first day after that 6 month period.

#### Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the:

- *Children and Young People Act 2008*
- *Crimes Act 1900*;
- *Crimes (Sentencing) Act 2005*; and
- *Ombudsman Act 1989*.

### Part 2 – Children and Young People Act 2008

This part makes amendments to give effect to the following Royal Commission Recommendations:

- Recommendation 7.3(e) of the Final Report which recommends amendment of mandatory reporting legislation to include people in religious ministry as mandated reporters;
- Recommendation 7.4 of the Final Report which recommends the amendment of mandatory reporting legislation so that religious ministers are not exempt from making reports about child abuse disclosures made during confession; and
- Recommendation 34 of the Criminal Justice Report which recommends amendments to ensure reports of child sexual abuse made through the mandatory reporting and

reportable conduct schemes are referred to police, and to avoid duplication of reporting with these schemes and the failure to report offence.

**Clause 4 – Offence—mandatory reporting of abuse New section 356 (1A)**

This clause clarifies that information disclosed in a religious confession is not exempt from the obligations to report under the *Children and Young People Act 2008*.

**Clause 5 – Section 356 (2), definition of mandated reporter, new paragraph (oa)**

This clause makes ministers of religion mandated reporters under the *Children and Young People Act 2008*.

**Clause 6 – Section 356 (2), new definitions**

This clause provides the definition of ‘religious confession.’

**Part 3 – Crimes Act 1900**

This part implements the following Royal Commission recommendations:

- Recommendation 33 of the Criminal Justice Report which recommends the creation of a new offence of failure to report child sexual abuse;
- Recommendation 35 of the Criminal Justice Report which recommends the application of the failure to report offence to information disclosed in, or in connection with, a religious confession;
- Recommendation 30 of the Criminal Justice Report, which recommends the removal of any remaining limitation periods or immunities for child sexual offences;
- Recommendation 83 of the Criminal Justice Report which recommends the repeal of the presumption a male under 14 years is ‘incapable’ of having sexual intercourse, prior to 1985.

**Clause 7 – New sections 66AA and 66AB**

***66AA – Failure to report child sexual offence***

New section 66AA creates a new offence for failing to report child sexual abuse to a police officer. This implements recommendations 33 and 35 of the Royal Commission’s Criminal Justice Report, taking into consideration the advice on the implementation of these recommendations in the Analysis Report provided by The Hon. Justice Julie Dodds-Streeton.<sup>41</sup>

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<sup>41</sup> The Hon. Justice Julie Dodds-Streeton and Jack O’Connor (2019), *Analysis Report: Implementation of Royal Commission Into Institutional Responses to Child Sexual Abuse Recommendations Regarding the Reporting of Child Sexual Abuse with Implications for the Confessional Seal*.



The essence of this reform is to make clear that all adults have a duty to report child sexual abuse to the police. As the Royal Commission emphasised in its report, it is important that adults proactively report information about child sexual abuse because:<sup>42</sup>

- It is difficult for victims to disclose or report the abuse at the time, or even soon after it has occurred. If persons other than the victim do not report, the abuse—and the perpetrator—may go undetected for years;
- Children are likely to have less ability to report the abuse to police or other authorities, or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of adults;
- Those who commit child sexual abuse offences may have multiple victims and may offend against particular victims over lengthy periods of time. A failure to report may leave the particular child exposed to repeated abuse, and may expose other children to abuse.

Section 66AA(1) sets out the circumstances in which a person commits an offence for failing to report information regarding child sexual abuse. A person must be an adult; have obtained information that leads to them reasonably believing that a sexual offence has been committed against a child; and have failed to provide the information to a police officer as soon as practicable after forming the belief. The offence attracts a maximum penalty of two years imprisonment.

Section 66AA(2) provides for a number of exemptions to the offence. These exemptions are important for reducing duplicate reporting, respecting the self-determination of adult victims, and protecting personal safety.

Section 66AA(2)(d) is to the effect that a person is exempt from the requirement to make a report to police under section 66AA if they are a mandated reporter under the *Children and Youth People Act 2008* and have already reported the information under that Act. This particular exemption minimises duplicate reporting between the mandatory reporting scheme and the new offence and specifically addresses recommendation 34 of the Royal Commission’s Criminal Justice Report.

Section 66AA(2) also provides for an exemption where a person has “another reasonable excuse.” This allows for flexibility for the range of circumstances in which it would be reasonable to not report the information.

Section 66AA(3) clarifies that the obligation to report arises even if the information was disclosed in the context of a religious confession.

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<sup>42</sup> Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report*, Parts III-VI, p. 133. Available at: <https://www.childabuseroyalcommission.gov.au/policy-and-research/our-policywork/criminal-justice>

Section 66AA(4) clarifies that that the *Criminal Code 2002* does not apply to this offence, save for the applied provisions.

Section 66AA(5) provides for immunity from professional disciplinary action, or civil or criminal liability where information is provided in accordance with the offence ‘honestly and without recklessness.’ Section 66AA(6) provides that the immunity does not apply if giving the information would be a breach of legal professional privilege. This qualification is important so as to safeguard the right to a fair trial, and the right to legal professional privilege is an important component of the right to a fair trial.

The concept of ‘without recklessness’ in this offence is not a new legal concept. It has been used in the context of similar provisions, such as at section 874 of the *Children and Young People Act 2008* which provides for similar immunities in the context of the Mandatory Reporting Scheme. The phrase ‘without recklessness’ clarifies that immunity does not extend to reports of information which the reporter knows to be false or misleading.

Section 66AA(7) provides that the offence does not apply retrospectively. The offence only applies to information that has been obtained on or after the commencement of the offence. This does not mean that the child sexual abuse offence itself must have occurred after commencement, only that the information must have been obtained after commencement.

Section 66AA(8) provides key definitions necessary for the section.

#### ***66AB – Making false report about child sexual offence***

New section 66AB makes it an offence to knowingly make a false or misleading report to the police about an alleged child sexual offence. The offence is punishable by 12 months imprisonment.

#### **Clause 8 – Sexual intercourse—people not to be presumed incapable by reason of age New section 68 (3)**

This clause addresses recommendation 83 of the Royal Commission’s Criminal Justice Report which recommends the repeal of the presumption a male under 14 years is ‘incapable’ of having sexual intercourse, prior to 1985. This reform and its human rights impacts are discussed in detail in the human rights analysis above.

#### **Clause 9 – New section 441B**

This clause addresses recommendation 30 of the Criminal Justice Report, which recommends the removal of any remaining limitation periods or immunities for child sexual offences. This section retrospectively applies an amended alternative verdict to the repealed offence provision of section 70 of the Crimes Act (Trial for carnal knowledge—verdict of assault with intent). This is designed to remedy an inconsistency in the legislation which created a gap in the availability of an alternative verdict between sections 70 and 72.

#### **Clause 10 – New section 442A**

This clause requires the Minister to review the new failure to report offence (new section 66AA) as soon as practicable after it has been in operation for 2 years. This will provide an opportunity to review the effectiveness of the offence, and its interaction with the mandatory reporting and reportable conduct schemes.

## **Part 4 – Crimes (Sentencing) Act 2005**

The Bill amends the *Crimes (Sentencing) Act 2005* to implement recommendation 78 of the Royal Commission’s Criminal Justice Report which recommends that special measures available to witnesses in proceedings are extended to victims making victim impact statements.

A victim can participate in the sentencing process by detailing the consequences of the offence for them through a victim impact statement. Victim impact statements provide an opportunity for victims to outline their experiences of the abuse, and how it has impacted on their lives. This can include a description of the physical, financial, social, psychological or emotional consequences of the offences on the victim.

The Royal Commission said that all special measures that apply to assist victims in giving evidence in criminal matters, should also be provided to victims giving their victim impact statements where such measures have an application in sentencing proceedings. It gave examples of measures such as having a support person, or reading a statement in a separate room via CCTV. It noted that some special measures, such as the use of an intermediary, would only be necessary where there is to be a cross-examination of the victim regarding their statement.<sup>43</sup>

Section 52 of the Crimes (Sentencing) Act currently allows a victim impact statement to be read by audiovisual link if ‘the maker of the statement was eligible to give evidence in the proceeding to which the statement relates by audiovisual link under the *Evidence (Miscellaneous Provisions) Act 1991*’ (EMPA).

The amendments in Part 4 extend the application of the EMPA to victim impact statements to give effect to the Royal Commission recommendation.

### **Clause 11 – Victim impact statements—use in court Section 52 (4)**

This clause amends section 52 (4) of the Crimes (Sentencing) Act to expand the circumstances in which a maker of a victim impact statement can access the special requirements under the EMPA to seek extra protections while providing their statement.

Subsection (4) outlines that the special requirements apply to the maker of a statement if the special requirements for giving evidence under the EMPA applied to the maker giving evidence in the related criminal proceeding or would have applied if the maker gave evidence in the related criminal proceeding. This section recognises that not all criminal matters proceed to a

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<sup>43</sup> Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report*, Parts VII-X, p. 324. Available at: <https://www.childabuseroyalcommission.gov.au/policy-and-research/our-policywork/criminal-justiceReport>, Parts VII-X, page 324.

contested hearing and that victims may nonetheless wish to make a victim impact statement on a sentence even where the accused entered a guilty plea.

Subsection (5) ensures that the maker of the statement is able to access the special measures if they have a previously prepared statement that they wish to read out in court, rather than make a contemporaneous statement.

Subsection (6) defines special requirement with reference to the relevant provisions in the EMPA.

## **Part 5 – Ombudsman Act 1989**

This part makes amendments to the *Ombudsman Act 1989* to create alignment with the new failure to report offence and the mandatory reporting scheme. In particular, the amendments will clarify the extent to which information disclosed in a religious confession must be reported under the Reportable Conduct Scheme. This part also makes some minor amendments to clarify definitions in the Reportable Conduct Scheme that apply to religious bodies.

### **Clause 12 – Section 17D, definitions of employee, head and reportable allegation**

This is a technical amendment that removes the definitions of *employee*, *head* and *reportable allegation* from section 17D, as the Bill relocates these definitions to new sections 17EAA-17EAC.

### **Clause 13 – Section 17EA (2), definition of religious body, example and note**

This is a technical amendment that removes the definition of *religious body* from section 17EA(2) and relocates it to section 17D.

### **Clause 14 – New sections 17EAA to 17EAC**

This clause amends the definitions of *head* of a designated entity, reportable allegation and employee to further clarify the definitions.

#### ***17EAA Meaning of head of a designated entity—div 2.2A***

Section 17EAA is an amended definition of *head* of a designated entity. The amended definition adds two further elements for religious bodies. The first is a requirement that a religious body nominate an individual as the head of the body.

The second is permitting the Ombudsman to nominate an individual as the head of the body, if the religious body does not make a nomination. This second element ensures that if it is necessary to have an established head of entity for the Ombudsman to perform their functions under the Act, and a religious body has not nominated a head, the ombudsman can nominate a head and continue to exercise its functions. For example, if the Ombudsman receives a complaint or notification about a religious body which has not nominated a head of entity, the Ombudsman may in these circumstances nominate a head of entity.

#### ***17EAB Meaning of reportable allegation—div 2.2A***

Section 17EAB is an amended definition of reportable allegation. The new definition clarifies and limits the scope of information that must be reported if the information is disclosed in a religious confession.

Information disclosed in a religious confession will only be required to be reported if it relates to a sexual abuse against a child, or non-accidental physical injury to a child. This is a much narrower scope than the information that must generally be reported under the reportable conduct scheme. The purpose of this amendment is to minimise the extent to which the scheme limits the right to freedom of thought, conscience religion and belief (section 14 HR Act) while still achieving the purpose of protecting the physical and sexual safety of children. In restricting the scope of information that requires reporting in a religious confession, the amendments take the least restrictive means possible to achieve the purpose.

#### ***17EAC Meaning of employee—div 2.2A***

Section 17EAC is an amended definition of employee. The new definition clarifies that a person is not an employee of a religious body merely because the person participates in worship.

#### **Clause 15 – Expiry—pt 11 Section 53**

This clause is a technical amendment which extends the operation of the current exemption for reporting information disclosed in a religious confession until the commencement of this Bill. This ensures all of the amendments affecting reporting requirements and the confessional seal come into operation at the same time.

#### **Clause 16 – Dictionary, definition of employee**

This clause is a technical consequential amendment arising from the relocation of the definition of *employee* within the Ombudsman Act 1989.

#### **Clause 17 – Dictionary, definition of head**

This clause is a technical consequential amendment arising from the relocation of the definition of *head* within the Ombudsman Act 1989.

#### **Clause 18 – Dictionary, definition of reportable allegation**

This clause is a technical consequential amendment arising from the relocation of the definition of *reportable allegation* within the Ombudsman Act 1989.