2020

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL 2020

EXPLANATORY STATEMENT

and

HUMAN RIGHTS COMPATIBILITY STATEMENT

(Human Rights Act 2004, s 37)

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ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL 2020

Outline

ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL 2020

Introduction

This Explanatory Statement relates to the *Royal Commission Criminal Justice Legislation Amendment Bill 2020* (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.

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the Human Rights Act 2004.

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[1], and

2. amend s 127 of the *Evidence Act 2011* (ACT) relating to religious confessions, to support the reforms passed in 2019 which implemented the Royal Commission recommendations relating to reporting laws.[2]

The Bill will address the following Royal Commission recommendations:

- Recommendation 21 of the Criminal Justice Report which recommends that each state and territory government should introduce legislation to amend its persistent child sexual abuse offence so that:

  a. the actus reus is the maintaining of an unlawful sexual relationship

  b. an unlawful sexual relationship is established by more than one unlawful sexual act

[1] *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

[2] Royal Commission Criminal Justice Legislation Amendment Act 2019.

c. the trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts

d. the offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed

e. on sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.

- Recommendation 22 of the Criminal Justice Report which recommends that legislation for a persistent child abuse offence, to the effect of the Royal Commission draft provision (Appendix H), should be introduced;

- Recommendation 44 of the Criminal Justice Report which recommends that in order to ensure justice for complainants and the community, the laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual abuse offences should be reformed to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials;

- Recommendation 45 of the Criminal Justice Report which recommends that tendency or coincidence evidence about the defendant in a child sexual offence prosecution should be admissible:

  a. if the court thinks that the evidence will, either by itself or having regard to the other evidence, be 'relevant to an important evidentiary issue' in the proceeding, with each of the following kinds of evidence defined to be 'relevant to an important evidentiary issue' in a child sexual offence proceeding:

     i. evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding

     ii. evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole

  b. unless, on the application of the defendant, the court thinks, having regard to the particular circumstances of the proceeding, that both: i. admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant ii. if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk;

- Recommendation 46 of the Criminal Justice Report which recommends that common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution;

- Recommendation 47 of the Criminal Justice Report which recommends that issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution. The court should determine admissibility on the assumption that the evidence will be accepted as credible and reliable, and the impact of any evidence of concoction, collusion or contamination should be left to the jury or other fact-finder;

- Recommendation 48 of the Criminal Justice Report which recommends that tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt;

- Recommendation 49 of the Criminal Justice Report which recommends that evidence of:

    a. the defendant's prior convictions

    b. acts for which the defendant has been charged but not convicted (other than acts for which the defendant has been acquitted)

  should be admissible as tendency or coincidence evidence if it otherwise satisfies the test for admissibility of tendency or coincidence evidence about a defendant in a child sexual offence prosecution.

- Recommendation 50 of the Criminal Justice Report which recommends that Australian governments should introduce legislation to make the reforms recommended by the Royal Commission to the rules governing the admissibility of tendency and coincidence evidence;

- Recommendation 51 of the Criminal Justice Report which recommends that legislation to the effect of the Royal Commission draft provisions (Appendix N) should be introduced for Uniform Evidence Act jurisdictions and non–Uniform Evidence Act jurisdictions.

In summary, the Bill will:

a) Amend section 56 of the *Crimes Act 1900* to give effect to the recommendations of the Royal Commission regarding persistent child sexual abuse offences, and to address issues which arose in the cases of *KN v R* [2019] ACTCA 37 (*KN v R*) and *R v EN* [2019] ACTSC 354.

b) Amend the tendency and coincidence evidence provisions in the *Evidence Act 2011* to implement the model provisions developed by the Council of Attorneys-General working group and agreed to by the Council of Attorneys-General in December 2019.

c) Amend section 127 of the *Evidence Act 2011* to provide that information regarding sexual abuse or non-accidental physical injury that is being experienced, has been experienced or there is a substantial risk may be experienced, by a child, is not captured by the entitlement of a member of the clergy to refuse to divulge that a religious confession was made or the contents of a religious confession.

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

Consultation on the proposed approach

The Justice and Community Safety Directorate has consulted with the Sexual Assault Reform Program (SARP) Reference Group on the draft Bill. Comments received were broadly supportive of the reforms and comments on the draft Bill were considered in the development of the Bill.

Significant targeted consultation occurred in relation to the amendments at Part 2 of the Bill, which relate to amendments to the offence of a sexual relationship with a child or young person under special care. This included opportunities to contribute to policy discussions, as well as an opportunity to provide feedback in relation to the technical construction of the offence.

Consultation on the amendments in relation to tendency and coincidence were part of a national consultation process which including the drafting, consultation and agreement by the Council of Attorneys-General (CAG). The tendency and coincidence provisions, which are in Part 3 of this Bill, are based on the model laws agreed to by CAG.

Feedback has informed the drafting of this Bill.

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[3]

> *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,*

[3] *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

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 12 – Right to privacy and reputation;
- Section 14 – Right to freedom of religion;
- Section 21 – Right to a fair trial;
- Section 24 – Right not to be tried or punished more than once; 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 a government 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.[4]

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*[5], 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".

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 a violation of

[4] 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.
[5] No. 33218/96, 26 November 2002

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"[6].

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 amendments to section 56 (sexual relationship with a young person) of the *Crimes Act 1900* give effect to recommendations of the Royal Commission and support the rights of children subjected to sexual abuse. The primary purpose of these amendments is to ensure justice can be sought for, and by, child victims of sexual offenders. The resulting court proceedings will promote greater understanding of the circumstances and conditions that have led to abuse, greater community awareness of this as a societal issue, and help to remove the stigma and encourage other victims to come forward. The imposition of penalties on those convicted of this offence will signal the

[6] No. 35810/09, 28 January 2014

community's repudiation of this behaviour, act as general deterrent to this type of offending and enable those who offend to be appropriately punished.

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. As explained in *R v Oakes*,[7] 'there must be a proportionality between the effects of the measures which are responsible for limiting [protected rights], and the objective which has been identified as of "sufficient importance"' and this means that any measure 'should impair "as little as possible" the right or freedom in question.'

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

The amendments in the Bill engage and limit the right to privacy and reputation (s 12 HR Act); the right to freedom of thought, conscience, religion and belief (s 14 HR Act); the right to a fair trial (s 21 HR Act); the right not to be tried or punished more than once (s 24 HR Act). These limitations are discussed in detail below. The absolute right regarding retrospective criminal laws (s 25 HR Act) will also be discussed.

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.[8] 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 to privacy is engaged and limited by the Bill as it exempts individuals, in certain circumstances, from the entitlement to refuse to divulge information regarding child sexual abuse or, in certain circumstances, physical abuse, even if those disclosures were made in the course of confidential communications. The nature and extent of the limitation is to exempt a

[7] [1986] 1 S.C.R. 103.

[8] (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.

person who has obtained information regarding the abuse from the entitlement to refuse to divulge that information in proceedings.

Legitimate objective and rational connection

The purpose of the limitation is to prevent the concealment of child abuse and improve access to justice for victims of child abuse. Requiring the disclosure of information regarding child sexual abuse (and related issues) will be effective to achieve this objective by providing a strong disincentive for anyone to collude in concealing such information from public officials.

Proportionality

This measure is the least rights-restrictive means available of preventing the concealment of child abuse and improving access to justice for victims of child abuse. 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 reporting abuse. Further, a failure to protect against abuse can result in the continued abuse of the victim and potentially other children. As discussed in further detail below, 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.[9]

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*
> >
> > *(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

[9] Ibid, p. 216.

all matters, personal conviction and the commitment to religious or belief, whether manifested individually or in community with others."[10]

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.[11]

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

Clauses 14 and 15 explicitly exempt information relating to child sexual abuse or non-accidental physical injury disclosed within the context of a religious confession from being subject to the entitlement to refuse to divulge that information in section 127 of the *Evidence Act 2011*. 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. It also improves access to justice for victims, ensuring that information that is required to be reported under the reporting laws introduced in 2019[12] is not then subject to an entitlement to refuse to divulge during criminal proceedings, which would impact the ability to prosecute.

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 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

[10] UN Human Rights Committee General comment No. 22 (48) (art. 18) CCPR/C/21/Rev.1/Add.4, 27 September 1993.
[11] 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.
[12] Royal Commission Criminal Justice Legislation Amendment Act 2019.

confessions and that these disclosures were not reported by the member of clergy hearing the confession.[13]

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.[14]

Dr Geraldine Robinson—a psychologist who 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."[15]

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: [16]

- 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.

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.[17]

Amendments were made to the *Crimes Act 1900,* the *Children and Young People Act 2008* and the *Ombudsman Act 1989* in the *Royal Commission Criminal Justice Legislation Amendment Act 2019,* requiring the reporting of child sexual abuse and non-accidental physical injury

[13] *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
[14] Ibid, p. 203
[15] Ibid, pp. 203-204.
[16] Ibid, p. 133.
[17] Ibid, p. 216.

disclosed in the context of religious confessions. The amendments in this Bill to the religious confession entitlement in s 127 of the *Evidence Act 2011* align with those 2019 amendments, facilitating the ability to conduct proceedings in relation to child abuse where information has been received under the seal of the confession. 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 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 acknowledge that Catholic priests would be unlikely to report information disclosed in a confession either voluntarily, or 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 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, and considered s 127 of the *Evidence Act 2011* in detail. However, as Justice Dodds-Streeton explains, at the very least this approach will:[18]

- 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.[19]

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 and to give that information during proceedings if required.

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, by confining the scope of the amendments to information relating to child sexual abuse and non-accidental physical injury of a child.

[18] 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.
[19] Ibid, p. 45.

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, ensuring children are protected from abuse and improving access to justice for victims of child sexual abuse.

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[20].

One principle underpinning the right to a fair trial is the principle of equality under the law. This requires that parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to proceedings.

The amendments in this Bill to the tendency and coincidence evidence provisions in the *Evidence Act 2011* engage the right to a fair trial, because they clarify the circumstances in which that type of evidence will be admitted in child sexual abuse trials.

The amendments to s 56 of the *Crimes Act 1900* limit the right to a fair trial in the construction of the offence provision and how the prosecution is required to prove it. This will be discussed in further detail below.

Tendency and coincidence evidence

Tendency and coincidence evidence is generally excluded in criminal trials to avoid the risk that the jury will use the evidence to reason impermissibly that the defendant is guilty of the charge because they have acted in a particular way in the past. The protections around tendency and coincidence evidence were described by the Royal Commission as reflecting:

> …a concern that the jury will consider it to be too relevant and will give it a greater weight than it deserves. That is, the common law considers the evidence to be highly, and often unfairly, prejudicial to the accused. It is thought that the process of reasoning may be no more than 'well, he committed the other acts, so he must be guilty of this one too'. This reasoning is built on assumptions about how juries will view such evidence.

The Royal Commission found that the tests for admissibility of tendency and coincidence evidence unnecessarily preclude evidence from being admitted in criminal proceedings,[21]

[20] *Brown v Stott* (2003) 1 AC 681
[21] The Royal Commission, Criminal Justice Report, Parts III-VI, page 634.

unnecessarily prevent joint trials,[22] and lead to 'unwarranted acquittals in prosecutions for child sexual abuse offences'.[23] As a result, it concluded that 'the criminal justice system is failing to provide adequate criminal justice for victims'.[24]

Australian courts' history of preventing tendency or coincidence evidence being adduced due to the risk of prejudice to the accused reflects, at least in part, concern about impermissible jury reasoning.[25] In fact, the Royal Commission suggested that it is this concern, rather than any perceived lack of probative value, that plays the largest role in limiting the admissibility of tendency and coincidence evidence.[26]

The Royal Commission identified three ways in which this prejudice is said to manifest:[27]

- Inter-case conflation prejudice: Juries will confuse or conflate the evidence led to support different charges in a joint trial, so that they will wrongly use evidence relating to one charge in considering another charge.

- Accumulation prejudice: Juries will assume the accused is guilty due to the number of charges against him or the number of prosecution witnesses, regardless of the strength of the evidence.

- Character prejudice: Juries will use evidence about the accused's other criminal misconduct and find guilt by reasoning that an accused who has behaved in a certain way once will do so again.

The exclusion of tendency and coincidence evidence to prevent such prejudice is seen as the 'duty of a trial judge',[28] especially in sexual offences proceedings, which are said to require special care to ensure that the defendant is not unfairly prejudiced.[29]

The Royal Commission expressed doubt about the actual likelihood or incidence of this impermissible reasoning (and resultant unfair prejudice). Research was commissioned that used mock juries to acquire evidence on the actual reasoning process undertaken by juries.[30] The research found that, contrary to assumptions made in the common law, it is "unlikely that a defendant will be unfairly prejudiced in the form of impermissible reasoning as a

[22] The Royal Commission, Criminal Justice Report, Parts III-VI, page 634.
[23] The Royal Commission, Criminal Justice Report, Parts III-VI, page 633.
[24] The Royal Commission, Criminal Justice Report, Parts III-VI, page 634.
[25] The Royal Commission, Criminal Justice Report, Parts III-VI, page 455.
[26] The Royal Commission, Criminal Justice Report, Parts III-VI, page 417 and 455.
[27] The Royal Commission, Criminal Justice Report, Parts III-VI, page 458.
[28] *IMM v The Queen* [2016] HCA 14, [158]–[161] (Nettle and Gordon JJ); (2016) 257 CLR 300, 345-6.
[29] The Royal Commission, Criminal Justice Report, Parts III-VI, page 457.
[30] J Goodman-Delahunty, M Nolan and E van Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2017.

consequence of joinder of counts or the admission of tendency evidence".[31] Instead, "jury verdicts were logically related to the probative value of the evidence".[32]

This Bill adopts the model bill developed by the Council of Attorneys-General working group relating to tendency and coincidence evidence, ensuring uniformity with the uniform evidence jurisdictions.

The amendments to the admissibility requirements for tendency evidence in new section 97A only relate to child sexual offence proceedings. The amendments retain a threshold requirement and clarify what evidence will be considered of probative value in those offence matters. The amendments specify the types of matters that cannot be considered to deprive tendency evidence of probative value, which have largely been taken from existing jurisprudence in this area. However, the courts still retain the power to consider those matters in exceptional circumstances.

The further restriction on tendency and coincidence evidence in section 101 of the *Evidence Act 2011* is retained, although amended to require the probative value of the evidence only outweigh danger of unfair prejudice.

Accordingly, the right to a fair trial is not limited by these amendments, insofar as the Royal Commission's findings demonstrate that the fears about unfair prejudice arising from this kind of evidence are unfounded. That is, the Royal Commission Jury Reasoning Research shows that the effect of these amendments, with the retention of threshold requirements and restrictions, will not give rise to unfair prejudice and thereby do not limit the right to a fair trial. Furthermore, 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.[33] These amendments will improve access to justice for victims of child sexual abuse.

Section 56

Nature and extent of the limitation (s28(2)(c))

The amended offence under section 56 – *Sexual relationship with child or young person under special care* - provides that the actus reus of the offence is the relationship and not the particular constituent sexual acts. The prosecution is not required to allege the particulars of any sexual act, as they would if it was charged as a separate offence. All members of the jury are not required to be satisfied about the same acts. For a person to be convicted of an offence against section 56, the trier of fact must be satisfied beyond reasonable doubt that a relationship existed.

[31] J Goodman-Delahunty, M Nolan and E van Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2017.
[32] The Royal Commission, Criminal Justice Report, Parts III-VI, page 463.
[33] *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1 (24 January 2008) (Bell J)

One element of a fair trial is that the accused is given sufficient information to know the case against them.[34] As a result, a charge must identify the essential factual ingredients of the offence,[35] which will usually include the time, place and manner of the accused's alleged acts or omissions.[36]

The prosecution will be required to allege the particulars of the period of the sexual relationship (section 56 (5)). However, under s 56 (4), in a proceeding for an offence against section 56, there is no requirement for—

> (a) the prosecution to allege the particulars of a sexual act that would be necessary if the act were charged as a separate offence; or
>
> (b) the trier of fact to be satisfied of the particulars of a sexual act that it would need to be satisfied of if the act were charged as a separate offence; or
>
> (c) if the trier of fact is a jury—all the members of the jury to agree on the same sexual acts committed as part of the relationship.

In some circumstances it may be possible to charge an offence as having occurred between certain dates within a stated period. If a period of months or years is given, it may be necessary to particularise a distinguishing fact or event that happened close to the time of the alleged offence – for example, it happened in a specified year 'during the school camp'.

If the sexual abuse is alleged to have been committed repeatedly on many occasions, charges could be brought for the first and last occasions of offending if the complainant can remember them most clearly and can give sufficient particulars of those occasions. Section 56(1) provides that the prosecution must prove that the accused engaged in a relationship with the complainant that involved more than one sexual act.

The Director of Public Prosecution has a continuing obligation of full disclosure that requires the accused to be provided with all relevant evidence in a case, including the evidence that would be led by the prosecution to establish a sexual act. The sufficiency of particulars is decided by the court on a case-by-case basis.[37] This is an important protection to ensure that an accused person is able to receive a fair trial. Where insufficient particulars are given, the court may rule that the accused cannot receive a fair trial, and the matter may be delayed, retried or stayed. An accused may not have a fair trial where they are unable to defend themselves against an indeterminate number of offences that occurred on unspecified dates. They may be unable to present their defence or test the complainant if sufficient particulars are not given.[38]

[34] *Johnson v Miller* (1937) 59 CLR 467, 489 (Dixon J).
[35] *Kirk v IRC* [2010] HCA 1 [26], (2010) 239 CLR 531, 557.
[36] *Johnson v Miller* (1937) 59 CLR 467, 489.
[37] See, for example, *Veysey v R* [2011] VSCA 309; (2011) 33 VR 277.
[38] *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266.

The amendments to section 56 do not abrogate this responsibility of the court to ensure that the accused receives adequate particulars to receive a fair trial.

The importance of the purpose of the limitation (s28(2)(b)) and relationship between the limitation and its purpose (s28(2)(d))

The right to a fair trial has been described as 'a central pillar of our criminal justice system'.[39] Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes.[40] The right to a fair trial is 'manifested in rules of law and of practice designed to regulate the course of the trial'.[41] It is 'a right not to be tried unfairly' or 'an immunity against conviction otherwise than after a fair trial'.[42]

The Royal Commission found that "making the actus reus the relationship rather than the individual occasions of abuse, provides the best opportunity to charge repeated or ongoing child sexual abuse in a manner that is more consistent with the sort of evidence a complainant is more likely to be able to give."[43] This purpose must be balanced against the accused's right to a fair trial. It is often difficult for young people to give adequate details of the sexual offending against them because:

- children do not have a good understanding of dates, times, locations or an ability to describe how different events relate to each other on a temporal basis;
- delay in reporting may cause memories to fade or events to be (wrongly) attributed to a particular time or location when they in fact occurred earlier or later, or at another location; and
- the abuse may have occurred repeatedly and in similar circumstances, so the complainant is unable to describe specific or distinct occasions of abuse.[44]

This has been described in *R v Johnson* [2015] SASCFC 170 as a "perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence."

In 2016, Brother Rafferty was tried in relation to six counts of child sexual abuse alleged to have been committed between 1984 and 1987 against one complainant. The allegations were that Brother Rafferty, a teacher at St Patrick's College in Goulburn, NSW, sexually abused a child who was a student at that school and taking music lessons from Brother Rafferty. Brother Rafferty was acquitted on all six counts. The judge acquitted the accused on all counts and said:

[39] *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
[40] Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 247.
[41] *Dietrich v The Queen* (1992) 177 CLR 292, 299–300
[42] *Jago v The District Court of NSW* (1989) 168 CLR 23, 56–7 (Deane J).
[43] Royal Commission, Criminal Justice Report, August 2017, Parts III-VI, page 68.
[44] Royal Commission, Criminal Justice Report, August 2017, Parts III-VI, page 10.

> I am well satisfied that the accused did sexually abuse the complainant at school and I reject his blanket denial as a reasonable possibility.[45]
>
> The Crown has to prove the particular incident that is said to support the count on the indictment. It is not sufficient for the Crown to establish some generalised sexual misconduct by the accused towards the complainant.[46]

This example is particularly relevant to the consideration of the need for particulars and the extent to which a persistent child sexual abuse offence might address the difficulties many complainants will have in giving details about abuse that is alleged to have occurred many years earlier. In late 2016, the Royal Commission commissioned research in relation to memory and the requirements of the law that are relevant to child sexual abuse cases. The research confirms the many difficulties for complainants in providing adequate particulars, particularly in cases of repeated abuse.[47] Some studies also suggest that, while older children may be better able to distinguish between repeated events, after a period of delay, even of several weeks, they may be no better than younger children at distinguishing between repeated events.[48]

The amended provision allows for the effective charging and successful prosecution of repeated but largely indistinguishable occasions of child sexual abuse while having regard to the need to provide the accused with sufficient particulars to enable him or her to receive a fair trial. This is achieved through the requirements for the prosecution to particularise the period of the sexual relationship and for the prosecution to prove that the accused engaged in a sexual act with the complainant on two or more occasions. The accused's right to a fair trial is also protected by the preservation of courts' jurisdiction and power to stay proceedings.

Any less restrictive means reasonably available to achieve the purpose (s28(2)(e))

There are no other avenues to achieve the purpose which are less restrictive. Consistent with the recommendations of the Royal Commission, without undermining a fair trial for the accused, there must be an offence that allows for prosecutions that does not require particularisation in a manner inconsistent with the ways in which complainants remember the child sexual abuse. These amendments represent a reasonable and justifiable limitation on the right to a fair trial, in order to effectively improve access to justice for survivors of child sexual abuse. The express preservation of courts' jurisdictions and powers to stay proceedings provides an effective safeguard to ensure that the right to a fair trial is not unduly limited by this measure.

[45] R v Christopher Rafferty (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), page 16.
[46] R v Christopher Rafferty (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), page 4.
[47] J Goodman-Delahunty, M Nolan and E van Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, page 101.
[48] J Goodman-Delahunty, M Nolan and Evan Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, page 101.

Section 24 HR Act – Right not to be tried or punished more than once

Section 56 *Crimes Act 1900* includes a provision that allows a person to be charged on a single indictment with, and convicted of and punished for, both a sexual relationship offence and specific sexual offences committed against the same person during the period of the relationship.

The relationship offence requires the prosecution to prove an additional element to those of the individual sexual offences – that is, that the accused engaged in a relationship with the child or young person under special care. Therefore, the relationship offence is distinct from the specific sexual offences.

Furthermore, a person can only be charged, convicted of and punished for, the relationship offence and the specific sexual offences if they are charged on a single indictment. As held in *KN v R*:[49] "We consider that ss 56(8) and (9) [*renumbered to (7) and (8) in this Bill*] unequivocally allow for concurrent charging and conviction, provided that the relationship charge and the specific sexual offence charges are prosecuted in the same indictment."

This is consistent with the Royal Commission comments that this construction

> …addresses the risk of 'double jeopardy' by otherwise not allowing a person to be convicted of:
>
> • an unlawful sexual relationship offence if they have already been convicted or acquitted of one of the unlawful sexual acts that are alleged to constitute the unlawful sexual relationship
>
> • a sexual offence in relation to a child if they have already been convicted or acquitted of an unlawful sexual relationship offence in relation to the child for a period which includes the occasion on which the sexual offence is alleged to have been committed
>
> • an unlawful sexual relationship offence in relation to a child if they have already been convicted or acquitted of a predecessor offence – an earlier version of a persistent child sexual abuse offence – in relation to the child for the same period or if any part of the period overlaps.[50]

Finally, new paragraph (b) of section 56 (7) requires that, where a person is charged and convicted of both a relationship offence and a specific sexual offence on the same indictment, they must not be sentenced consecutively. This is consistent with the Queensland Code approach. As was held in *KN v R*:[51]

[49] [2019] ACTCA 37 at 82.
[50] The Royal Commission, Criminal Justice Report, Parts III-VI, page 73.
[51] [2019] ACTCA 37 at 80.

> Of course, where a sexual relationship offence and the specific sexual offence/s are charged in the same indictment and an accused person is convicted of the relationship offence on the basis of the act/s the subject of the specific charge/s (assuming that it is possible to determine that that was or may have been the case), then the sentencing judge is likely to decide that the sentence for the relationship charge captures the whole of the criminality of the specific charges (or vice versa) and to impose entirely concurrent sentences.

This position is now confirmed in this Bill through the inclusion of section 56 (7) (b).

Section 25 HR Act – Retrospective criminal laws

The amendments in the Bill engage and limit the right to protection from retrospective criminal laws (section 25 HRA). The Bill amends section 56 of the Crimes Act to confirm that it has retrospective effect (retained from the current provision) and amends the maximum penalty so that, depending on the period of the relationship, the penalty imposed does not exceed given penalties which reflect relevant maximum penalties of the time of the offending.

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'.[52]

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

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.[53]

Article 7 does not require a restrictive reading of the criminal law[54], 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[55]. 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'[56]. 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[57]:

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".

[52] Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010).
[53] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).
[54] ECHR Application No.00008710/79 DR 28
[55] ECHR Application No.00013079/87 60 DR 256
[56] M Hale, *The history of the pleas of the Crown*, 1736
[57] *CR v United Kingdom* (1995) 21 EHRR 363, [41]

The ECHR found that (emphasis added)[58]:

> *…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)[59]:

> *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 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"[60].

The purpose of the limitation (s 28 (2) (b)) and the nature and extent of the limitation (s 28 (2) (c))

The amendment at clause 5 of the Bill substitutes s 56 of the *Crimes Act 1900* (Crimes Act), and retains an existing provision in that section that allows a charge under section 56 to be laid where the sexual relationship was engaged in before the amendment day (the day the Act commences).

The offence of maintaining a relationship with a young person was originally introduced in 1991.[61] This offence allowed a prosecution to proceed in cases where there is evidence of a course of persistent sexual activity over time, but the evidence lacked the particularity required to permit individual charges to be laid for each of the separate criminal acts. Under this provision, an adult was taken to have maintained a sexual relationship with a young person if the adult has engaged in a sexual act in relation to the young person on three or more occasions.[62]

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[58] *CR v United Kingdom* (1995) 21 EHRR 363, [42]
[59] *CR v United Kingdom* (1995) 21 EHRR 363, [44]
[60] *CR v United Kingdom* (1995) 21 EHRR 363, [47]
[61] The offence was inserted by the *Crimes (Amendment) Act (No. 3) 1991* which inserted s92E(2) into the *Crimes Act 1900*.
[62] *Crimes Act 1900*, s.92EA(3).

The substituted section 56 provides that the relationship, rather than individual sexual acts, constitutes the actus reus for the offence. Section 56(2) allows a charge under section 56 to be laid where the relationship was engaged in before the amendment day (the day the Act commences). This provision has been retained from the amended section 56 that was introduced by the *Crimes Legislation Amendment Act 2018*. The prosecution must prove that the accused engaged in more than one sexual act with a young person or person under their special care over any period in the relationship. A sexual act includes all sexual offences and conduct that is substantially similar to an act that constitutes an offence.

The definition also clarifies that a sexual act does not include an offence against section 55(2) (Sexual intercourse with young person) or section 61(2) (Act of indecency with young person) if the person who committed the act establishes the available defence for consenting young people. The defendant must prove that at the time of the offence he or she believed on reasonable grounds that the complainant was 16 years or above or at the time of the offence the complainant was between 10 and 16 years old and the complainant was in fact not more than two years younger than the defendant. In addition, the defendant must prove the complainant consented to the sexual conduct.

The substituted section 56 permitting charges to be laid retrospectively (retained from the existing section 56) does not offend section 25 of the HRA, as it does not seek to criminalise conduct that was previously legal. The offence applies only to conduct that was unlawful at the time it was committed, and the amendment only affects the way in which it can be charged. The maximum penalties applicable under the original section 56 (that is prior to the changes made by the *Crimes Legislation Amendment Act 2018)* are as follows:

- 7 years imprisonment – if a person is convicted of an offence under section 56(2);
- 14 years imprisonment - if a person convicted of an offence is found to have committed another sexual offence and that other offence is punishable by imprisonment for less than 14 years; and
- Life imprisonment - if a person convicted of an offence is found to have committed another sexual offence and that other offence is punishable by imprisonment for more than 14 years.

Offences that are punishable by imprisonment for more than 14 years include section 55 (sexual intercourse with a young person) and section 62 (Incest and similar offences). The substituted section 56(1), consistent with the amendment made by the *Crimes Legislation Amendment Act 2018*, provides that the maximum penalty is 25 years imprisonment.

However, the substituted section 56 permitting charges to be laid retrospectively does not offend s 25 of the HR Act. Section 56(6) provides that where the offence occurred wholly or in part before the amendment day, while the maximum penalty is that in section 56(1), the

sentence imposed must not exceed given penalties, which reflect relevant maximum penalties of the time the offence occurred.

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

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'.[63]

The purpose of the retrospective application of section 56 is very important as it improves access to justice for survivors of child sexual abuse. When first introduced, section 56 operated prospectively and did not capture sexual offending that occurred before the offence commenced. This is problematic given sexual abuse is often not reported for years, even decades, after it has occurred.[64]

The Royal Commission found that it takes on average 31.9 years to disclose the abuse.[65] Delay is a 'typical, rather than an aberrant, feature of child sexual abuse'.[66] The delay in complaint is frequently even longer if the abuse occurred in an institutional context or was committed by a person in authority.[67]

The Royal Commission notes that:

> Many children who are subjected to repeated occasions of child sexual abuse in similar circumstances are unlikely to be able to distinguish the particular occasions of abuse from each other. Many children may have composite memories of repeated occasions of abuse and may recall events and give evidence in that form. Even as adults, survivors may be in no better position to distinguish particular occasions of abuse from each other than they were as children. These circumstances are features of this type of abuse rather than any indication that the account that the victim or survivor has given is untrue or unreliable.[68]

[63] Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010).
[64] Cashmore, J, Taylor, A, Shackel, R and Parkinson, P, 2016, *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.
[65] Royal Commission, Final Report Volume 4, 2017, page 33.
[66] Cossins, A. (2010a). *Alternative Models for Prosecuting Child Sexual Offences in Australia*. Sydney: National Child Sexual Assault Reform Committee, page 82. See also, DeVoe, E. R., & Faller, K. C. (1999). The characteristics of disclosure among children who may have been sexually abused. *Child Maltreatment*, 4, 217–27. Goodman, G. S., Taub, E. P., Jones, D. P., England, P., et al. (1992). Testifying in criminal court: Emotional effects on child sexual assault victims. *Monographs of the Society for Research in Child Development*, 57(5), serial no 299. Henry, J. (1997). System intervention trauma to child sexual abuse victims following disclosure. *Journal of Interpersonal Violence*, 12, 499–512.
[67] J Cashmore, A Taylor, R Shackel and P Parkinson, *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, page 20.
[68] Royal Commission, Criminal Justice Report, August 2017, Parts III-VI, page 68.

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

As identified by the Royal Commission, the retrospective application of this provision is necessary to achieving the purpose of improving access to justice for survivors of child sexual abuse. The amendment to section 56 permitting charges to be laid retrospectively does not offend section 25 of the HRA, as it does not seek to criminalise conduct that was previously legal. Depending on the circumstances of the offending, the maximum penalty will be higher than the maximum penalty available under the original provision and in others it will be less. However, on sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.

There are no other avenues to achieve the purpose which are less restrictive. The Royal Commission stated that the retrospective operation of retrospective persistent child abuse offences in South Australia or Tasmania had not appeared to result in unfairness to an accused.[69]

[69] Royal Commission, Criminal Justice Report, August 2017, Parts III-VI, page 71.

Royal Commission Criminal Justice Legislation Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Royal Commission Criminal Justice Legislation Amendment Bill 2020**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004.*

…….

Gordon Ramsay MLA
Attorney-General

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 2020*.

Clause 2 — Commencement

This clause provides that the Act 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:

- *Crimes Act 1900; and*
- *Evidence Act 2011*.

Part 2 – Crimes Act 1900

This part makes amendments to better align section 56 of the *Crimes Act 1900* (ACT) with the recommendations made by the Royal Commission[70] and section 229B of the *Criminal Code Act 1899 (Qld)* sch 1 (Criminal Code (Qld)), as endorsed by the Royal Commission. It also makes amendments to align sections 55A, 56 and 61A, so there are not multiple meanings of 'under special care' in these sections.

Clause 4 – Sexual intercourse with young person under special care Section 55A (2)
This clause substitutes (2) to align s 55A with s 56 and s 61A, ensuring there are not multiple definitions of 'under special care' and that the more expansive definition is used.

Clause 5 – Section 55A (5), new definition of *foster carer*
This clause aligns the meaning of 'foster carer' with section 518 (2) of the *Children and Young People Act 2008*, ensuring there are not multiple definitions of 'foster carer'.

Clause 6 – Section 56 Sexual relationship with a child or young person under special care

[70] Recommendations 21 and 22 of the Royal Commission, Criminal Justice Report, August 2017.

This clause substitutes the section 56 offence of maintaining a sexual relationship with a young person with a revised provision to more closely align with the Model Provision recommended by the Royal Commission (recommendations 21 and 22 of the *Criminal Justice Report*).

Between 1989 and 1999 all Australian jurisdictions introduced persistent child sexual abuse offences. Throughout Australia, the provisions varied but each sought to allow a prosecution to proceed in cases where there is evidence of a course of unlawful conduct over time, but the evidence lacked the particularity required to permit charges to be laid for each of the separate criminal acts. In 1991, the ACT introduced section 56 of the Crimes Act which prohibits maintaining a sexual relationship with a young person. These provisions were introduced to overcome the issues identified by the High Court's decision in *S v The Queen* (1989) 168 CLR 266 where it was held that offending which could not be sufficiently particularised could not be successfully prosecuted. When first introduced, each offence operated prospectively and did not capture sexual offending that occurred before the offence commenced. This is problematic given abuse is often not reported for years, even decades, after it has occurred. The Royal Commission found that, on average, survivors of child sexual abuse who disclose in adulthood take 31.9 years to do so.[71]

In *KBT v R* (1997) 191 CLR 417 the High Court considered the Queensland offence of 'maintaining a sexual relationship with a child/young person' under s229B of the Criminal Code (Qld). In *KBT* it was held that s229B required the jury to be satisfied beyond reasonable doubt as to the commission of the same three acts which constituted relevant sexual offences. This meant that three occasions of abuse must be clearly articulated and particularised, albeit without requiring dates and exact circumstances.

Given the similarity between the offences Australia-wide, *KBT* effectively applied to all persistent child abuse offences and rendered them ineffective and unworkable.

Following the decision in *KBT*, Queensland, South Australia, Tasmania and Western Australia made substantive amendments to their persistent child sexual abuse offences. South Australia and Tasmania amended their offences to make them retrospective in operation.

Victoria also amended its persistent child abuse provision.[72] However, the ACT provision remained in its original form until 2018. The effect was that, prior to 2018, charges were very rarely laid under section 56.[73]

The Royal Commission conducted a detailed review of all Australian persistent child abuse offences and recommended that each state and territory government introduce legislation to amend its persistent child sexual abuse offence so that the unlawful sexual relationship, rather

[71] Royal Commission, Final Report Volume 4, 2017, page 33.
[72] In July 2015, Victoria introduced a course of conduct charge provision in the Criminal Procedure Act (Vic), Sch 1, cl 4A.
[73] Some examples of s.56 charges being prosecuted in the ACT prior to 2018 include - R v Tominac [2009] ACTSC 75 (6 July 2009) and R v AB [2011] ACTSC 204 (16 December 2011).

than individual sexual acts, constitutes the actus reus for the offence in accordance with the Model Provision.[74]

In 2018, the Crimes Legislation Amendment Act 2018 substituted a new s 56 offence provision which endeavoured to introduce amendments consistent with the Royal Commission recommendations regarding persistent child sexual abuse offences.

The ACT Court of Appeal decision in the case of *KN v R* [2019] ACTCA 37 (*KN v R*) determined that s 56 as introduced in 2018 did not implement the Royal Commission recommendations as intended, including that the relationship was not the actus reus of the offence.

Substituted section 56 changes the title of the offence to remove the word 'maintaining', as the offence provision only requires the relationship be engaged in.

Substituted section 56 (1) sets out the elements of the offence to more closely align with the Royal Commission recommendations regarding persistent child sexual abuse offences, and the Queensland provision of s 229B Criminal Code (Qld), as endorsed by the Royal Commission. The relationship is the actus reus of the offence.

The accused must have engaged in a relationship with a child or young person under special care, and the relationship must involve more than one sexual act by the accused against the child or young person.

Substituted section 56 (2) varies from existing sections 56(2) and (3) to include a broad definition of 'relationship' at paragraph (a), as it is not intended that the relationship need be of a certain nature or particular class. Rather, it is simply the way in which the accused and child or young person are connected. Section 56 (2) (b) makes it clear that the relationship can have started, or started and ended before the day the law is amended by this Bill.

Substituted section 56 (3) varies from existing section 56 (4) and requires the trier of fact to be unanimously satisfied beyond reasonable doubt that the actus reus of the relationship existed. This is consistent with Royal Commission recommendations 21 and 22, and aligns with s 229B of the Criminal Code (Qld). The section is intended to clarify that the prosecution must prove the existence of the relationship, not the individual sexual acts, beyond reasonable doubt.

Substituted section 56 (4) varies from existing section 56(5) with paragraph (c) amended to make clear that if the trier of fact is a jury, all members of the jury need not agree on the same sexual acts committed as part of the relationship – only that the relationship existed and that it involved more than one sexual act. This is consistent with (3) and with Royal Commission recommendations 21 and 22.

[74] Recommendations 21 and 22 of the Royal Commission, Criminal Justice Report, August 2017.

Substituted section 56 (5) replicates the requirements of existing section 56(6) that the prosecution is required to allege the particulars of the period of the relationship, and paragraph (b) has been added to clarify how the geographical nexus operates in relation to this offence.

Substituted section 56 (6) replaces existing section 56(7) to provide for the determination of the penalty for this offence. Substituted section 56(6) confirms that where an offence under section 56(1) occurred wholly or in part before the amendment day, the maximum penalty for the offence is the penalty in 56(1). However, to ensure compatibility with section 25 of the HR Act, for an offence against section 56 where the period of the relationship occurred wholly or in part before 2 March 2018, the imposed sentence must not exceed given penalties determined by the period of the relationship – as detailed in Table 56. Section 34A of the *Crimes (Sentencing) Act 2005* (ACT) also continues to apply in this scenario.

Substituted section 56 (7), replaces existing section 56 (8).

It was held in *KN v R* at [82]:

> We consider that ss 56(8) and (9) [*renumbered to (7) and (8) in this Bill*] unequivocally allow for concurrent charging and conviction, provided that the relationship charge and the specific sexual offence charges are prosecuted in the same indictment.

That statement aptly captures the intention of this provision.

Paragraph (b) makes clear that a person must not be required to serve the sentence consecutively for an offence against subsection (1) and a sexual offence mentioned in paragraph (a) (ii), to prevent double punishment.

Substituted section 56 (8) replaces existing section 56(9) and is unchanged, other than to reflect references to a 'relationship' rather than a 'sexual relationship' and the numbering of substituted section 56.

Substituted section 56 (9) replaces existing section 56 (10) and is unchanged other than to reflect the numbering of substituted section 56.

Substituted section 56 (10) requires the consent of the director of public prosecutions to start a proceeding for an offence under this section. This aligns the section more closely with the requirements for proceeding with a course of conduct charge under section 66B.

Substituted section 56 (11) remains unchanged from existing section 56(11).

Substituted section 56 (12) sets out the definition of terms used in this provision, replacing existing section 56(13). It varies from the existing section to include a definition of 'child' and an changed definition of 'young person', to align section 56 with section 55A. It also now includes definitions for '1991 maximum penalty' and 'current maximum penalty', in relation to section 56 (6). The definition of 'special care' is that in section 55A (2). 'Amendment day'

has also been changed to mean the day section 3 of the *Royal Commission Criminal Justice Legislation Amendment Act 2020* commenced.

Clause 7 – Act of indecency with young person under special care, Section 61A (2), omit
This clause omits section 61A (2).

Clause 8 –Section 61A (5), definitions
This clause omits a number of definitions from s 61A, as these terms are defined in section 55A and the amendment made by clause 9 renders these definitions in section 61A redundant.

Clause 9 –Section 61A (5), new definition of *special care*
This clause inserts a new provision to apply the definition of ***special care*** in section 55A(2) for the purposes of section 61A. This is one of a number of amendments in the Bill to ensure that a consistent definition of this term applies for the offences at sections 55A, 56 and 61A.

Clause 10 – Failure by person in authority to protect child or young person from sexual offence, new section 66A (2) (aa).
This clause inserts new paragraph (aa) which provides that for subsection (1) (c), it does not matter that the first person is aware of the risk mentioned in subsection (1) (b) because of information communicated to the person during a religious confession. The intent of this amendment is to make clear that a person in authority, in a relevant institution, cannot rely on the fact of information having been communicated to them during a religious confession to avoid criminal liability for the offence of failure to protect a child or young person from the risk that a sexual offence will be committed against them.

Clause 11 – Section 66A (5), new definition of religious confession
This clause inserts a definition of religious confession by reference to s 66AA (8).

Part 3 – Evidence Act 2011

This part implements amendments arising from recommendations 44 – 51 of the Royal Commission's Criminal Justice Report,[75] which relate to tendency and coincidence evidence. It also amends section 127, to align with reforms passed in 2019 to implement Royal Commission recommendations relating to reporting laws.[76] The Royal Commission was satisfied that tendency and coincidence evidence admissibility laws need to be changed to facilitate more admissibility and cross-admissibility of that kind of evidence in child sexual abuse trials. The Commission was so satisfied, on the basis that:

> "Courts have assumed for many years that tendency and coincidence evidence is likely to be highly prejudicial – that is, very unfair – to the accused. They have assumed that juries will place too much weight on this evidence, assuming that the accused must be

[75] Recommendations 44 – 51, Royal Commission, Criminal Justice Report, August 2017.
[76] *Royal Commission Criminal Justice Legislation Amendment Act 2019.*

guilty because he is the sort of person who commits offences. A number of considerations have led us to conclude that these assumptions are wrong…"[77]

The Royal Commission set out the basis for that conclusion, including the Jury Reasoning Research of 2016.[78]

The Royal Commission recommended a specified test for the admissibility of tendency and coincidence evidence in child sexual abuse trials. A Council of Attorneys-General working group was established to develop model provisions following extensive consultation with stakeholders in each jurisdiction, and did so, incorporating the Royal Commission's findings in relation to this kind of evidence, and the nature of the recommendations made by the Royal Commission in relation to tendency and coincidence evidence and joint trials. Those model provisions were agreed to by the Council of Attorneys-General.

This part implements those model provisions.

Clause 12 – Application – pt 3.6
Section 94 (4) and (5)

New section 94 (4) clarifies that principles or rules of the common law or equity preventing or restricting the admissibility of evidence about propensity or similar fact evidence are not relevant when applying Part 3.6 of the *Evidence Act 2011* (ACT).

New section 94 (5) provides that a court, when assessing the probative value of evidence under Part 3.6 of the *Evidence Act 2011* (ACT), is not to have regard to the possibility that tendency evidence or coincidence evidence may be the result of collusion, concoction or contamination.

Clause 13 –New section 97A, Admissibility of tendency evidence in proceedings involving child sexual offences -
New sections 97A (1) to (3) introduce a rebuttable presumption that certain tendency evidence relating to a child sexual offence is presumed to have significant probative value.

New section 97A(4) provides that the court may determine that the tendency evidence does not have significant probative value if it satisfied that there are sufficient grounds to do so.

New section 97A(5) sets out matters that may not ordinarily be taken into account by a court to overcome that presumption and determine that the evidence does not have significant probative value, unless the court considers there are exception circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account.

New clause 97A(6) sets out the definition of *child sexual offence* for section 97A.

[77] The Royal Commission, Criminal Justice Report: Tendency and coincidence evidence and joint trials, page 2.
[78] Professor Jane Goodman-Delahunty, Professor Annie Cossins and Natalie Martschuk, Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: an Empirical Study, May 2016.

Clause 14 – The coincidence rule, New section 98 (1A)

New section 98 (1A) clarifies that coincidence evidence includes evidence from 2 or more witnesses claiming they are victims of offences committed by an accused person, which is used to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the accused person did a particular act.

Clause 15 – Further restrictions on tendency evidence and coincidence evidence presented by prosecution, Section 101(2)

This clause substitutes an amended test for the restriction on tendency evidence and coincidence evidence presented by the prosecution. Section 101(2) now requires that the probative value of the evidence outweighs the danger of unfair prejudice to an accused person.

Clause 16 – Religious confessions, Section 127 (2)

The Council of Attorneys-General working group which was established to develop model provisions for tendency and coincidence evidence was also tasked with developing proposed amendments to s 127 of the uniform evidence laws, arising from the Royal Commission recommendations relating to the reporting of child sexual abuse and disclosures made in the seal of the confession.[79] The *Royal Commission Criminal Justice Legislation Amendment Act 2019* (ACT) introduced legislation requiring the reporting of information about child sexual abuse or non-accidental physical injury even where that information was received under the seal of the confession.

The essence of that reform was 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: [80]

- 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.

[79] The Royal Commission, Criminal Justice Report, Recommendations 33 – 35, implemented in the Royal Commission Criminal Justice Legislation Amendment Act 2019.

This clause aligns the *Evidence Act 2011* (ACT) with those requirements. It amends s 127 (2), so that s 127(1), which excuses a member of the clergy from disclosing that a religious confession was made, or the contents of such a confession, does not apply if the religious communication includes information relating to a child or young person that is experiencing, has experienced, or at substantial risk of experiencing, sexual abuse or non-accidental physical injury.

Schedule 1 – Consequential amendments

All amendments in Schedule 1 are consequential amendments as a result of the changes to section 56 of the Crimes Act.