



Australian Capital Territory

Royal Commission Criminal Justice Legislation Amendment Act 2020

A2020-31

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Australian Capital Territory

Royal Commission Criminal Justice Legislation Amendment Act 2020

A2020-31

An Act to amend legislation about child sexual offences, and for other purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

Part 1 Preliminary

1 Name of Act

This Act is the *Royal Commission Criminal Justice Legislation Amendment Act 2020*.

2 Commencement

This Act commences on a day fixed by the Minister by written notice.

Note 1 The naming and commencement provisions automatically commence on the notification day (see [Legislation Act](#), s 75 (1)).

Note 2 A single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions (see [Legislation Act](#), s 77 (1)).

Note 3 If a provision has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period (see [Legislation Act](#), s 79).

3 Legislation amended

This Act amends the *Crimes Act 1900* and the *Evidence Act 2011*.

Note This Act also amends other legislation (see sch 1).

Part 2 Crimes Act 1900

4 Sexual intercourse with young person under special care Section 55A (2)

substitute

- (2) Without limiting subsection (1), a young person is under the *special care* of a person if the person—
- (a) is a teacher at a school, or a person with responsibility for students at a school, and the young person is a student at the school; or
 - (b) is a parent, step-parent, grandparent, foster carer or legal guardian of the young person; or
 - (c) is a domestic partner of a person mentioned in paragraph (b); or
 - (d) has an established personal relationship with the young person in relation to the provision of religious, sporting, musical or other instruction; or
 - (e) is the young person's employer; or
 - (f) provides professional counselling to the young person; or
 - (g) is a health service provider and the young person is the person's patient; or
 - (h) is a custodial officer and the young person is a young detainee in the officer's care, custody or control; or
 - (i) is a carer for the young person if the young person has impaired decision-making ability; or
 - (j) is otherwise responsible for the care, supervision or control of the young person.

5 Section 55A (5), new definition of *foster carer*

insert

foster carer—see the [Children and Young People Act 2008](#), section 518 (2).

6 Section 56

substitute

56 Sexual relationship with child or young person under special care

- (1) A person commits an offence if the person—
- (a) is an adult; and
 - (b) engages in a relationship with a child, or a young person under the special care of the adult, that involves more than 1 sexual act.

Maximum penalty: imprisonment for 25 years.

- (2) For subsection (1) (b)—
- (a) a ***relationship*** includes repeated contact, interaction, engagement or association, of a sexual nature or otherwise; and
 - (b) the relationship may have started, or started and ended, before the amendment day; and
 - (c) 1 or more of the sexual acts may have occurred before the amendment day; and
 - (d) a sexual offence that could be charged and proved under section 66B (Course of conduct charge—child sexual offences) can be 1 of the sexual acts.

- (3) For a person to be convicted of an offence against subsection (1), the trier of fact must unanimously be satisfied beyond reasonable doubt that the relationship existed.
- (4) However, in a proceeding for an offence against subsection (1), 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 involved in the relationship.
- (5) In a proceeding for an offence against subsection (1)—
- (a) the prosecution is required to allege the particulars of the period of the relationship; and
 - (b) without limiting the [Criminal Code](#), section 64 (2) (Extension of offences if required geographical nexus exists), a geographical nexus exists for this offence if—
 - (i) any part of the relationship was engaged in inside the ACT; or
 - (ii) at least 1 of the sexual acts occurred inside the ACT.
- (6) For an offence against this section that occurred partly or wholly before 2 March 2018, the maximum penalty is the current maximum penalty, however, for a relationship engaged in over the period mentioned in table 56, column 2, the sentence imposed must not be more than the penalty mentioned in column 3 for that period.

Table 56

column 1 item	column 2 period of relationship	column 3 penalty
1	wholly before 24 December 1991	the lesser of— (a) the current maximum penalty; and (b) either— (i) if 2 or more sexual acts alleged to be involved in the relationship are found to have occurred—the total of the maximum penalties for each offence constituted by the sexual acts; or (ii) in any other case—the highest maximum penalty for the offences constituted by the sexual acts alleged to be involved in the relationship
2	started before, on or after 24 December 1991 and ended before 2 March 2018	the lesser of— (a) the current maximum penalty; and (b) the 1991 maximum penalty
3	started on or after 24 December 1991 and ended on or after 2 March 2018	the current maximum penalty
4	started on or after 2 March 2018	the current maximum penalty

Example—item 1, column 3, par (b) (i)

An offender is convicted of an offence against this section for a relationship that occurred wholly before 24 December 1991. The jury agrees that 3 acts of indecency occurred. The maximum penalty for committing an act of indecency at the time the acts occurred is 5 years imprisonment. A court may impose a sentence for an offence against this section of up to the total of the maximum penalty for the 3 acts of indecency, ie 15 years imprisonment.

Example—item 1, column 3, par (b) (ii)

An offender is convicted of an offence against this section for a relationship that occurred wholly before 24 December 1991. The sexual acts that were alleged to be involved in the relationship included conduct that, if sufficiently particularised, would have constituted an act of indecency in the third degree and 3 acts of indecency without consent. The jury agrees that 2 sexual acts occurred but were not unanimous about which ones. The maximum penalty for the sexual acts at the time the acts occurred are 10 years and 5 years imprisonment respectively. A court may impose a sentence for an offence against this section of up to the highest maximum penalty for the alleged sexual acts, ie 10 years imprisonment.

- (7) A person—
- (a) may be charged on a single indictment with, and convicted of and punished for, both—
 - (i) an offence against subsection (1); and
 - (ii) 1 or more sexual offences committed by the person against the same child or young person under the special care of the person during the alleged period of the relationship; but
 - (b) must not be required to serve the sentences for the offence against subsection (1) and the sexual offences consecutively.
- (8) Except as provided by subsection (7), a person cannot be convicted of an offence—
- (a) against subsection (1) if the person has already been convicted or acquitted of an offence constituted by 1 or more of the sexual acts alleged to be involved in the relationship; or
 - (b) constituted by a sexual act against a child or young person under the special care of the person if the sexual act is alleged to have been committed during the period for which the person has already been convicted or acquitted of an offence against subsection (1) in relation to the child or young person.
- (9) For subsection (8), a person is taken not to have been convicted of an offence if the conviction is quashed or set aside.

- (10) A proceeding for a charge for an offence under this section must not be started without the consent of the director of public prosecutions.
- (11) The [Criminal Code](#), chapter 2 (other than the applied provisions) does not apply to an offence against this section.
- (12) In this section:

1991 maximum penalty means the maximum penalty for this offence applying on 24 December 1991.

Note This section was previously s 92EA which was inserted into this Act by the [Crimes \(Amendment\) Act \(No 3\) 1991](#) (A1991-90). See that Act for the maximum penalty for this offence applying on 24 December 1991.

amendment day means the day the *Royal Commission Criminal Justice Legislation Amendment Act 2020*, section 3 commenced.

child means a person who is under the age of 16 years.

current maximum penalty means the maximum penalty mentioned in subsection (1).

sexual act—

(a) means—

- (i) an act that constitutes an offence against this part; or
- (ii) an act that constituted an offence against a sexual offence provision of this Act previously in force (a **historical offence**); or
- (iii) an attempt to commit an act that constitutes or constituted an offence against this part or a historical offence; or
- (iv) an act that, if particulars of the time when or place where the act took place were sufficiently particularised, would constitute or have constituted an offence against this part or a historical offence at the time the act occurred; but

- (b) does not include an act referred to in—
- (i) section 55 (2) (Sexual intercourse with young person) if the person who committed the act establishes the matters referred to in section 55 (3) that would be a defence if the person had been charged with an offence against section 55 (2); or
 - (ii) section 61 (2) (Act of indecency with young people) if the person who committed the act establishes the matters referred to in section 61 (3) that would be a defence if the person had been charged with an offence against section 61 (2).

special care—see section 55A (2).

young person means a person who is at least 16 years old, but not yet an adult.

**7 Act of indecency with young person under special care
Section 61A (2)**

omit

8 Section 61A (5), definitions

omit the definitions of

custodial officer

employer

health service provider

young detainee

9 Section 61A (5), new definition of *special care*

insert

special care—see section 55A (2).

**10 Failure by person in authority to protect child or young person from sexual offence
New section 66A (2) (aa)**

insert

- (aa) 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; and

11 Section 66A (5), new definition of *religious confession*

insert

religious confession—see section 66AA (8).

Part 3 Evidence Act 2011

12 Application—pt 3.6 New section 94 (4) and (5)

insert

- (4) To remove any doubt, any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying this part to tendency evidence or coincidence evidence about a defendant.
- (5) In determining the probative value of tendency evidence or coincidence evidence for section 97 (1) (b), 97A (4), 98 (1) (b) or 101 (2), it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.

13 New section 97A

insert

97A Admissibility of tendency evidence in proceedings involving child sexual offences

- (1) This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue.
- (2) It is presumed that the following tendency evidence about the defendant will have significant probative value for section 97 (1) (b) and section 101 (2):
 - (a) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest);

- (b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.
- (3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, or any other child or children generally.
- (4) Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so.
- (5) The following matters (whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds for subsection (4) unless the court considers there are exceptional circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account:
- (a) the sexual interest or act to which the tendency evidence relates (the *tendency sexual interest or act*) is different from the sexual interest or act alleged in the proceeding (the *alleged sexual interest or act*);
 - (b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred;
 - (c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act;
 - (d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act;

- (e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act;
 - (f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features;
 - (g) the level of generality of the tendency to which the tendency evidence relates.
- (6) In this section:

child sexual offence—

- (a) means each of the following offences (however described and regardless of when it occurred):
 - (i) an offence against, or arising under, a territory law involving sexual intercourse with, or any other sexual offence against, a person who was a child at the time of the offence;
 - (ii) an offence against, or arising under, a territory law involving an unlawful sexual act with, or directed towards, a person who was a child at the time of the offence;
 - (iii) an offence against, or arising under, a law of the Commonwealth, a State or a foreign country that, if committed in the Territory, would have been an offence of a kind mentioned in subparagraph (i) or (ii); but
- Note* **State** includes the Northern Territory (see [Legislation Act](#), dict, pt 1).
- (b) does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.

**14 The coincidence rule
New section 98 (1A)**

insert

- (1A) To remove any doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceeding.

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

omit

the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant

substitute

the probative value of the evidence outweighs the danger of unfair prejudice to the defendant

**16 Religious confessions
Section 127 (2)**

substitute

- (2) Subsection (1) does not apply if—
- (a) the communication involved in the religious confession was made for a criminal purpose; or

- (b) the religious confession includes information relating to—
- (i) a child or young person that is experiencing, or that has experienced, sexual abuse or non-accidental physical injury; or
 - (ii) a substantial risk that a child or young person may experience sexual abuse or non-accidental physical injury.

Schedule 1 Consequential amendments

(see s 3)

Part 1.1 Crimes (Child Sex Offenders) Act 2005

[1.1] Schedule 1, part 1.1, item 12

substitute

12	<i>Crimes Act 1900</i> , section 56 (2)	sexual relationship with child or young person under special care	
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Part 1.2 Sex Work Act 1992

[1.2] Schedule 1, new item 15A

insert

15A	56	sexual relationship with child or young person under special care	
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Part 1.3 Supreme Court Act 1933

[1.3] Schedule 2, part 2.2, item 14

substitute

14	Crimes Act	56	sexual relationship with child or young person under special care
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Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2 July 2020.

2 Notification

Notified under the [Legislation Act](#) on 29 July 2020.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

I certify that the above is a true copy of the Royal Commission Criminal Justice Legislation Amendment Bill 2020, which was passed by the Legislative Assembly on 23 July 2020.

Clerk of the Legislative Assembly

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