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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMES LEGISLATION AMENDMENT BILL (NO 2) 2017

EXPLANATORY STATEMENT

Presented by

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Explanatory Statement

Introduction

This Explanatory Statement relates to the *Crimes Legislation Amendment Bill (No 2) 2017* (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 Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Purpose of the Bill

The Bill makes a number of amendments to criminal laws in the ACT.

In summary, the Bill will:

a) amend section 56 of the Crimes Act (maintain sexual relationship with a young person) so that the unlawful sexual relationship, rather than individual sexual acts, constitutes the actus reus for the offence. This will enable repeated but largely indistinguishable occasions of child sexual abuse to be charged effectively;

b) amend section 66 of the Crimes Act (Using the internet etc to deprave young people) to create two new grooming offences to criminalises the non-electronic grooming of a child and grooming of persons other than a child;

c) make a minor amendment to the Crimes Act so that section 65(3) refers to 'child exploitation material' rather than 'child pornography', making it consistent with the rest of the Act;

d) amend section 34 (sentencing - irrelevant considerations) of the *Crimes (Sentencing) Act 2005* (Crimes (Sentencing) Act) to exclude good character as a mitigating factor in sentencing for child sexual abuse offences where that good character "enabled" the offending;

e) amend the Crimes (Sentencing) Act so that an offender cannot be concurrently subject to a good behaviour order and a parole order;

f) amend the *Criminal Code 2002* (the Criminal Code) to provide that the offence of incitement, referred to in section 47(1), includes an offence a person is taken to have committed pursuant to section 45 of the Criminal Code; and

g) amend the *Magistrates Court Act 1930* (the Magistrates Court Act) to allow circle sentencing in the Childrens Court.

Further analysis of each amendment is contained in the detail of the Explanatory Statement below:

Human Rights Considerations

The Bill engages, and places limitations on, the following *Human Rights Act 2004* (HRA) rights:

- Section 24 – Right to a fair trial
- Section 25 – Retrospective criminal laws

The Bill also engages, and supports, the following HRA 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
- Section 20 – Children in the criminal process
- Section 27 – Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

Section 28 of the HRA requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*[1]. A party must show that:

> [f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"[2].

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of allowing victims of sexual and physical violence to seek justice.

Detailed human rights discussion

Rights engaged and supported

Amendments to give effect to Royal Commission recommendations

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) was established in January 2013 to investigate institutions that have failed to protect children or respond to allegations of child sexual abuse. On 14 August 2017, the Royal Commission published the Final Criminal Justice Report[3] (the report) and made 85

[1] [1986] 1 S.C.R. 103.
[2] *R v Oakes* [1986] 1 S.C.R. 103.
[3] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* . Available at: https://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/criminal-justice

recommendations aimed at reforming the Australian criminal justice system in order to provide a fairer response to victims of institutional child sexual abuse.

The amendments to section 56 (maintain sexual relationship with a young person) and section 66 (using the Internet etc to deprave young people) of the Crimes Act and the amendment to section 34 (sentencing - irrelevant considerations) of the Crimes (Sentencing) Act all 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 allow victims of sexual violence to seek justice. The resulting litigation will promote greater understanding of the circumstances and conditions that have led to abuse and greater community awareness of this as a societal issue, helping to remove the stigma and encouraging other victims to come forward. This will also support the right to protection from torture and cruel, inhuman or degrading treatment, protection of family and children, and the right to liberty and security of person (ss 10, 11 and 18 of the HRA).

Circle Sentencing amendments

The Bill creates a Childrens Circle Sentencing Court in the jurisdiction of the Childrens Court. The new court is called the Warrumbul court, which is the Ngunnawal word for 'youth'.

The Bill allows the specialist Circle Sentencing process to apply to Aboriginal and Torres Strait Islander children. This gives the ACT Aboriginal and Torres Strait Islander community an opportunity to work collaboratively with the ACT criminal justice system to address over representation issues and offending behaviour.

The amendments at Part 5 of the Bill engage and support the cultural and other rights of Aboriginal and Torres Strait Islander people at section27 of the HRA. The amendments allow Aboriginal and Torres Strait Islander Elders and Panel members to contribute to the sentencing process of Aboriginal and Torres Strait Islander children in a culturally appropriate way. The amendments allow people in the Circle Sentencing court to explain culturally relevant details to the Court, while still ensuring that the defendant is aware that criminal behaviour is not tolerated or accepted in their community.

In addition, as these amendments expand the jurisdiction of Circle Sentencing to include Aboriginal and Torres Strait Islander children to participate, the amendments support the rights of those children in criminal proceedings (section 20 HRA) by ensuring that they have culturally appropriate sentencing options available to them in criminal proceedings.

<u>Rights engaged and limited</u>

Under section 28 of the HRA, human rights may be subject to reasonable limits that can be demonstrably justified in a free and democratic society.

Section 25 – 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 provide that it has retrospective effect and amends the maximum penalty so that, depending on the

circumstances of the offending, the penalty may be potentially heavier than that which applied when the crime was committed.

Section 25 of the HRA 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 (s28(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'.

In *R v Secretary of State for the Home Department ex parte Uttley* [2004] UKHL 38, the House of Lords held that human rights law would only be infringed if a sentence imposed on a defendant exceeded the maximum penalty which could have been imposed under the law in force at the time the offence was committed. In that case, Lord Rodger of Earlsferry stated in a majority judgment that the purpose of Article 7 (the European Convention on Human Rights equivalent to s 25(2)) "is not to ensure that the offender is punished in exactly the same way as he would have been punished at the time of the offence, but to ensure that he is not punished more heavily than the relevant law passed by the legislation would have permitted at that time. So long as the court keeps within the range laid down by the legislature at the time of the offence, it can choose the sentence which it considers most appropriate. The principle of legality is respected." [para 42] This position has been endorsed by the European Court of Human Rights in *Kafkaris v Cyprus* (21906/04 [2008] ECHR 143; by the NZ Supreme Court in *Morgan v The Superintended, Rimutaka Prison* [2005] NZSC 26; and by the Privy Council in *Flynn v Her Majesty's Advocate* [2004] UKPC D1.

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

The offence of maintaining a relationship with a young person was introduced in 1991.[4] This offence allowed a prosecution to proceed in cases where there is evidence of a course of persistent unlawful conduct 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

[4] The offence was inserted by the *Crimes (Amendment) Act (No. 3) 1991* which inserted s92E(2) into the *Crimes Act 1900*.

the adult has engaged in a sexual act in relation to the young person on three or more occasions.[5]

The substituted section 56 provides that the unlawful sexual relationship, rather than individual sexual acts, constitutes the actus reus for the offence. Section 56(3) allows a charge under section 56 to be laid where the sexual relationship was maintained before the amendment day (the day the Act commences). The prosecution must prove that the accused engaged in a sexual act with a young person or person under their special care on two or more occasions. 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 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 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) provides that the maximum penalty is 25 years imprisonment. Depending on the circumstances of the offending, the maximum penalty may be higher than the maximum penalty available under the original provision and in some circumstances it will be less.

The substituted section 56 permitting charges to be laid retrospectively does not offend s25 of the HRA. Section 56(7) provides that where the offence occurred wholly or in part before the amendment day, when imposing a sentence a court must consider the prior maximum penalty for the offence under section 56 or an offence constituted by a sexual act alleged to constitute the sexual relationship.

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[5] *Crimes Act 1900*, s.92EA(3).

This ensures that an offender's human rights are limited to the least extent possible.

The importance of the purpose of the limitation (s8(2)(b)) and relationship between the limitation and its purpose (s28(2)(d))

The purpose of the limitation 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'.[6]

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.[7]

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.[8] The Royal Commission found that it takes on average 22 years to disclose the abuse.[9] Delay is a '*typical*, rather than an aberrant, feature of child sexual abuse'.[10]

The delay in complaint is frequently even longer if the abuse occurred in an institutional context or was committed by a person in authority.[11]

For example, between January 1980 and February 2015, 4,444 people alleged incidents of child sexual abuse made to 93 Catholic Church authorities. These claims related to over 1000

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[6] Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010).

[7] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

[8] Cashmore, J, Taylor, A, Shackel, R and Parkinson, P, 2016, *The impact of delayed reporting onthe prosecution and outcomes of child sexual abuse cases*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.

[9] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,*2015, p 444, available at https://childabuseroyalcommission.gov.au/policy-and-research/our-policywork/redress/final-report-redress-and-civil-litigation

[10] Cossins, A. (2010a). *Alternative Models for Prosecuting Child Sexual Offences in Australia*. Sydney: National Child Sexual Assault Reform Committee, p82. 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.

[11] 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, p 20.

separate institutions. The average age of people who made claims of child sexual abuse, at the time of the alleged abuse, was 10.5 for girls and 11.6 for boys. The average time between the alleged abuse and the date a claim was made was 33 years.[12]

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.[13]

Any less restrictive means reasonably available to achieve the purpose (s28(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.[14]

Section 21 – Fair trial

The right to a fair trial (s21 HRA) is also engaged and limited by this amendment.

Section 21 of the HRA states that:

> (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The nature of the right affected (s28(2)(a))

The right to a fair trial is a basic human right. Article 10 of the *Universal Declaration of Human Rights* states:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal

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[12] Opening by Senior Counsel Assisting, Public Hearing into Catholic Church Case Study, p7. Available at http://www.childabuseroyalcommission.gov.au/case-study/261be84b-bec0-4440-b294-57d3e7de1234/case-study-50,-february-2017,-sydney

[13] Royal Commission, *Criminal Justice Report,* August 2017, Parts III-VI, page 68.

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

charge against him".

This right is also captured in the *International Covenant on Civil and Political Rights* which states at Article 14.1:

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

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.

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

The amended offence under section 56 provides that the actus reus of the offence is the unlawful sexual relationship and not the particular unlawful 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 sexual relationship existed.[15]

One element of a fair trial is that the accused is given sufficient information to know the case against them.[16] As a result, a charge must identify the essential factual ingredients of the offence,[17] which will usually include the time, place and manner of the accused's alleged acts or omissions.[18]

The prosecution will be required to allege the particulars of the period of the sexual relationship.[19] However, 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 if the trier of fact is satisfied the nature and character of a person's conduct was consistent with a sexual act; or
> (c) if the trier of fact is a jury—members of the jury to agree on which sexual act constitutes the sexual relationship.[20]

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

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[15] Section 56(4) of the *Crimes Act 1900.*
[16] *Johnson v Miller* (1937) 59 CLR 467, 489 (Dixon J).
[17] *Kirk v IRC* [2010] HCA 1 [26], (2010) 239 CLR 531, 557.
[18] *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467, 486.
[19] Section 56(6) of the *Crimes Act 1900*.
[20] Section 56(5) of the *Crimes Act 1900*.

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(2) provides that the prosecution must prove that the accused engaged in a sexual act with the complainant on two or more occasions. 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.21 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. 22 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'.[23] Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes.[24]

The right to a fair trial is 'manifested in rules of law and of practice designed to regulate the course of the trial'.[25] It is 'a right not to be tried unfairly' or 'an immunity against conviction otherwise than after a fair trial'.[26]

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."[27] 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

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[21] See, for example, *Veysey v R* [2011] VSCA 309; (2011) 33 VR 277.
[22] *S v The Queen* [1989] HCA 66; (1989) 168 CLR 266.
[23] *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
[24] Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 247.
[25] *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.
[26] *Jago v The District Court of NSW* (1989) 168 CLR 23, 56–7 (Deane J).
[27] Royal Commission, *Criminal Justice Report,* August 2017, Parts III-VI, page 68.

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.[28]

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 him while he 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:

> I am well satisfied that the accused did sexually abuse the complainant at school and I reject his blanket denial as a reasonable possibility.[29]
>
> 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.[30]

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.[31] 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 .[32]

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

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[28] Royal Commission, *Criminal Justice Report,* August 2017, Parts III-VI, page 10.
[29] *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 16.
[30] *R v Christopher Rafferty* (Unreported, NSWDC, Frearson SC DCJ, 25 August 2016), p 4.
[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, p 101.
[32] 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, p 101.

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, which is outweighed by the importance of improving access to justice for survivors of child sexual abuse and which is still largely protected by the express preservation of courts' jurisdictions and powers to stay proceedings.

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 *Crimes Legislation Amendment Act 2017 (No 2)*.

Clause 2 — Commencement

This clause provides that sections 32 to 36 commence on 1 September 2018. This is to allow time for operational changes relevant to these sections.

The remaining provisions will commence on the day after the Act's notification day.

Clause 3 — Legislation amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Crimes Act 1900, Crimes (Sentencing) Act 2005, Criminal Code 2002* and the *Magistrates Court Act 1930.*

Part 2 – *Crimes Act 1900*

Clause 4 — Section 56

This clause substitutes the original section 56 offence of maintaining a sexual relationship with a young person with a revised provision to align with the Model Provision recommended by the Royal Commission.[33]

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.

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

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.

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 s29B of the *Criminal Code Act 1899* (Qld) sch 1 (*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 has also more recently amended its persistent child abuse provision.[34] However, the ACT provision remained in its original form. The effect is that charges are very rarely laid under section 56.[35]

Under the original ACT provision, an accused is taken to have maintained a sexual relationship with a young person if they have engaged in a sexual act in relation to the young person on three or more occasions. There is no utility in using this provision over charging specific incidents: if the complainant cannot recall specific incidents but is able to give an account of repeated sexual abuse a charge cannot be proved under section 56.

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 than individual sexual acts, constitutes the actus reus for the offence in accordance with the Model Provision.[36]

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[34] In July 2015, Victoria introduced a course of conduct charge provision in the *Criminal Procedure Act* (Vic), Sch 1, cl 4A.

[35] Some examples of s.56 charges being prosecuted in the ACT include - *R v Tominac* [2009] ACTSC 75 (6 July 2009) and *R v AB* [2011] ACTSC 204 (16 December 2011).

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

Substituted section 56 (1) creates an offence for an adult to maintain a sexual relationship with a young person or a person under the special care of an adult. The maximum penalty for the offence is up to 25 years imprisonment.

This section is based on section 3(1) of the Model Provision and it identifies the core of the offence as the maintaining of the relationship rather than the two or more individual unlawful acts.

Section 56 (2) provides that 'maintaining a sexual relationship' is where an adult engages in a sexual act with a young person or a person under the special care of the adult on two or more occasions over any period.

This section is based on section 3(2) of the Model Provision. The section is intended to be read in conjunction with the definition of sexual act in section 56(12).

Section 56 (3) states that the period or any part of the period may be before the amendment day (being the day this Act commences), and one or more of the sexual acts may have occurred before the amendment day.

This section is based on section 3(7) of the Model Provision. The section is intended to ensure that sexual acts which constituted an offence before the amendment day constitute a sexual act for the purpose of the section 56 offence.

Section 56 (4) provides that for a person to be convicted of an offence against section 56(1), the trier of fact must be satisfied beyond reasonable doubt that a sexual relationship existed.

This section is based on section 3(4) of the Model Provision. The section is intended to clarify that the prosecution must prove the existence of the unlawful relationship, not the individual sexual acts, beyond reasonable doubt.

Section 56 (5) states that in a proceeding against section 56(1) the prosecution is not required to allege the particulars of a sexual act that would be necessary if the act were charged as a separate offence. There is also no requirement for 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 if the trier of fact is satisfied the nature and character of a person's conduct was consistent with a sexual act. If the trier of fact is a jury there is no requirement for members of the jury to agree on which sexual act constitutes the sexual relationship.

This section is based on section 3(5) of the Model Provision. The section is intended to clarify that the unlawful sexual relationship, rather than individual sexual acts, constitutes the actus reus for the offence.

The sexual acts may each being particularised as courses of conduct. For example:

- penile/vaginal sexual penetration under section 55 (Sexual intercourse with young person) occurring approximately weekly over a period of 12 months between specified dates; and
- oral sexual penetration under section 55 (Sexual intercourse with young person) occurring approximately weekly over a period of 12 months between specified dates.

Such particulars could be supplemented by reference to the first and last occasions when the sexual acts occurred, if the complainant remembers them. The jury may be satisfied that the accused maintained an unlawful sexual relationship if they are satisfied of some or all of the alleged occasions of abuse. If the jury is satisfied of the oral penetration but not the penile/vaginal penetration, it could still be satisfied of the relationship if it is satisfied that the oral penetration occurred on two or more occasions.

Although each juror must be satisfied that two or more individual unlawful acts have been proved beyond reasonable doubt, the offence removes the requirement that they be satisfied of *the same* two or more acts.

Section 56(6) provides that the prosecution must allege the particulars of the period of the sexual relationship.

This section is based on section 3(6) of the Model Provision. The section requires the prosecution to provide the particulars necessary to allow the accused to receive a fair trial.

Section 56(7) provides that where an offence under section 56(1) occurred wholly or in part before the amendment day, when imposing a sentence a court must consider the maximum penalty before the amendment day for an offence against this section; and an offence constituted by a sexual act alleged to constitute the sexual relationship.

This section is based on section 3(8) of the Model Provision. This provision requires that when sentencing an offender under the new section 56 the court should consider the maximum penalty at the time of the offence. The version of the section 56 offence which is being replaced by the section 56 substituted by clause 4, had a penalty of between 7 years imprisonment to life imprisonment, depending on the circumstances of the offending. This section should be taken into account by the court when balancing all appropriate factors in sentencing an offender.

Section 56(8) provides that a person may be charged on a single indictment with, and convicted of and punished for, both an offence against section 56 and one or more sexual offences committed by the person against the same young person or person under the special care of the person during the alleged period of the sexual relationship.

This section is based on section 4(1) of the Model Provision. The section is intended to address the circumstances in which a person may be charged with the unlawful sexual relationship offence and other sexual offences. It allows a person to be charged on the same indictment with both the offence of maintaining an unlawful sexual relationship with a child and one or more sexual offences against the same child during the period of the alleged unlawful sexual relationship.

Section 56(9) is based on sections 4(2), 4(3) and 4(4) of the Model Provision. This section is intended to address the risk of 'double jeopardy', protected by s24 of the HRA, by not allowing a person to be convicted of:

- a section 56 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 a section 56 offence in relation to the child for a period which includes the occasion on which the sexual offence is alleged to have been committed; and

- a section 56 offence in relation to a child if they have already been convicted or acquitted of a previous offence under section 56 in relation to the child for the same period or if any part of the period overlaps.

Section 56(10) provides that a person is taken not to have been convicted of an offence if the conviction is quashed or set aside.

This section is based on section 4(5) of the Model Provision. The section protects the right of an accused not to be tried or punished more than once (section 24 of the HRA).

Section 56 (11) is a technical provision that provides that the Criminal Code does not apply to an offence against section 56 other than chapter 2 (the immediately applied provisions).

Section 56 (12) defines relevant terms for this section.

The definitions are largely drawn from section 2 of the Model Provision.

The definition of ***sexual act*** includes all aspects of the Model Provision. 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 definition of ***special care*** also includes all aspects of the Model Provision. The definition also includes a person with responsibility for students at a school where the younger person is a student, a professional counselling relationship, an employment relationship and a grandparent. The intention is that this definition is broad enough to include all instances where there is a power imbalance between young people aged 16 and 17 and an adult so that any apparent "consent" given in the context of these relationships is not adequate to establish that sexual acts were free and voluntary.

Clause 5 – Possessing child exploitation material, Section 65 (3)

This clause omits 'child pornography' at section 65(3) of the Crimes Act and substitutes 'child exploitation material' for consistency with the rest of the Act.

The Crimes Act was amended by the *Crimes (Child Sex Offenders) Amendment Act 2015* (the Amendment Act) to replace a number of references to 'child pornography' with 'child exploitation material'. The Explanatory Statement to the amendment Act indicates that it was intended that all references to 'child pornography' were to be replaced with 'child exploitation material'. A reference to 'child pornography' in section 65(3) was overlooked.

Clause 6 –Section 66 heading

This clause is a technical amendment to reflect the changes to section 66 made by clause 7.

Clause 7 – Section 66 (1)

This clause substitutes the original section 66 with a revised provision to align with the recommendations of the Royal Commission.[37] This clause creates two new grooming offences – grooming a child generally (no longer limited to electronic grooming) and grooming someone other than the child.

The current offence in section 66 (Using the Internet etc to deprave young people) of the Crimes Act only applies to conduct that occurs electronically. It does not recognise the broader circumstances where an adult seeks to build a relationship of trust with a child and that adult intends to sexualise that relationship at some point in time.

Grooming refers to a preparatory stage of child sexual abuse, where an adult gains the trust of a child (and, perhaps, other people of influence in the child's life) in order to take sexual advantage of the child. It is a complex, commonly incremental process that can involve three main stages (1) gaining access to the victim, (2) initiating and maintaining the abuse and (3) concealing the abuse.[38] Grooming includes a range of techniques, many of which are not explicitly sexual or directly abusive in themselves.

The Royal Commission examined this issue and noted that what makes otherwise benign conduct 'grooming' is that the adult forms an intent for his or her conduct to make more likely or facilitate sexual relations with a child. Before a substantive unlawful sexual act occurs, and without the benefit of hindsight, it can be difficult to identify and distinguish grooming from other conduct that is common and, in many cases, desirable in healthy adult/child mentoring relationships.

As a result, the Royal Commission recommended the introduction of legislation to adopt a broad grooming offence that captures any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence. The Royal Commission also recommended that legislation should be introduced to extend its broad grooming offence to the grooming of persons other than the child.

These amendments give effect to the Royal Commission recommendations.

Section 66(5) retains the defence available if the defendant proves that the defendant believed on reasonable grounds that the young person the target of the defendant's actions was at least 16 years old. This ensures that these offences do not criminalise sexual advances being made to people over the age of 16 years.

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[37] Recommendations 25 and 26 of the Royal Commission, *Criminal Justice Report,* August 2017.
[38] Colton, M, Roberts, S & Vanstone, M 2012, Learning lessons from men who have sexually abused children, *The Howard Journal of Crime and Justice*, vol. 51, no. 1, pp. 79–93.

Section 66(1)(a) provides that a person must not in person or by any other means encourage a young person to commit or take part in, or watch someone else committing or taking part in an act of a sexual nature. This section uses the term "encourage" to replace the term "suggest" in the original provision. This broad term more clearly describes the type of conduct covered by the offence. Encouragement with no resulting sexual conduct will be an offence, and the offence also applies regardless of whether the accused intends for the sexual activity to occur.

This offence is intended to cover grooming which takes place in person or by any other means, including electronic means. An example is provided of showing a young person indecent material online or on a mobile phone.

Section 66(1)(b) provides that a person must not engage in conduct with a young person with the intention of making it more likely that the young person would commit or take part in, or watch someone else committing or taking part in an act of a sexual nature.

This offence is intended to recognise the broad circumstances where an adult seeks to build a relationship of trust with a child and that adult intends to sexualise that relationship at some point in time. For example, requesting that a child take photos of themselves and provide them to the offender.

Section 66(1)(c) provides that a person must not engage in conduct with a person who has a relationship with a young person with the intention of making it more likely that the young person would commit or take part in, or watch someone else committing or taking part in an act of a sexual nature.

This offence is intended to extend the offence to the grooming of persons other than the child. For example, it may be conduct such as encouraging an adult responsible for the child to leave the child alone with the accused.

Maximum penalty

This section also amends the maximum penalty to provide that where the young person is aged under 10 years the maximum penalty for an offence against section 66 is:

(a) for a 1st offence—imprisonment for 9 years; or
(b) for a 2nd or subsequent offence—imprisonment for 12 years.

It is intended that this maximum penalty apply to each of the three offences set out in section 66. This is appropriate given that the grooming conduct is directed towards the child, even if it is committed via a third party. This increased penalty reflects the increased vulnerability of young children and is also consistent with other relevant provisions across Part 3 of the Crimes Act.

Clause 8 – Section 66 (2)

This clause is a consequential amendment to reflect the changes to section 66(1).

Clause 9 – Section 66 (4)

This clause is a consequential amendment to reflect the changes to section 66(1).

Clause 10 – Section 66 (5)

This clause is a consequential amendment to reflect the changes to section 66(1).

Clause 11 – Section 66 (6), definition of *using electronic means*

This clause is a consequential amendment to reflect the changes to section 66(1).

Part 3 – *Crimes (Sentencing) Act 2005*

This Part amends the Crimes (Sentencing) Act so that an offender cannot be concurrently subject to a good behaviour order and a parole order. This amendment is intended to avoid confusion and inefficiency in the sentence administration process where an offender is subject to two separate sets of conditions, some of which are consistent across the two orders and some of which are not.

Clause 5 – Combination sentences—offences punishable by imprisonment, Section 29 (1) (d), new note

This clause inserts a new note into section 29 of the Crimes (Sentencing) Act. Section 29 allows a sentencing court to create combination sentences, selecting from two or more of a list of options. The two relevant options for the purposes of these amendments are subsection (1)(a) 'an order sentencing the offender to imprisonment', and subsection (1)(d) 'a good behaviour order'.

The note being inserted summarises the changes made to section 31, clarifying that a good behaviour order may not be set to start when an offender may either be serving full-time detention or be on parole.

Clause 6 – Section 29 (1), example 1, first dot point

This amendment standardises the language used in the first example at section 29(1) to be consistent with the rest of the Act.

Clause 7 – Combination sentences—start and end, Section 31 (c), example, dot points

This clause is intended to demonstrate the effect of the changes to section 31. It substitutes the current example dot points to reflect that these amendments are intended to result in a court no longer being able to make a combination sentence where a good behaviour order commences during a possible period of imprisonment or parole.

Clause 8 – New section 31 (2)

Section 31 of the Crimes (Sentencing) Act works in combination with section29. Section 29 allows a sentencing court to make a combination sentence made up of different elements.

Section 31 gives the sentencing court the power to set the start and end dates of any part of the sentence. The clause inserts new section 31(2) which states that a sentencing court cannot commence a good behaviour order during a period when the offender may be serving a period of full-time imprisonment or be on parole.

When an offender is given a sentence with a nonparole period, the offender can apply to be released from full-time imprisonment at the conclusion of the non-parole period. Applications for parole are made to the Sentence Administration Board (the SAB). If the SAB approves an application for parole, the offender is released subject to a parole order. Breaches of a parole order are heard by the SAB, while breaches of good behaviour orders are heard by the court. When a good behaviour order runs concurrently with a parole order, the offender is subject to two separate sets of conditions, some of which may be consistent across the two orders and some of which may not. In the case of *Peter v Wade* [2017] ACTSC 122, Chief Justice Murrell stated that where a good behaviour order runs concurrently with a parole order, there is potential for '…conflict between decisions made by the executive and the judiciary'. This can lead to confusion and inefficiency in the sentence administration process.

It is intended that if a sentencing court makes a good behaviour order, new section 31(2) will require the court to set the date of commencement for the good behaviour order to be at least at the end of any full sentence of imprisonment, including any period of possible parole.

Clause 9 – Sentencing—irrelevant considerations, New section 34 (2) (d) and examples

This clause amends section 34(2)(d) to implement the recommendations of the Royal Commission to exclude good character as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending.[39] This clause provides that in deciding how an offender should be sentenced for an offence, a court must not reduce the severity of a sentence it would otherwise have imposed in child sexual abuse offences where the offender has good character, to the extent that the offender's good character enabled the offender to commit the offence.

Delays in reporting, combined with the concealed nature of child sexual abuse, and the fact that it is often perpetrated by people in positions of authority, mean that offenders often do not have a criminal history, and conversely, have been previously viewed as respected members of the community. The Sentencing Data Study for the Royal Commission examined 283 Australian cases involving institutional child sexual abuse, and found that more than 50% of offenders 'had no prior record'. A study of 84 decisions of the NSW District Court found that 44% of offenders were teachers and 27.4% of offenders were priests.

Often, and particularly in institutional settings, the 'good character' of offenders, and the position of trust and authority they hold, allow them to perpetrate child exploitation, and groom other adults to facilitate access to children.[40] While such actions can be reflected in the

[39] Recommendation 74 of the Royal Commission, *Criminal Justice Report,* August 2017.
[40] Arie Freiberg, Hugh Donnelly and Karen Gelb, 'Sentencing for Child Sexual Abuse in Institutional Contexts' (*Report for the Royal Commission into Institutional Responses to Child Sexual Abuse,* July 2015) 81.

charging and conviction for offences involving a 'position of authority' and 'grooming', it is a perverse outcome of the criminal justice system that prior 'good character' can legitimately be considered a mitigating factor in sentencing.

Good character is a relevant sentencing consideration. It can go some way towards showing that an offender is unlikely to reoffend, concomitantly reducing the need for specific deterrence and community protection. However, as noted by the Royal Commission, good character evidenced by a lack of prior convictions can be a fallacy, especially given the delays in, and lack of, reporting in child sexual abuse cases. Indeed, the findings of the Royal Commission indicated that most child sexual offenders are 'repeat offenders'. In many cases, particularly institutional settings, '[t]he offender may have used his or her reputation and good character to facilitate the grooming and sexual abuse of a child and to mask their behaviour', sometimes allowing 'them to continue to offend despite complaints or allegations being made'. In this way, the 'good character' actually 'facilitated' the offending behaviour; without it, 'the offending would have been less likely to take place'.[41]

The criminal law plays an important 'vindicatory' role for victims and the community, ensuring that offenders are held accountable for unlawful behaviour. Allowing an offender's 'good character' to mitigate the sentence imposed 'potentially deletes the "wrongfulness" message of this crime' in a way that is out of line with community understanding of the psychological damage wrought by child sexual exploitation.[42]

In 2002, the High Court handed down the decision of *Ryan v The Queen* (2001) 206 CLR 267. The case involved a priest who had been convicted of multiple child sexual offences spanning over 20 years. The trial judge held:

> "[W]hatever he had done and achieved, he is not a good man. The prisoner is a man who preyed upon the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult … How can a man, who showed a kind and friendly face to adults, but who sexually abused so many young boys in so many ways over such a long period of time, be considered a good man? … His unblemished character and reputation does not entitle him to any leniency whatsoever."

The High Court overturned this decision on appeal, finding that, while 'the appellant was not entitled to significant leniency... [he] was entitled to *some* leniency for his otherwise good character' and work in the community. This decision reflects the current law in the ACT.

In response to this decision, NSW and South Australia enacted legislation to prescribe that 'good character' could not be considered a mitigating factor in sentencing where it facilitated the commission of the sexual offences against children.

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[41] Royal Commission, *Criminal Justice Report,* August 2017, Parts VII – X, p 288-292.
[42] Stevens and S Wendt, 'The "Good" Child Sex Offender: Constructions of Defendants in Child Sexual Abuse Sentencing' (2014) 24 *Journal of Judicial Administration* 95, 106, quoted in Arie Freiberg, Hugh Donnelly and Karen Gelb, 'Sentencing for Child Sexual Abuse in Institutional Contexts' (*Report for the Royal Commission into Institutional Responses to Child Sexual Abuse,* July 2015) 80.

The Royal Commission also examined this issue and in making the recommendations to exclude good character as a mitigating factor highlighted that 'the requirement that the good character in question specifically *aid* the offence may limit the application of the provision'.[43]

Case law in NSW has affirmed that 'assistance' is a high threshold. In *AH v R* [2015] NSWCCA 51, the offender was the victim's step-father, and sexually abused her when she was nine years old. The Court held that 'while the relationship the offender had with the victim's mother and the subsequent trust that was created engendered an environment in which the offence could be committed, the offender's good character did not *assist in the commission of the offences'*.

In *LB,* an unreported decision of the NSW District Court (9 February 2012), a rugby coach who sexually abused a junior player on his team was found to be of good character, and further this good character did not assist him in committing the offences. Although Bennett DCJ held, 'in the broader context that his exposure to the victim was by reason of his role in junior rugby league, which he could only have had because of good character and lack of prior convictions'; however, this was merely 'coincidental with the commission of these offences'. The offender could rely on evidence of good character in mitigation of sentence, including evidence of 'the contribution he has made to the community... to the junior rugby league'.

The artificial separation of good character and commission of sexual offences does not reflect the realities of child sexual abuse, and the fact that it is often committed by trusted persons in positions of authority and who are well-regarded by the community, particularly in institutional contexts.

This effect of the amendment to section 34 means that good character is excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character "enabled" the offending. This applies in sentencing proceedings for all child sexual abuse offences, whether the offender is an adult or a child/young person. For example, there could be instances where a 17 year old obtains employment at a school as a teacher's aid, with no criminal convictions. The position at the school enables the teacher's aid to gain access to children and offences are committed.

This amendment will still operate in accordance with section 33 of the Crimes (Sentencing) Act (relevant considerations) which means that an offender's good character can still be taken into consideration by a sentencing court when assessing factors such as the offender's prospects of rehabilitation or re-offending.

[43] Royal Commission, *Criminal Justice Report,* August 2017, Parts VII – X, p293 (emphasis in original).

Part 4 – *Criminal Code 2002*

Clause 10 – Incitement, New section 47 (1A)

This clause amends section 47 of the Criminal Code to insert new s47(1A) to provide that a person can incite another to commit an offence if they urge another person to aid, abet, counsel, procure, be knowingly concerned in or a party to, the commission of an offence by someone else.

This amendment corrects the issue identified in *The Queen v Holliday* [2017] HCA (unreported, 6 September 2017) (Holliday) where the High Court dismissed a prosecution appeal from a decision of the ACT Court of Appeal. The principal issue was whether Holliday could be convicted of an offence of inciting the commission of an offence by urging another inmate, Powell, to procure a third person to commit the substantive offence of kidnapping. The Court held that, at least in circumstances where no offence of kidnapping was committed, Holliday could not be convicted of urging Powell to commit the offence of kidnapping contrary to section 47 of the Criminal Code. A majority of the High Court reached that conclusion on the basis that in order for a person to be convicted of an offence of incitement under section 47 of the Criminal Code, that person must have urged the commission of a discrete offence. The majority concluded that procuring the commission of an offence is not a discrete offence under the Criminal Code.

This clause makes it clear that the offence incited referred to in section 47(1) includes an offence a person is taken to have committed pursuant to section 45(complicity and common purpose) of the Criminal Code.

This amendment corrects the issue identified in Holliday. The gap exposed compromises the ability to prosecute crimes where the instigator takes care to distance him or herself from the criminal activity, as well as crimes proposed at the top levels of criminal organisations utilising more sophisticated means.

Clause 11 – Section 47 (4)

This clause amends section 47(4) to include a provision to the effect that that a person may be found guilty of incitement whether or not the offence incited was committed.

This clause is inserted to remove any doubt that a person may be found guilty of the offence of incitement even though the offence incited was an offence a person is taken to have committed pursuant to section 45, and the offence incited was not committed.

Part 5 – *Magistrates Court Act 1930*

Clause 19 – Childrens Court, Section 287 (1)

This clause is consequential to the amendment made by clause 23 to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 20 – Chief magistrate to arrange business of Childrens Court, Section 290 (2) (a)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 12 – Childrens Court Magistrate to hear all matters, Section 291 (1)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 13 –Section 291 (2)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 14 – Childrens Court Magistrate, Section 291A (1) and (2)

This clause substitutes new sections 291A (1) and (2) to provide that the Chief Magistrate may declare more than one magistrate to be a Childrens Court Magistrate. Currently only one magistrate can be declared to be the Childrens Court Magistrate. This amendment will support the listing capacity of the Childrens Court and promote the acquisition of specialist skill sets for the Magistracy.

Clause 15 – Section 291A (3)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 16 – Section 291A (4)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 17 – Acting Childrens Court Magistrate, Section 291B (1)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 18 – Section 291B (1) (b)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate and provides that the Chief Magistrate may assign a magistrate to act as a Childrens Court Magistrate if there is no Childrens Court Magistrate able to exercise the functions of a Childrens Court Magistrate.

Clause 19 – Section 291B (2)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 29 – Assignment of other magistrates for Childrens Court matters, Section 291C (1)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 200 – Section 291C (2) (d)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 211 – Completion of part-heard matters, Section 291D (1) (b) (i)

This clause is consequential to the amendment to allow more than one magistrate to be declared to be a Childrens Court Magistrate.

Clause 222 – New part 4A.4

The Galambany Court has been providing a culturally sensitive and specialist sentencing process for Aboriginal and Torres Strait Islander offenders since 2004. Currently, children are precluded from appearing before the Galambany Court.

This clause inserts a new part 4A.4 into the Magistrates Court Act to create a Childrens Circle Sentencing Court in the jurisdiction of the Childrens Court. The new court is called the Warrumbul court, which is the Ngunnawal word for 'youth'.

This clause inserts new section 291GA which provides that the Childrens Court is known as the Warrumbul Court when it is sitting to provide circle sentencing.

This clause inserts new section 291GB which provides that the Childrens Court may give a direction in relation to the procedure to be followed in relation to circle sentencing for certain Aboriginal or Torres Strait Islander offenders, and any other relevant matter in relation to circle sentencing. Such a direction is not taken to limit the Childrens Court's discretion in sentencing an offender.

New section 291GB (3) provides that nothing in s291GB limits the Childrens Court's power to give a direction under s309 (Directions about procedure).

Clause 23 – Definitions—ch 4C, Section 291L

This clause is a minor technical amendment to move the definitions of 'Aboriginal or Torres Strait Islander offender' and 'circle sentencing' to the Dictionary of the Act. The definitions of these terms remain the same.

Clause 24 – Directions about procedure, Section 309, note

This clause amends the note at s309 to clarify that the Childrens Court (and not only the Magistrates Court) may make procedures to be followed in relation to circle sentencing.

Clause 25 – Dictionary, definition of *Aboriginal or Torres Strait Islander offender*

This clause is a minor technical amendment to move the definitions of 'Aboriginal or Torres Strait Islander offender' to the Dictionary of the Act. The definitions of these terms remain the same.

Clause 26 – Dictionary, definition of *circle sentencing*

This clause is a minor technical amendment to move the definition of 'circle sentencing' to the Dictionary of the Act. The definition of this term remains the same.