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LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL 2018

EXPLANATORY STATEMENT

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ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL 2018

Outline

Introduction

This Explanatory Statement relates to the *Royal Commission Criminal Justice Legislation Amendment Bill 2018* (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 policy objective of this bill is to implement a number of recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in its Final Criminal Justice Report[1] (the report). The Bill will enhance the protection of children from child sexual abuse and improve the justice system's response to child sexual abuse.

In summary, the Bill will:

a) create a new offence in the *Crimes Act 1900* of failure by a person in authority, in a relevant institution, to protect a child from the risk that a sexual offence will be committed against the child;

b) create a procedural mechanism for charging offences as a 'course of conduct' for child sexual abuse;

c) amend the sentencing provisions in the *Crimes (Sentencing) Act 2005* so that sentences for child sexual abuse must be imposed according to current sentencing practice rather than the sentencing practice at the time of the offending, while retaining the principle that a sentence must not exceed the maximum that applied at the time of the offence; and

d) amend the *Evidence (Miscellaneous Provisions) Act 1991* to:

    i) include principles for dealing with child witnesses;

    ii) harmonise the structure and definitions within chapter 4, which contains the Special Measures available to witnesses in proceedings; and

[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

iii) extend the availability of certain measures to more categories of witnesses, including witnesses with disability, family members of and people in a special relationship with particular vulnerable witnesses and for all child witnesses;

e) make consequential amendments to other legislation as a result of the changes to the Evidence (Miscellaneous Provisions) Act.

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. On 14 August 2017, the Royal Commission published the report, which made 85 recommendations aimed at reforming the Australian criminal justice system in order to improve access to justice for victims of institutional 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 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's response to child sexual abuse. 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 appropriately balanced against the human rights of children to safety, protection and justice.

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

- Section 12 – Right to privacy and reputation;
- Section 21 – Right to a fair trial;
- Section 22 – Rights in criminal proceedings; and
- Section 25 – Retrospective criminal laws.

The Bill also engages, and 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;
- Section 20 – Children in the criminal process;
- Section 21 – Right to a fair trial; and
- Section 22 – Rights in criminal proceedings.

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

International human rights law places obligations on governments to "respect, protect and fulfil" rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and 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 the positive obligation of governments to uphold rights in depth, 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.[2]

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*[3], 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 found to be a violation of Article 3 of the Convention. The ECHR held that "the State must be considered to

[2] 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.

[3] No. 33218/96, 26 November 2002

have failed to fulfil its positive obligation to protect the current applicant from the sexual abuse to which she was subjected"[4].

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 Bill engages and 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). These are supported by all proposed amendments and are discussed briefly below.

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 12 HR Act). The Bill gives effect to these rights by creating offences to compel individuals in positions of authority in institutions to protect children from abuse, as well as by making a number of amendments that assist victims of child sexual abuse to seek justice.

In addition, the Bill makes a number of amendments that engage and support the right to a fair trial (s 21 HR Act). The right to a fair trial has been found to include a 'triangulation of

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

interests' which include those of the accused, the victim and his or her family, and the public.[5] The Bill gives effect to this right by extending the application of existing special measures to witnesses in child sexual abuse cases.

Rights engaged and limited

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*[6]. 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"*[7].

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

The amendments in the Bill primarily engage and limit rights in criminal proceedings (s 22 HR Act). For this reason, that limitation is discussed in detail below.

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

Section 22 (2) (a) HR Act – Rights in criminal proceedings

Section 22 (2) (a) of the HR Act states that:

> *Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge*

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

This right corresponds to the right provided for in Article 14 of the International Covenant on Civil and Political Rights (the ICCPR). An accused is entitled to know the case against them, and have particulars that identify the charge, including the time, place and manner of an alleged

[5] *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1 (24 January 2008) (Bell J)
[6] [1986] 1 S.C.R. 103.

[7] *R v Oakes* [1986] 1 S.C.R. 103.

offence. This allows a complainant to identify and respond to the allegation made against them, and lessens the risk of duplicitous charges.

The United Nations Human Rights Committee (UNHRC) said, by implication, that the rights guaranteed by Article 14 could only be derogated from in exceptional circumstances. The circumstances must be so exceptional that even in times of public emergency, a State must make sure the 'derogations do not exceed those strictly required by the exigencies of the actual situation'.[8]

Penfold J of the ACT Supreme Court said the object of section 22(2)(a) is to ensure that 'participants in the criminal justice system should not be placed at risk of being **misled or confused by the processes and forms** adopted by those who administer that system' (emphasis added).[9]

The UNHRC explained that (emphasis added):[10]

> *the specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates* ***both the law and the alleged general facts*** *on which the charge is based.*

In Australian courts, issues in relation to particularisation of charge sheet or indictment are usually resolved by reference to common law standards of natural justice, instead of reference to a specific human right.[11] The High Court stated that 'in framing the particulars of an offence the prosecution cannot be more precise than the evidence available for tender at the trial will permit'.[12] The Court then went further to say that 'if no greater specificity than that was necessary to identify the case the appellant had to meet, no basis was identified for requiring that the chosen span of dates *whatever its width* be treated as an element of the offence'.[13]

In *DPP (Vic) v R S*,[14] the Victorian County Court ruled that section 25(2)(a) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) was not engaged in a "course of conduct" charge if the DPP was required to provide all particulars the DPP would rely on, to the greatest possible extent. Section 25(2) (a) is substantially similar to section 22(2) (a) of the ACT's HR Act.

Based on a decision of the Victorian County Court,[15] it was suggested that while section 25(2)(a) requires the prosecutor to inform an accused of the 'nature' of their charge, which

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[8] United Nations Human Rights Committee, *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, 21 August 2007 [6].
[9] *William Kevin Stone v Les Brien & Itshak Yosef* [2009] ACTSC 6 (18 February 2009).
[10] Above n 3, [31].
[11] See, eg, *WGC v The Queen* (2007) 233 CLR 66.
[12] Ibid 103 [129].
[13] Ibid 104 [132].
[14] *DPP (Vic) v R S* [2016] VCC 1464 [53]—[59].
[15] Judicial College of Victoria, *Victorian Charter of Human Rights Bench Book* (10 May 2016) < http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57448.htm>.

includes information about the particulars of the charge, the level of detail required in those particulars will depend on the charge brought.

Importantly, where a charge permits particulars that are unavoidably vague, the right may not be engaged.

The common law principle of natural justice may not be co-extensive or wider than what Article 14(3) contemplates, but both have highly similar requirements as to the particularisation of charges.

The UN International Criminal Tribunal for the former Yugoslavia (ICTFY) said the following:[16]

> *In a case based upon individual responsibility where the accused is alleged to have personally done the acts pleaded in the indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a reasonable range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.* (citations omitted)

This paragraph was quoted by the United Nations Special Court for Sierra Leone (SCSL) in *Prosecutor v Norman - Decision on the Second Accused's Motion for Service and Arraignment on the Consolidated Indictment* (6 December 2004).

The views of both the ICTFY and the SCSL are relevant here because the relevant parts of their Statutes are almost identical to Article 14 of the ICCPR. The Statutes set out the rules and procedures of both Tribunals and were created by United Nations resolutions. Article 17(4) of the Statutes for SCSL and Article 21(4) of the Statutes of ICTFY are almost identical to Article 14(3) of the ICCPR (upon which section 22(2)(a) of the *Human Rights Act 2004* (ACT) was based).

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

This right is limited by the amendment at clause 6 of the Bill, which inserts new section 66B into the *Crimes Act 1900* (Crimes Act) to create a mechanism for a course of conduct to be included in a single charge on indictment. The purpose is to recognise the nature and effects of persistent child abuse and the impact that has on memory recall.

[16] *Prosecutor v Brdanin – Decision on Objections by Momir Talic to the Form of the Amended Indictment* (20 February 2001) Trial Chamber, United Nations International Criminal Tribunal for the former Yugoslavia.

In the Royal Commission's Case Study 46, a victim (FAB) gave evidence about the abuse against him between 1984 and 1987.

FAB gave evidence to the Royal Commission about his trial, stating:

> *Looking back, I know that my evidence probably didn't come across as well as it could have. I know that this would have created some doubt in the judge's mind. But I had spent my whole life up until that point trying to forget what had happened to me at the school so that I could get on with the rest of my life. When I was giving my evidence at the trial, it was very difficult for me to recall and describe the minute details of each particular incident of the abuse.*[17]

The Royal Commission examined FAB's case, which was a trial against the accused before a single judge for three counts of indecent assault and three counts of sexual assault. The judge ultimately acquitted the accused on all counts:

> *I am well satisfied that the accused did sexually abuse the complainant at a school and I reject his blanket denial as a reasonable possibility. I do not believe him on that. The complainant made a complaint way back in 1999 which was not properly dealt with. The circumstances of that complaint in my view are strongly indicative of truth….Having said all that I cannot be satisfied of the particular incidents beyond reasonable doubt. The complainant has only given evidence of three of the six counts, and as to the others, the evidence is too imprecise and vague and inconsistent to accept beyond reasonable doubt in a criminal trial.* [18]

The difficulty of FAB in recalling precise and exact particulars of persistent sexual abuse committed many years earlier is not uncommon in child sexual offence matters. To require complainants to delineate separate, and specific, acts of "largely indistinguishable occasions of abuse" [19] years after the abuse happened is "at best an artificial exercise that does not convey the nature of the abuse they endured and, at worst, impossible" [20].

Allowing complainants of historic child sexual abuse the ability to access justice in a way that recognises the trauma and impact of the abuse supports equality before the law.

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

The section 22 (2) right is not an absolute right, but has been characterised as a protection against an accused being misled or confused by insufficient particulars contained in a charge against them. As previously noted, the UNHRC has said that there must be sufficient information to indicate the law and the alleged general facts on which the charge is based.[21]

[17] Royal Commission, *Criminal Justice Report*, Parts III – VI (2017) 13
[18] Royal Commission, *Criminal Justice Report*, Parts III – VI (2017) 15
[19] Royal Commission, *Criminal Justice Report*, Parts III – VI (2017) 29
[20] Royal Commission, *Criminal Justice Report*, Parts III – VI (2017) 29
[21] Above n 3, [31].

The Bill amends legislation to protect victims of child sexual abuse who are subjected to ongoing or persistent abuse, and to ensure justice and equality before the law for those victims. The accused's rights in criminal proceedings could be said to be limited by the new course of conduct provision allowing general particulars of the offence to be alleged, rather than specific incidents of each incident of offending.

However, section 66B (4) of the Crimes Act expressly requires that a charge for a sexual offence under this section must contain particulars that are necessary to give reasonable information about the various incidents of the offence that are alleged to amount to a course of conduct over a stated period. This ensures that there will be enough material provided in the charge for the accused to have sufficient information to indicate the law and the alleged facts on which the charge is based.

In addition, any course of conduct offence can only be pursued with the consent of the Director of Public Prosecutions. This caveat ensures that the provision is implemented appropriately and with proper oversight.

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

The limitation on the section 22 (2) (a) right is intended to provide greater protection for victims who have been subjected to persistent historic child sexual abuse.

The purpose of the course of conduct amendment discussed above is to protect vulnerable victims of child sexual abuse from further trauma, and to ensure justice and equality before the law for those victims.

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

The charge appears to represent a reasonable and justifiable limitation on the in criminal proceedings, having regard to the importance of improving access to justice for survivors of child sexual abuse and which would still largely be protected by the express preservation of courts' jurisdictions and powers to stay proceedings.

These restrictions are proportionate to the aim of keeping people safe and are the least restrictive means possible in the circumstances.

Other rights engaged and limited

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.[22] Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary (reasonable in the circumstances). The right is engaged by the Bill as it requires individuals, in certain circumstances, to take action to protect children when they are aware of a substantial risk of child sexual abuse, even if those disclosures were made in the course of confidential communications.

The purpose of the limitation is to prevent the concealment of child sexual abuse. The nature and extent of the limitation is to compel a person who has become aware of the substantial risk of child sexual abuse to take action to protect a child against the continuation of that abuse in certain circumstances. The limitation is the least restrictive means possible to achieve a balance between the rights of the person disclosing abuse or receiving a disclosure, and the abused child. This is because evidence shows that, unlike other categories of crime, child sexual 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 could result in the continued abuse of the victim and potentially other children.

Section 21 HR Act – Right to a fair trial

The right to a fair trial includes all proceedings in a court or tribunal and all stages of proceedings. It is concerned with procedural fairness, that is, the right of all parties in proceedings to be heard and respond to any allegations, and the requirement that the court be unbiased and independent. The nature of the right may be absolute in itself, in that it can never be justified to hold an unfair trial, but many of the principles that characterise a fair trial are not absolute[23]. A component of the right to fair trial is that the accused has the opportunity to cross-examine the complainant's evidence. The right is engaged by the Bill through the interaction with recorded statements and the ability to observe the manner in which the evidence is given and use that as the basis for cross-examination. The nature and extent of the limitation is minor, in that the cross-examination can still occur based on visual cues that are recorded at the time the evidence is given. The purpose of the amendments is to allow evidence to be gathered and recorded early in the process, to allow children and their families or closest support figures the ability to discuss the abuse and heal. The limitation is the least restrictive as the opportunity to cross-examine the complainant is maintained. If the complainant gives their evidence by way of a recorded statement, the statement will be, wherever possible, given by audiovisual recording. As a result, the accused will be able to observe the manner in which the evidence is given, as well as the content of that evidence, allowing for cross-examination on the basis of observations and reliability. The right to a fair trial is further supported by the fact that the audiovisual recording of the complainant's evidence will be available for viewing before the trial, allowing the accused time to prepare their case.

Section 22 HR Act – Rights in criminal proceedings – examination of witnesses

[22] (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.

[23] *Brown v Stott* (2003) 1 AC 681

Section 22 provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. A person charged with a criminal offence is also entitled to a number of minimum guarantees, including the ability to cross-examine prosecution witnesses. The amendments in new Part 4 of the Bill will engage an accused's rights in criminal proceedings, but will not limit them, as the substantive changes affect how complainants give evidence in chief. The amendments will not limit the ability of an accused to examine witnesses or adduce evidence for their own submissions.

The amendments in Part 4 of the Bill extend the provisions that have been in use for children and people with an intellectual disability since 2008 in the ACT.

Section 25 HR Act – Retrospective criminal laws

It may appear that Part 3 of the Bill in relation to sentencing engages the right at section 25(2) of the HR Act, which provides that: "[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 the offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty." However, the Bill does not engage this right as offenders will not be subject to heavier penalties than applied to the offence when it was committed. While they may be subject to current sentencing patterns and practices, they will not be subject to current maximum penalties.

Royal Commission Criminal Justice Legislation Amendment Bill 2018

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 2018*.

Clause 2 — Commencement

This clause provides that the Act will commence on the day after its 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;*
- *Evidence (Miscellaneous Provisions) Act 1991;* and
- *Evidence (Miscellaneous Provisions) Regulation 2009*

The Bill also makes consequential amendments to other legislation at schedule 1.

Part 2 – Crimes Act 1900

The Bill introduces amendments to the Crimes Act. These implement a number of recommendations of the Royal Commission's Criminal Justice Report:

- recommendation 23 (formalising the ability to charge more than one incident of a sexual offence as a course of conduct);
- recommendation 24 (allowing the offence of maintaining a sexual relationship to have one or more sexual acts particularised as a course of conduct); and
- recommendation 36 (new offence for failing to protect a child or young person from sexual abuse).

Clause 4 – Maintaining sexual relationship with young person or person under special care – new section 56 (3) (c)
This clause implements the Royal Commission recommendation 24:

State and territory governments should consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.

This clause allows a sexual offence that could be charged and proved under the new section 66B course of conduct charge to be included as one of the relevant sexual acts for the offence of maintaining a sexual relationship with a young person or a person under special care.

The intent of this is to ensure that, where a course of conduct charge is considered appropriate there is flexibility to allow the correct charges to apply to reflect the moral culpability of the accused in circumstances that reflect the nature of the offending and the impact on memory recall of children.

This clause should be read in conjunction with new section 66B, outlined below.

Clause 5 – Section 56 (11)
This clause corrects a drafting error identified in section 56 (11) and is a technical amendment only.

Clause 6 – New sections 66A and 66B
This clause inserts a new offence for failing to protect a child or young person from sexual offences in an institutional context.

New Section 66A – Failure by person in authority to protect child or young person from sexual offence.

New section 66A of the Crimes Act implements the Royal Commission recommendation 36:

State and territory governments should introduce legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution as follows:

a. The offence should apply where:

i. an adult person knows that there is a substantial risk that another adult person associated with the institution will commit a sexual offence against:

• a child under 16

• a child of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child

ii. the person has the power or responsibility to reduce or remove the risk

iii. the person negligently fails to reduce or remove the risk.

b. The offence should not be able to be committed by individual foster carers or kinship carers.

c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster care and kinship care services should be included, but individual foster carers and kinship carers should not be included. Facilities and services provided by religious institutions, and any service or functions performed by persons in religious ministry, should be included.

d. State and territory governments should consider the Victorian offence in section 49C of the Crimes Act 1958 (Vic) as a useful precedent, with an extension to include children of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child.

The essence of this reform is to prevent institutions from permitting the continued contact between alleged perpetrators and potential or actual victims, and from moving alleged perpetrators to different positions within that or other institutions if there is a substantial risk of future abuse.

In Case Study 13, the Royal Commission examined the response of the Marist Brothers to allegations of child sexual abuse against Brothers Kostka Chute and Gregory Sutton. Their report states[24]:

On 19 July 1969 the Provincial Council, chaired by Brother Othmar Weldon and with Brother Alman Dwyer in attendance, decided to give Brother Chute a canonical warning because he had admitted that he had 'inappropriately sexually touched' a child at St Joseph's School at Lismore.

In about 1969 the Provincial, Brother Weldon, and his successor as Provincial, Brother Dwyer (from 1983 to 1989), transferred Brother Chute from Lismore to Marist College Penshurst and made him the principal in the knowledge that Brother Chute had admitted to inappropriately touching a child while he was a class teacher at St Joseph's School and that that conduct warranted a canonical warning.

Brother Weldon and Brother Dwyer did not make successor Provincials aware of the knowledge they had of Brother Chute's admission or of the decision that that conduct warranted a canonical warning. That neither Brother Weldon nor Brother Dwyer ensured this conduct was known by subsequent Provincials meant that no warning was given to prospective schools of the risk Brother Chute posed to children and reflects very poorly on the Marist Brothers' approach to these matters under the leadership in place between 1958 and 1972.

[24] https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Case%20Study%2013%20-%20Findings%20Report%20-%20Marist%20Brothers.pdf

In 1969, following his removal from St Joseph's School, Lismore, Brother Chute was appointed to the position of principal of the primary school at Marist College Penshurst. He taught at the school until 1972.

Notwithstanding that the Provincial Council was aware that Brother Chute had abused a child at Lismore in the period 1967 to 1969 and considered that that conduct warranted a canonical warning, Brother Chute was placed in a position of responsibility as a teacher at Marcellin Junior College in Coogee in 1973, as principal of Marist Brothers Parramatta in 1975 and as a teacher at Marist College Canberra in 1976.

The headmaster of Marist College Canberra, Brother Terence Heinrich, received an allegation in 1986 that Brother Chute had touched a boy's penis in the dark during a film night. He did not bring the complaint by the boy's parents to the attention of his successor at Marist College Canberra on handover of the role. He told the then Provincial, Brother Dwyer, of the allegation.

Brother Dwyer was a member of the Provincial Council in 1969 and knew of Brother Chute's admission to touching a child in Lismore and that it warranted a canonical warning. With that knowledge, the Provincial did nothing about this complaint. He did not advise Brother Heinrich of the canonical warning. He placed Brother Chute in a position of responsibility as assistant religious education coordinator at Marist College Canberra between 1983 and 1989.

Not only was this inaction by the Provincial woefully inadequate but it also presented an opportunity to remove Brother Chute from teaching or from contact with and therefore access to children. By not taking this opportunity, the Provincial put more children at risk of being sexually abused by Brother Chute.

...

In summary, the Marist Brothers, through a senior Brother or Provincial, knew the following about Brother Chute's sexual offending:

- ***St Anne's Primary School, Bondi** (1962) – in 1962 the Community Superior of the Bondi Marist Brothers, Brother Phillips, knew that Brother Chute had admitted to sexually abusing AAI but did not report it to the Provincial or to the police.*

- ***St Joseph's School, Lismore** (1969) – Brother Weldon, Provincial from 1964 to 1972, and Provincial Council member Brother Dwyer knew that Brother Chute had admitted to touching a child at Lismore. In 1969 the Provincial Council, comprising the then Provincial, Brother Weldon, and Brother Dwyer, who was to become a Provincial, determined to give Brother Chute a canonical warning for the touching of a child at Lismore and with that knowledge the*

Provincial transferred him to a position of responsibility as principal of Marist College Penshurst.

- ***Marist College Canberra** (1986) – in 1986 the Provincial, Brother Dwyer, was told of an allegation that Brother Chute's hand had contact with a boy's penis. Provincial Dwyer did nothing, notwithstanding his knowledge of the admission in 1969 by Brother Chute and that it warranted a canonical warning.*

- ***Marist College Canberra** (1983–1989) – the Provincial, Brother Dwyer, permitted Brother Chute to keep teaching children at Marist College Canberra during his term as Provincial from 1983 to 1989 with the knowledge he had of the 1969 admission, the canonical warning and the 1986 allegation.*

- ***Marist College Canberra** (1983–1988, 1993) – the Provincial, Brother Dwyer, did not tell two headmasters of Marist College – Brother Heinrich (headmaster from 1983 to 1988) and Brother Wade (headmaster from 1993 to 2000) – that Brother Chute had admitted to touching a child at Lismore and that in 1969 the Provincial Council determined that that conduct warranted a canonical warning.*

- ***Marist College Canberra** (1993) – in late 1993, Brother Turton, the Provincial from 1989 to 1995, received an allegation which conveyed unwanted conduct of a sexual nature by Brother Chute.*

- ***Marist College Canberra** (1993) – in December 1993, the Provincial, Brother Turton, received a second complaint of a similar nature. With this knowledge, Provincial Turton did not tell the Marist Brothers' community, other teachers or parents of:*

    - *the investigation of Brother Chute's conduct that he initiated*

    - *that Brother Chute had now had two complaints made against him of a similar sexualised nature*

    - *that Brother Chute was removed because of these complaints.*

The Marist Brothers kept no written record of these accumulated allegations of Brother Chute's repeated offending conduct.

Between 1962 and 1972, and 1983 and 1993, the relevant Provincial of the Marist Brothers took no, or no adequate, steps to ensure that Brother Chute did not have contact with children through his work as a Marist Brother.

The Marist Brothers did not report any allegations of child sexual abuse to the police in the period 1962 to 1993. The Church parties acknowledged that 'It is today a great source of regret to the Marist Brothers that Brother Chute's conduct was not reported to the police much earlier' so that later instances of abuse would not have occurred.

After his removal from teaching in 1993, the Marist Brothers received complaints from 48 of Brother Chute's former students alleging that Brother Chute had sexually abused them when they were children. Forty of these complainants attended Marist College Canberra.

Similar examples provided to the Royal Commission spanning different institutions and religious institutions across Australia demonstrate this is not an isolated issue. For example:

- Case Study 6 which indicated that a teacher who had child sexual abuse allegations made against him was re-engaged as a relief teacher in 2008 at the same school, with 33 counts of indecent treatment taking place during that period.

- Case Study 22 which indicated that despite complaints made to Rabbis at Yeshiva Bondi and Yeshivah Melbourne, there was no evidence that steps were taken to record the abuse allegation or remove the perpetrator. In relation to one instance the Royal Commission noted 'the nature and frequency of reports to Rabbi Groner strongly suggest a pattern of total inaction. In his practice of keeping complaints confidential, including not informing the principal, Rabbi Glick, Rabbi Groner failed in his obligation to the students'

- Case Study 23 demonstrated that despite mandatory reporting obligations applying to non-government schools in NSW from 1988, five teachers employed at Knox Grammar School were permitted to remain in positions of authority at the school after allegations of child abuse were made against them. In one instance, the headmaster told one of the teachers prior to allowing him to perform relief duties for the resident masters at a boarding house 'I hope you are careful with your touching habits with boys'.

It was from the above case studies that the Royal Commission considered a 'failure to protect' offence was necessary to 'give appropriate emphasis to the obligation of those in responsible positions in institutions to protect children in their care from sexual abuse'[25].

New section 66A (1) sets out the circumstances when a person in authority commits an offence for failing to protect a child or young person.

The offence relies on there being a 'substantial risk', of which a person in authority in an institution is aware, being a risk that a sexual offence will be committed against a child or young person in the institution's care, supervision or control by another person associated with the institution. The term 'substantial risk' is not a new legal concept and has been well established as the basis for determining recklessness. It is appropriate that the level of risk is assessed according to the circumstances of each case. It is likely that the risk would be assessed as a 'substantial risk' in the case studies outlined above where there were either multiple reports, canonical warnings, or admissions of child sexual abuse irrespective of legal action. It may not be reasonable to infer substantial risk from an isolated and unsubstantiated allegation

[25] Royal Commission, *Criminal Justice Report*, Parts III – VI (2017) 246.

that is denied. However, should a complaint not be properly investigated and a second complaint made, a level of risk may then be inferred.

In order to prove the offence, it must also be established that the person knew the risk existed, that their position allowed them to reduce or remove the risk and they intentionally or negligently failed to reduce or remove the risk. There is no requirement to prove a risk exists in relation to a specific child.

The intention of this offence is to appropriately sanction instances where people in positions of authority in relevant institutions know about abuse or other behaviour which raises their awareness of a risk of children or young people being sexually abused by someone associated with the institution and do nothing to protect children in the institution. Reporting the behaviour to police or through reportable conduct legislation does not necessarily reduce or remove the risk presented by the person associated with the institution.

The offence is punishable by imprisonment for five years.

Section 66A (2) outlines the required nexus to the ACT. Given the findings of the Royal Commission that young people and sexual offenders are moved around from one institution to another, it is important that the legislation allows flexibility for transient arrangements. This means that the offence can be charged if the child or young person was in the ACT at any time the person in authority knew about the risk, or that the person in authority was in a relevant institution in the ACT at the time they knew about the risk.

Section 66A (3) provides guidance about the circumstances that may amount to 'negligently failing to reduce or remove a risk'. Circumstances that may reduce or remove a risk may include the person in authority satisfying themselves that the risk does not exist, or taking steps to remove the person who represents the risk from their position, and ensuring that they do not have access to children in any other position.

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

Section 66A (5) provides key definitions necessary for the section.

New Section 66B – Course of conduct charge

New section 66B of the Crimes Act implements the Royal Commission's recommendation 23:

> *State and territory governments (other than Victoria) should consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.*

The purpose and human rights impacts of the section 66B amendment are discussed in depth above in the human rights analysis of the section 22 (2) (a) right.

The potential for double jeopardy and implications for the right to a fair trial have been raised during consultation on having a course of conduct charge and a maintaining charge in the same indictment. These issues are countered by the existence of section 56 (9) which states:

> *(9) Except as provided by subsection (8), 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 constitute the sexual relationship; or*
>
> *(b) constituted by a sexual act in relation to a young person or person under the special care of the person if the sexual act is alleged to have occurred during the period for which the person has already been convicted or acquitted of an offence against subsection (1) in relation to the young person or person under their special care.*

This addresses any potential issues of double jeopardy that might arise from having both a maintaining offence and a course of conduct offence on the same indictment. The term 'incidents' is intended to reflect instances of abuse as an amalgamation of separate but indistinct occasions of abuse, rather than specific and defined acts of abuse. There is also no requirement to prove a specified or arbitrary number of incidents in order to make out this type of charge. A course of conduct can be charged if there is sufficient evidence to prove, beyond reasonable doubt, that there was a course of sexual conduct that was persistent or repetitive to such an extent that the specifics of each incident are blurred in the mind of the victim.

However, a course of conduct charge should not be used as a tool to overcome the evidentiary deficiencies of a superficial investigation, nor should it be used merely as an alternative method of prosecuting what would otherwise be a series of substantive charges.

Where there is evidence to support multiple offence types in the course of conduct, each offence type will need to be filed as a separate course of conduct charge. For example, a child may disclose that every Sunday while their mother was out, they would be abused by their mother's friend. They know that this abuse happened shortly after their 7th birthday until they left home at 16. The child may remember that most times they were made to both touch the friend's genitals with their hand, and also with their mouth; that the abuse happened in their home, often in the child's bedroom but not always; and that there were a few Sundays where either the child's mother did not go out, or a different friend looked after them. For this type of offending, the following a course of conduct charges could be pursued:

- Section 61 (1) – act of indecency with young person under the age of 10
- Section 61 (2) – act of indecency with young person under the age of 16
- Section 55 (1) – sexual intercourse with young person under the age of 10
- Section 55 (2) sexual intercourse with young person under the age of 16

On the basis of the Royal Commission recommendation, this provision is modelled on the Victorian equivalent provision for a course of conduct charge in the *Criminal Procedures Act 2009*. The explanatory material for the Victorian provision can be found online at http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257D3A007B192C/$FILE/571239exi1.pdf.

Section 66B (1) outlines that more than one incident of the commission of the same child sexual offence may be included in a single charge if:

- each incident constitutes an offence against the same provision;
- each incident relates to the same complainant;
- the incidents take place on more than one occasion over a stated period; and
- the incidents, taken together, amount to a course of conduct having regard to the time, place and purpose of the incident or any other relevant matter.

Section 66B (2) states that for subsection (1), more than one type of act on different occasions may be alleged, for example penetrative sexual intercourse on one occasion and oral sexual intercourse on another occasion.

Section 66B (3) notes that for the avoidance of doubt a charge under subsection (1) does not establish a new offence and is a charge of a single offence.

Section 66B (4) states that a charge for a sexual offence under this section must contain particulars that are necessary to give reasonable information about the various incidents of the offence that are alleged to amount to a course of conduct over a stated period.

Section 66B (5) notes that the charge does not need to include particulars of specific incidents of the offence, nor do the particulars need to distinguish any specific incident of the offence from any other. This ensures that the purpose of the new section is preserved. If specific incidents of the offence or specific distinguishing factors exist, it is proper to charge a separate offence. The purpose of the course of conduct offence is to recognise the overwhelming body of evidence about the effects of child sexual abuse on memory recall.

Section 66B (6) states what the prosecution must prove beyond reasonable doubt in relation to the course of conduct charge.

Section 66B (7) clarifies that it is not necessary to prove an incident with the same degree of specificity as to the date, time, place, circumstances or occasion as would be required if the person were charged with the sexual offence constituted only by that one incident.

Section 66B (8) clarifies that it is not necessary to prove any particular number of incidents of the offence or the dates, places, circumstances or occasions of the incidents. It is also not

necessary to prove that there were distinctive features differentiating any of the events or the general circumstances of any particular incident. Again, this furthers the purpose of the section, which is targeted at recognising that child sexual abuse can have a significant impact on memory recall and requiring proof of specific incidents of abuse would defeat the purpose of the section.

Section 66B (9) clarifies that a person charged under section 66B may rely on any exception, exemption, proviso, excuse or qualification that applies to the offence with which the person is charged.

Section 66B (10) requires that Director of Public Prosecutions consent to the charge before a proceeding for a course of conduct charge can be started.

Section 66B (11) notes that a person can still be arrested for, charged with, and either remanded in custody or granted bail in relation to this charge before the consent from the Director of Public Prosecutions is granted.

Section 66B (12) defines child sexual offence as an offence against a child under this part or an offence against a child under a sexual offence provision of the Act previously in force.

Part 3 – Crimes (Sentencing) Act 2005

The amendments to the Crimes (Sentencing) Act implement the Royal Commission recommendation 75:

> *State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed*.

Sentencing is a complex and dynamic exercise, which changes in light of shifting community expectations about punishment, deterrence and denunciation, and understandings of rehabilitation and criminality.[26] Balancing these objectives is a complex task. It is even more complex in historic child sexual abuse matters.

Many child sexual abuse cases involve significant periods of delay in reporting and prosecution.[27] In this context, a question has arisen as to whether the sentencing standards to be applied are those at the date of the commission of the offence ('historical standards'), or those at the date of sentence ('current standards').

[26] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 293.
[27] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 307.

In the ACT, section 33(1) (za) of the *Crimes (Sentencing) Act 2005* (ACT) provides that the court is bound to consider 'current sentencing practice'. In *R v Scheeren,* an ACT case involving 11 counts of indecent assault and 1 count of 'buggery', Murrell CJ held that section 33(1) (za) must be read in light of section 25 of the *Human Rights Act 2004* (ACT).[28] This section provides that '[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'.[29] In light of this provision, and the non-exhaustive matters to which the court may properly have regard in sentencing, Murrell CJ interpreted section 33 'to permit consideration of sentencing patterns at the time when the relevant offence was committed, where those patterns are more lenient than current sentencing patterns'. Her Honour stated at [35]:

> *There is an important distinction between "current sentencing practice" (the matter addressed by s 33(1)(za) of the Sentencing Act) and "sentencing patterns": see Monfries v The Queen [2014] ACTCA 46 at [82] – [84], R v Scheeren [2014] ACTSC 272 at [44] – [57] (where the distinction was better expressed) and R v Nona [2015] ACTSC 136 at [48] – [50]. "Current sentencing practice" refers to the sentencing requirements that apply when the sentence is imposed, e.g. the statutory requirement to consider ss 7 and 33 of the Sentencing Act. "Sentencing patterns" refers to the length and structure of sentences that were imposed at the time that the offence was committed. Insofar as a sentencing pattern can be identified, sentences for historical offences should generally reflect the sentencing pattern when the offence occurred. The prosecution accepted that, consistent with the approach of the Victorian Court of Appeal in Stalio v The Queen (2012) 223 A Crim R 261 at [46] – [54], reference to past sentencing patterns supports the principle of "equal justice".*

This decision has been followed in a number of sentences where historical child sexual abuse is being considered – see for example by Penfold J in *R v WR [No. 5]*.[30] This issue was recently considered in *Kilic v The Queen*[31] where the High Court stated at [21]:

> *Current sentencing practices*
>
> *Section 5(2)(b) of the Sentencing Act 1991 (Vic) required Judge Montgomery, and the Court of Appeal, to have regard to "current sentencing practices". The evident purpose of that requirement is to promote consistency of approach in the sentencing of offenders. Consideration of "current sentencing practices" will include, where appropriate, the proper use of information about sentencing patterns for an offence. The requirement of currency recognises that sentencing practices for a particular offence or type of offence may change over time reflecting changes in community attitudes to some forms of offending. For example, current sentencing practices with*

[28] [2014] ACTSC 272.
[29] *Human Rights Act 2004* (ACT), s25(2).
[30] 2015] ACTSC 258 [37].
[31] [2016] HCA 48.

respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim.

In *Kilic* the High Court was considering a provision in identical terms to the ACT s33(1)(za) in the context of an identical provision to section 25 of the *Human Rights Act 2004* (ACT). [32]

The Royal Commission found that '[t]he period in which a case was sentenced had a significant impact on the type of penalty imposed'.[33] Since 1999, the percentage of child sexual abuse cases where the offender was sentenced to full-time imprisonment has increased.[34] Over time, child sexual abuse cases have increasingly produced 'the decision to incarcerate',[35] reflecting increasing community awareness of the long-term psychological damage to victims of these offences.[36]

Given the shift in attitudes towards child sexual offending, it is arguable that past sentencing practices have become increasingly irrelevant and unjust. A report for the Royal Commission entitled *Sentencing for Child Sexual Abuse in Institutional Contexts* listed a number of historical sentencing considerations which would now be considered out of line with current community standards.[37] These included:

- that 'the child consented'[38]
- that a teacher of a student victim was 'a weakling who succumbed to his eroticism'[39]
- that the sexual exploitation was 'non-violent'[40]
- that 'the child was a willing participant'[41]
- that a child victim had 'promiscuous sexual experience' at the time of the offence[42]

[32] The High Court was considering an appeal from the Victorian Court of Appeal. It is noted they also have Human Rights Legislation in the *Charter of Human Rights and Responsibilities Act 2006* (Victoria).
[33] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 278.
[34] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 278.
[35] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 278.
[36] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 288.
[37] 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) 95.
[38] Michael John Hill (aka Michael James Grant) (unrep) NSWCCA No 52 of 1979 (11 July 1979) 3 (Street J), cited 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) 95.
[39] Bakker (Ian John) CCA: VIC (27 February 1978) (Gillard J) extracted in R Carter, Australian Sentencing Digest Part IV (1985) 175, 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) 95.
[40] Balmer (James Gordon) CCA: NSW 325/81 (27 Aug 1982) summarised in R Carter, Australian Sentencing Digest Part IV (1985) 209, 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) 95.
[41] Michael John Hill (aka Michael James Grant) (unrep) NSWCCA No 52 of 1979 (11 July 1979) 3 (Street J), cited 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) 95.
[42] Butler [1971] VR 892 (19 July 1971), 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) 95.

- that no complaint was made.[43]

Judge Berman SC of the NSW District Court has acknowledged that there is now a greater appreciation amongst judges regarding the impact of child sexual abuse on victims than there was in the past:

> *To put it bluntly we now know that those old sentencing practices were wrong. Current law in NSW requires judges to perpetuate the errors of the past. Surely it would be better to impose a sentence which we now think to be a correct one rather than to be forced to impose a sentence which we know to be wrong.*[44]

Historic sentencing standards down play the long-term psychological harm to victims caused by sexual abuse. Sentencing offenders under historic standards could potentially have the effect of 'undermining public confidence in the judicial system'.[45] It could also deter complainants from coming forward in historic cases, where there is a perception that a historic crime will not be treated with the same 'seriousness' as cases that have occurred more recently.[46]

The Royal Commission recommended that legislation should be introduced to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.[47]

As noted above, consideration has been given as to whether this approach is compatible with retrospective criminal laws (s25 HR Act). The Royal Commission noted that reference to historic maximum penalties and current sentencing standards 'represents a fair balance' and 'does not infringe the right of an offender to face no harsher penalty than that which would have applied at the time of the offending'.[48] It also accords with the purpose of sentencing which 'recognises the harm done to the victim of the crime and the community'.[49]

Arguments in favour of historic sentencing standards point to the presumption against retrospectivity in criminal law, and highlight the importance of an offender knowing the law under which they will be punished at the relevant time that the offence was committed.[50] However, regard must be had to the considerable number of historic cases brought as a result of delayed reporting. The Royal Commission found that on average, it took 23.9 years to tell someone about child sexual abuse[51]. It was submitted to the Royal Commission that 'there isn't

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[43] Colin William Babbage (unrep) NSWCCA No 234 of 1979, cited 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) 95.

[44] Judge Berman SC, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation paper: Criminal justice, 2016, pp 2-3.

[45] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 315.

[46] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 315.

[47] Recommendation 76, Royal Commission, *Criminal Justice Report.*

[48] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 321.

[49] *Crimes Sentencing Act 2005* (ACT), s7(1)(g).

[50] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 317-8.

[51] Royal Commission, *Final report,* Volume 4: Identifying and disclosing child sexual abuse, (2017), 9

a logic in applying past sentencing standards to offending where the only reason the offending hasn't come forward is through a lack of earlier complaint'.[52]

The Royal Commission highlighted that, in such cases, 'it is likely that that offender has benefitted from many years of living in freedom in the community – a benefit that may well not have been available if the offender had admitted to the offending and subjected themselves to the criminal justice system at the relevant time'.[53]

Furthermore, rule of law considerations pertaining to the certainty of law may be undermined if historic standards are relied upon. Reference to historic standards will depend on access to historic 'sentencing remarks or statistics' through databases,[54] some of which are incomplete or missing.[55] This can create uncertainty for offenders before the court.[56]

Clause 7 – Sentencing—irrelevant considerations Section 34 (2) (d) and examples and note

This clause is a technical amendment as a result of the substantive amendment inserting new section 34A.

Clause 8 – New section 34A

This clause inserts a new section for sentencing for a sexual offence against a child. Section 34A (b) and its related examples relocate existing section 34 (2) (d).

Section 34A (a) gives effect to the Royal Commission recommendation to ensure that a court must sentence the offender in accordance with sentencing practice, including sentencing patterns, at the time of sentencing. This section does not increase the maximum penalty available at the time the offence was committed.

Part 4 – Evidence (Miscellaneous Provisions) Act 1991

The amendments to the *Evidence (Miscellaneous Provisions) Act 1991* (EMPA) implement five Royal Commission recommendations which are outlined under relevant clauses below.

In addition, due to the nature of the EMPA, and given the number of technical amendments required to be made to implement the Royal Commission recommendations, Chapter 4 has been remodelled to simplify and update the legislation.

The substance of the changes are outlined under the relevant clauses below.

Clause 9 – New part 2.1

[52] Transcript of Lloyd Babb SC, Case Study 46, (30 November 2016) T24138:21-35, quoted in Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 315.
[53] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 320.
[54] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 308.
[55] *R v Mark Stephen Ridley* [2014] ACTSC 382 [44]-[47] (Refshauge J).
[56] Royal Commission, *Criminal Justice Report,* Parts VII - X and Appendices (2017) 315.

New section 4A outlines the general principles for dealing with child witnesses in a proceeding. These include that:

- the child must be treated with dignity, respect and compassion;
- measures should be taken to limit, to the greatest practical extent, the distress and trauma suffered by the child when giving evidence;
- the child should not be intimidated in cross-examination; and
- the proceeding should be resolved as quickly as possible.

Clauses 10, 11, 12, 13, 14, 15 – Consequential amendments
These are consequential amendments as a result of the amendments to the EMPA.

Clause 16 – Chapter 4
There are three main categories of amendments in part 4. The first are amendments to implement the Royal Commission recommendations.

The second category of amendments are those which align special measures provisions (including for vulnerable witnesses in matters other than those involving sexual abuse of children) with the approach to special measures recommended by the Royal Commission. These include:

- harmonising definitions to be consistent across the EMPA;
- extending special measures for certain witnesses in homicide matters;
- extending special measures to all children who are required to give evidence in any proceeding; and
- extending the availability of 'general' special measures to people with a disability.

The third category of amendments is primarily technical in nature and relates to changes in the titles or numbers of relevant areas of the EMPA. These changes are minor in nature and result from the need to ensure the restructure flows. These amendments have been described as necessary to ensure consistency of language in the legislation, and will where appropriate signpost the existing section to which it relates.

The amendments to the Evidence (Miscellaneous Provisions) Act (EMPA) implement the Royal Commission recommendations 52, 53, 56 and 61:

> ***52:*** *State and territory governments should ensure that the necessary legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness's evidence in child sexual abuse prosecutions. This should include both:*

a) *in summary and indictable matters, the use of a prerecorded investigative interview as some or all of the witness's evidence in chief*

b) *in matters tried on indictment, the availability of pre-trial hearings to record all of a witness's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the witness need not participate in the trial itself.*

53: *Full prerecording should be made available for:*

a) *all complainants in child sexual abuse prosecutions*

b) *any other witnesses who are children or vulnerable adults*

c) *any other prosecution witness that the prosecution considers necessary.*

56: *State and territory governments should introduce legislation to require the audiovisual recording of evidence given by complainants and other witnesses that the prosecution considers necessary in child sexual abuse prosecutions, whether tried on indictment or summarily, and to allow these recordings to be tendered and relied on as the relevant witness's evidence in any subsequent trial or retrial. The legislation should apply regardless of whether the relevant witness gives evidence live in court, via closed circuit television or in a prerecorded hearing.*

61: *The following special measures should be available in child sexual abuse prosecutions for complainants, vulnerable witnesses and other prosecution witnesses where the prosecution considers it necessary:*

a) *giving evidence via closed circuit television or audiovisual link so that the witness is able to give evidence from a room away from the courtroom*

b) *allowing the witness to be supported when giving evidence, whether in the courtroom or remotely, including, for example, through the presence of a support person or a support animal or by otherwise creating a more child-friendly environment*

c) *if the witness is giving evidence in court, using screens, partitions or one-way glass so that the witness cannot see the accused while giving evidence*

d) *clearing the public gallery of a courtroom during the witness's evidence*

e) *the judge and counsel removing their wigs and gowns.*

Given the number of technical amendments required to be made to the EMPA, Chapter 4 has been remodelled to simplify and update the legislation. Other than making amendments to achieve the objectives outlined above, only cosmetic changes have been made to the EMPA.

The ACT has extensive special measures in place for a broad range of child and adult victims and witnesses in order to ensure access to justice, reduce trauma and capture the best quality evidence for the court.

The ACT's special measures for witnesses are outlined in the EMPA. Prerecorded evidence in chief can be used for complainants in sexual offence, domestic and family violence cases, with prerecorded evidence in chief for sexual offences used in the ACT since 2008.

The ACT also permits all complainants of sexual offences and all child witnesses to give evidence from a remote room, have the police interview played as the evidence in chief of the witness (evidence in chief interviews) and have a support person with them in the remote room (or in court if they choose to give evidence in court).

Under the current EMPA, a complainant is limited to the person, or any of the people, against whom a sexual or violence offence the subject of the proceeding is alleged, or has been found to have been committed. The current definition of witness does not operate to allow witnesses who are particularly vulnerable witnesses, such as parents of the victim, to also make use of these measures.

All child witnesses (complainants and other witnesses) in sexual offence proceedings are entitled to have their evidence pre-recorded at a pre trial hearing and then played at the trial. This special measure is available to:

- children
- witnesses who are intellectually impaired, and
- complainants who the court considers must give evidence as soon as practicable because the complainant is likely to suffer severe emotional trauma; or be intimidated or distressed.[57]

The third category requires the prosecution to make a pre trial application supported by evidence of the distress, intimidation or severe emotional trauma the witness would be likely to suffer. This evidence is usually in the form of a letter or report from a medical professional who will be required for cross-examination on the application. All of this evidence must be disclosed to the accused which may provide a disincentive for a witness to pursue the application.

The Royal Commission found that many survivors of institutional child sexual abuse who are now adults and do not have disability are 'vulnerable', particularly when they are describing their experiences of abuse and particularly in the very unfamiliar and stressful environment of a court.[58]

[57] Division 4.2.2B of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).
[58] Royal Commission, *Criminal Justice Report*, Parts VII - X and Appendices (2017) 90.

The Royal Commission concluded that prerecording the entirety of a witness's evidence is likely to have clear benefits for both the witness and the parties in a prosecution including:

- obtaining the evidence earlier – this particularly benefits children, who can move on with their lives, but it can also benefit the parties by narrowing the possible issues at trial or even identifying cases suitable for a guilty plea or withdrawal of charges;
- giving the witness a defined time to give their evidence, avoiding the risk of them unnecessarily waiting at court for other argument to take place in the trial; and
- being able to use the evidence again in any retrials without re-traumatising the witness.

Part 4.1 – Kinds of Proceedings

This section contains definitions of the kinds of proceedings referred to in Chapter 4 of the EMPA. Most of the content of this Part is from existing definitions contained in the EMPA.

New section 37 – Meaning of *proceeding*—pt 4.1

This section defines proceeding broadly, and incorporates the various definitions within the current EMPA. This definition is consistent with the definition in the *Legislation Act 2001* which defines 'proceeding' as 'a legal or other action or proceeding'.

New Section 38 – Meaning of *family violence offence proceeding*—ch 4

This section replaces the previous construction of family violence offence proceeding in the EMPA with a new definition to align 'family violence offence proceeding' to the definition of family violence offence in the *Family Violence Act 2016*.

Section 39 – Meaning of *less serious violent offence proceeding*—ch 4

This section reproduces the existing definition for a 'less serious violent offence' in section 37.

Section 40 – Meaning of *serious violent offence proceeding*—ch 4

This section reproduces the existing definition for a 'serious violent offence' in section 37.

Section 41 – Meaning of *sexual offence proceeding*—ch 4

This section reproduces the existing definition for a 'sexual offence' in section 37. It also incorporates the various definitions in the existing EMPA for a sexual violent offence proceeding that includes where a family violence order or a personal violence order has been made because of a sexual offence. This ensures that where there is an existing protection order that has been obtained because of allegations of a sexual offence, and there is a breach of that order, the complainant is able to access the same protections as they would if the original offence had been charged. This reflects the existing provisions in sections 40AA, 40NA and 40O of the EMPA.

Part 4.2 – What special requirements apply to particular proceedings

This section contains definitions of types of witnesses, and includes a table of which witnesses are afforded which special measures in which proceedings.

Section 42 – Definitions—pt 4.2

This section brings together all definitions of witness types. These are taken from existing definitions within the EMPA.

This section also includes a new type of witness called 'special relationship witness'. This category of witness is designed to cover situations outlined in the Royal Commission where children in sexual offence proceedings can give their evidence early, but their family or support people are prohibited from doing so. The effect of this is that the child is unable to talk to their family or support people about what happened until the court proceeding (often several months, if not years later). The Royal Commission was of the view that the benefits of prerecording of cross-examination should be extended to adult victims of historic child sexual abuse and to other witnesses as the prosecution considers necessary. This would then allow for prerecording of evidence not just for child and adult victims and child witnesses, but would permit other witnesses such as family members to give evidence at pre trial hearings where that is preferred.[59] The Royal Commission noted that examples of witnesses who fit into this category include parents, carers or siblings of a child complainant who may be required to give evidence in the prosecution.

Some of the advantages to the child prerecording their evidence and then being able to move on with their life will be missed if the parent cannot give their evidence until the trial itself takes place. Carers and family members are commonly also witnesses in a trial. They are told not to discuss the abuse with their child until the court proceedings are finished. This is to ensure that there is no contamination of the child's evidence. However, this means that the discussion of the abuse, which may be essential to the child's recovery cannot take place until after the child's parents have given evidence at the trial. This is may be considered a further reason why this measure should be extended to those witnesses that the prosecution considers necessary.

The other type of witness that a 'special relationship witness' includes is a close friend or family member of the victim in a serious violent offence proceeding that has resulted in the death of the person. This allows witnesses in homicide proceedings to access special measures if they had a close relationship with the deceased.

Section 43 – Special requirements—particular proceedings

This section summarises which witnesses are able to access which special measures. The tables are categorised by proceeding type and witness type. This is designed to streamline the overly complex and often repetitive nature of the EMPA, and make the EMPA more accessible for lay people and practitioners alike.

[59] Royal Commission, *Criminal Justice Report*, Parts VII - X and Appendices (2017) 90. .

This reflects the current law with the following changes:

- witnesses with a disability can now also apply to the court to have general special requirements applied to them. Currently, witnesses with disability that materially affects their ability to give evidence can access some special measures, but not others. For example, a witness with disability can currently have a support person in court, and is a witness to whom the requirement prohibiting of cross-examination by a self-represented accused applies but is not able to access other general special measures;

- all child witnesses in any offence proceeding have the full range of measures available to them. This recognises the special vulnerability of children and protects the rights of children in criminal proceedings;

- the new category of 'special relationship' is reflected in serious violent offence proceedings and sexual violent offence proceedings.

There are two notes that accompany this section. The first notes that an intellectually impaired witness may also be a witness with a disability if their impairment affects their ability to give evidence. The purpose of this note is to recognise that people who have an intellectual impairment may also benefit from the general special measures that are available. The special measures that are accessible by witnesses with an intellectual impairment has not otherwise changed.

The second note signposts that section 101 of the EMPA also applies to a child or witness with disability in other proceedings.

Section 44 – Court may inform itself about particular witnesses

This section notes that in deciding whether a person is a witness mentioned in this part, the court is not bound by the rules of evidence and may inform itself as it considers appropriate.

Section 45 – Failure to comply with ch 4

This section relocates existing section 36A of the EMPA.

Part 4.3 – Special requirements—general

This section contains definitions of important concepts in Chapter 4 of the EMPA. Most of the content of this Part is from existing definitions contained in the EMPA.

Division 4.3.1 – Preliminary—pt 4.3

Section 46 – Definitions—pt 4.3

This section defines relevant proceeding and witness. These definitions are based on the existing definitions in the EMPA, with minor and technical amendments to take into account changes to Chapter 4.

Division 4.3.2 – Special requirements—general

Section 47 – Accused may be screened from witness in court

This section relocates section 38C of the existing provisions, and has been updated to retain consistency in language.

Section 48 – No examination of witness by self-represented accused person

This section relocates section 38D of the existing provisions, and has been updated to retain consistency in language.

Section 49 – Witness may have support person in court

This section relocates section 38E of the existing provisions, and has been updated to retain consistency in language.

Section 50 – Evidence to be given in closed court

This section relocates sections 39 and 78 of the existing provisions, and has been updated to retain consistency in language.

Division 4.3.3 – Special requirements—audiovisual recording of police interview

Section 51 – Meaning of audiovisual recording—div 4.3.3

This section relocates section 40E of the existing provisions, and has been updated to retain consistency in language.

Section 52 – Police interview audiovisual recording may be admitted as evidence

This section relocates section 40F of the existing provisions, and has been updated to retain consistency in language.

Section 53 – Police interview audiovisual recording—notice

This section relocates section 40G of the existing provisions, and has been updated to retain consistency in language.

Section 54 – Police interview audiovisual recording—notice for access

This section relocates section 40H of the existing provisions, and has been updated to retain consistency in language.

Section 55 – Police interview audiovisual recording—access to accused person

This section relocates section 40I of the existing provisions, and has been updated to retain consistency in language.

Section 56 – Police interview audiovisual recording—admissibility

This section relocates section 40J of the existing provisions, and has been updated to retain consistency in language.

Section 57 – Police interview audiovisual recording—jury trial

This section relocates section 40K of the existing provisions, and has been updated to retain consistency in language.

Section 58 – Transcript of police interview audiovisual recording—access to court

This section relocates section 40L of the existing provisions, and has been updated to retain consistency in language.

Section 59 – Police interview audiovisual recording—offences

This section relocates section 40M of the existing provisions, and has been updated to retain consistency in language.

Division 4.3.4 – Giving evidence at pre-trial hearing

Section 60 – Witness may give evidence at pre-trial hearing

This section relocates section 40Q of the existing provisions, and has been updated to retain consistency in language.

Section 61 – Who may be present at pre-trial hearing

This section relocates section 40R of the existing provisions, and has been updated to retain consistency in language.

Section 62 – Evidence of witness at pre-trial hearing to be evidence at hearing

This section relocates section 40S of the existing provisions, and has been updated to retain consistency in language.

Section 63 – Witness may be required to attend hearing

This section relocates section 40T of the existing provisions, and has been updated to retain consistency in language.

Section 64 – Evidence of witness at pre-trial hearing—jury trial

This section relocates section 40U of the existing provisions, and has been updated to retain consistency in language.

Section 65 – Recording of witness's evidence at pre-trial hearing admissible in related hearing

This section relocates section 40V of the existing provisions, and has been updated to retain consistency in language.

Section 66 – Audiovisual recording of child's evidence—admissibility

This section relocates section 40W of the existing provisions, and has been updated to retain consistency in language.

Division 4.3.5 Giving evidence by audiovisual link

Section 67 – Meaning of *give evidence*—div 4.3.5

This section relocates section 40X of the existing provisions, and has been updated to retain consistency in language.

Section 68 – Giving evidence by audiovisual link

This section relocates section 43 of the existing provisions, and has been updated to retain consistency in language.

Section 69 – Recording evidence given by audiovisual link—sexual offence proceedings

This section relocates section 43A of the existing provisions, and has been updated to retain consistency in language.

Section 70 – Consequential orders—div 4.3.5

This section relocates section 44 of the existing provisions, and has been updated to retain consistency in language.

Section 71 – Making of orders—div 4.3.5

This section relocates section 45 of the existing provisions, and has been updated to retain consistency in language.

Section 72 – Jury warning about inferences from witness giving evidence by audiovisual link

This section relocates section 46 of the existing provisions, and has been updated to retain consistency in language.

Part 4.4 – Special requirements—sexual offence proceedings

Division – 4.4.1 Sexual offence proceedings—general

Section 73 – Certain evidence to be given in closed court

This section allows an application to be made to extend the protections currently available for witnesses in sexual offence proceedings who give evidence via pre-trial hearings to apply at any other time that evidence is given in court.

In granting an application, the court must consider both the witness's wishes about closing the court as a primary consideration as well as whether it is in the interests of justice to do so.

The witnesses who would be eligible to give evidence in a sexual offence proceeding by way of pre-trial hearings are:

- complainants;
- similar act witnesses;
- intellectually impaired witnesses
- special relationship witnesses in a proceeding involving a child complainant.

The policy intent behind closing the court for the witness to give evidence in pre-trial hearings does not cease to exist when the evidence is replayed. For that reason, this provision clarifies that the measures are able to continue when the witness gives evidence or their evidence is replayed.

Section 74 – Prohibition of publication of complainant's identity

This section relocates section 40 of the existing provisions, and has been updated to retain consistency in language.

Division 4.4.2 – Sexual offence proceedings—evidence of complainant's sexual reputation and activities

Section 75 – Immunity of sexual reputation

This section relocates section 50 of the existing provisions, and has been updated to retain consistency in language.

Section 76 – General immunity of evidence of complainant's sexual activities

This section relocates section 51 of the existing provisions, and has been updated to retain consistency in language.

Section 77 – Application for leave under s 76

This section relocates section 52 of the existing provisions, and has been updated to retain consistency in language.

Section 78 – Decision to give leave under s 76

This section relocates section 53 of the existing provisions, and has been updated to retain consistency in language.

Division 4.4.3 – Sexual offence proceedings—protection of counselling communications

Section 79 – Definitions—div 4.4.3

This section relocates section 54 of the existing provisions, and has been updated to retain consistency in language.

Section 79A – Meaning of *protected confidence*—div 4.4.3

This section relocates section 55 of the existing provisions, and has been updated to retain consistency in language.

Section 79B – When does div 4.4.3 apply?

This section relocates section 56 of the existing provisions, and has been updated to retain consistency in language.

Section 79C – Immunity for protected confidences in preliminary criminal proceedings

This section relocates section 57 of the existing provisions, and has been updated to retain consistency in language.

Section 79D – General immunity for protected confidences

This section relocates section 58 of the existing provisions, and has been updated to retain consistency in language.

Section 79E – Application for leave to disclose protected confidence

This section relocates section 59 of the existing provisions, and has been updated to retain consistency in language.

Section 79F – Threshold test—legitimate forensic purpose

This section relocates section 60 of the existing provisions, and has been updated to retain consistency in language.

Section 79G – Preliminary examination of protected confidence evidence

This section relocates section 61 of the existing provisions, and has been updated to retain consistency in language.

Section 79H – Giving of leave to disclose protected confidence

This section relocates section 62 of the existing provisions, and has been updated to retain consistency in language.

Section 79I – Ancillary orders for protection of person who made protected confidence

This section relocates section 63 of the existing provisions, and has been updated to retain consistency in language.

Section 79J – No waiver of protected confidence immunity

This section relocates section 64 of the existing provisions, and has been updated to retain consistency in language.

Section 79K – No protected confidence immunity for medical information

This section relocates section 65 of the existing provisions, and has been updated to retain consistency in language.

Section 79L – No protected confidence immunity for communications for criminal investigations and proceedings

This section relocates section 66 of the existing provisions, and has been updated to retain consistency in language.

Section 79M – No protected confidence immunity in case of misconduct

This section relocates section 67 of the existing provisions, and has been updated to retain consistency in language.

Division 4.4.4 – Sexual offence proceedings—directions and warnings to juries

Section 80 – Comments on complainants' evidence

This section relocates section 69 of the existing provisions, and has been updated to retain consistency in language.

Section 80A – Comments on children's evidence

This section relocates section 70 of the existing provisions, and has been updated to retain consistency in language.

Section 80B – Comments about lack of, or delays in making, complaint

This section relocates section 71 of the existing provisions, and has been updated to retain consistency in language.

Section 80C – Directions about implied consent

This section relocates section 72 of the existing provisions, and has been updated to retain consistency in language.

Section 80D – Directions about mistaken belief about consent

This section relocates section 73 of the existing provisions, and has been updated to retain consistency in language.

Part 4.5 – Special requirements—family violence offence proceedings

Division 4.5.1 – Preliminary—pt 4.5.1

Section 81 – Meaning of *recorded statement*—pt 4.5

This section relocates section 77 of the existing provisions, and has been updated to retain consistency in language.

Division 4.5.2 – Family violence offence proceedings—recorded statement of police interview

Section 81A – Recorded statement—requirements

This section relocates sections 77 (2), (3) and 79 of the existing provisions, and has been updated to retain consistency in language.

Section 81B – Recorded statement—may be admitted as evidence

This section relocates section 80 of the existing provisions, and has been updated to retain consistency in language.

Section 81C – Recorded statement—hearsay rule and opinion rule

This section relocates section 81 of the existing provisions, and has been updated to retain consistency in language.

Section 81D – Validity of proceeding not affected

This section relocates section 81A of the existing provisions, and has been updated to retain consistency in language.

Section 81E – Recorded statement—represented accused person to be given copy

This section relocates section 81B of the existing provisions, and has been updated to retain consistency in language.

Section 81F – Recorded statement—unrepresented accused person to be given access

This section relocates section 81C of the existing provisions, and has been updated to retain consistency in language.

Section 81G – Recorded statement—admissibility

This section relocates section 81D of the existing provisions, and has been updated to retain consistency in language.

Section 81H – Recorded statement—accused person to be given audio copy

This section relocates section 81E of the existing provisions, and has been updated to retain consistency in language.

Section 81I – Recorded statement—jury trial

This section relocates section 81Fof the existing provisions, and has been updated to retain consistency in language.

Section 81J – Recorded statement—offence to publish

This section relocates section 81G of the existing provisions, and has been updated to retain consistency in language.

Division 4.5.3 – Recorded statement of police interview admissible as evidence application for protection order

Section 81K – Recorded statement—may be admitted as evidence in application for family violence protection order

This section relocates section 81H of the existing provisions, and has been updated to retain consistency in language.

Clause 17 – 52 – Consequential amendments

These are consequential amendments as a result of the amendments to the EMPA outlined above.

Part 5 – Evidence (Miscellaneous Provisions) Regulation 2009

The amendments to the *Evidence (Miscellaneous Provisions) Regulation 2009* (EMPA Regulation) include consequential amendments necessary as a result of the restructure of Chapter 4 of the EMPA.

Schedule 1 – Consequential amendments

The amendments outlined in Schedule 1 are consequential amendments necessary to replace references in other legislation and are a result of the restructure of Chapter 4 of the EMPA.