Parliamentary Committees



Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019

Report No. 59, 56th Parliament
Legal Affairs and Community Safety Committee
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Legal Affairs and Community Safety Committee

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Acknowledgements

The committee acknowledges the assistance provided by the Department of Justice and Attorney-General.

Contents

Abbreviations

ACSQ	Anglican Church Southern Queensland
AIC Paper	Australian Institute of Criminology Paper on *Exploring the Implications of Child Sex Dolls*
ANROWS	Australia's National Research Organisation for Women's Safety
Bravehearts	Bravehearts Foundation Ltd
BRISSC	Brisbane Rape and Incest Survivors Support Centre
CAG	Council of Attorneys-General
CEM	Child Exploitation Material
CEM Report	Queensland Sentencing Advisory Council report on the *Classification of Child Exploitation Material for Sentencing Purposes*
Code	Criminal Code
committee	Legal Affairs and Community Safety Committee
Criminal Justice Report	Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse
Department / DJAG	Department of Justice and Attorney-General
DFV	Domestic and family violence
Evidence Act	*Evidence Act 1977*
FLPA	Family Law Practitioners' Association of Queensland
HRA	*Human Rights Act 2019*
LSA	*Legislative Standards Act 1992*
OQPC	Office of the Queensland Parliamentary Counsel
PeakCare	PeakCare Queensland Inc.
PSA	*Penalties and Sentences Act 1992*
QAI	Queensland Advocacy Incorporated
QCEC	Queensland Catholic Education Commission
QHRC	Queensland Human Rights Commission
QLS	Queensland Law Society

QSAC	Queensland Sentencing Advisory Council
Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse
WLSQ	Women's Legal Service Queensland
YAC	Youth Advocacy Centre Inc.
YJA	*Youth Justice Act 1992*

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General.

I commend this report to the House.

Peter Russo MP

Chair

Recommendation

Recommendation **2**

The committee recommends that the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (the committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Police and Corrective Services
- Fire and Emergency Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (Bill) was introduced into the Legislative Assembly and referred to the committee on 27 November 2019. The committee is to report to the Legislative Assembly by 7 February 2020.

1.2 Inquiry process

On 3 December 2019, the committee invited stakeholders and subscribers to make written submissions on the Bill. Twenty-six submissions were received.

The committee received a public briefing about the Bill from the Department of Justice and Attorney-General (department) on 10 December 2019. A transcript is published on the committee's web page; see Appendix B for a list of officials.

The committee received written advice from the department in response to matters raised in submissions.

The committee held a public hearing on 17 January 2020 (see Appendix C for a list of witnesses).

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

The objectives of the Bill are to:

- Implement recommendations of the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report);
- Implement recommendations of the Queensland Sentencing Advisory Council's (QSAC) report on the *Classification of Child Exploitation Material for Sentencing Purposes* (CEM Report);
- Create new offences criminalising the possession, production and supply of anatomically correct, life-like child replicas used for sexual gratification; and
- Other minor and technical amendments.[2]

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1 *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

2 Explanatory notes, p 1.

1.4 Government consultation on the Bill

As advised in the explanatory notes, the recommendations of the Criminal Justice Report were informed by extensive public and private consultation undertaken by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). Subsequent to that report being released, consultation on its recommendations was conducted with key legal and non-legal stakeholders between December 2018 and February 2019. Further feedback was sought from stakeholders in April 2019 in relation to recommendations 44-51.

Wide consultation was also undertaken by QSAC in preparing its CEM Report and in seeking feedback from government, legal and non-legal stakeholders on the Report recommendations after its release.

Public consultation on a draft of the Bill was conducted between 22 August and 20 September 2019, including consultation forums conducted with key stakeholders. Feedback received during consultation was taken into account in finalising the Bill. The Chief Justice, President of the Children's Court, the Chief Judge and the Chief Magistrate were also consulted during drafting of the Bill and their comments taken into account in finalising the Bill.[3]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation

The committee recommends that the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 be passed.

[3] Explanatory notes, pp 18-19.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

2.1 Background

The Bill seeks to implement reforms whose genesis is in recommendations made in one of three recent reports. The background to these reforms and proposed amendments are considered in detail below.

2.1.1 Royal Commission – Criminal Justice Report - Institutional Responses to Child Sexual Abuse

From 2012-17, the Royal Commission undertook a comprehensive inquiry into institutions' responses to allegations of child sexual abuse in Australia and made 409 recommendations across various reports. The Criminal Justice Report was released in August 2017, ahead of the Royal Commission's Final Report in December 2017, and contained 85 recommendations for reforms to the Australian criminal justice system that were aimed at providing fairer and more effective responses to victims of child sexual abuse, including child sexual abuse in an institutional context.[4]

The June 2018 Queensland Government response to the Royal Commission's recommendations accepted or supported in principle more than 240 of the recommendations, including some of those from the Criminal Justice Report.[5] The Bill contains amendments to implement a number of key recommendations from the Criminal Justice Report.[6] These are discussed below at 2.2.

2.1.2 Queensland Sentencing Advisory Council – CEM Report

In November 2016, QSAC was tasked with considering matters that included, primarily:

- the sentencing guidelines in section 9(7) of the *Penalties and Sentences Act 1992* (PSA) to see whether any further factors should be added; and
- the classification of Child Exploitation Material (CEM) for sentencing purposes.[7]

QSAC published its CEM Report in July 2017, making 16 recommendations for legislative reform and changes to operational practice.

The Bill implements Recommendations 1 and 3 of the CEM Report by amending the PSA. Recommendation 1 advocated three amendments to section 9(7) of the PSA to insert further sentencing guidelines for a judge to consider when sentencing an offender for CEM offences, in relation to an offender's conduct or behaviour and any relationship between an offender and a child, and to ensure that the PSA employs language reflective of the broad types of materials which may be covered by CEM related criminal offences. Recommendation 3 supported giving expert reports tendered during sentencing proceedings to Queensland Corrective Services to further inform offender program and treatment delivery so as to enhance the success of rehabilitation efforts.[8] These reforms are discussed below at 2.3.

[4] Explanatory notes, p 1.

[5] Explanatory notes, p 1.

[6] Explanatory notes, p 2.

[7] This term of reference arose as a result of recommendation 4.11 of the Queensland Organised Crime Commission of Inquiry report dated 30 October 2015, see explanatory notes, p 2.

[8] Explanatory notes, p 2.

2.1.3 Australian Institute of Criminology - Paper – '*Exploring the Implications of Child Sex Dolls'*

In March 2019, the Australian Institute of Criminology published a paper titled *Exploring the Implications of Child Sex Dolls*[9] (AIC Paper) which advised that, over a five year period, 133 life-like child replicas designed to be used for sexual gratification were imported into Australia, with some being found in Queensland.[10]

The AIC Paper highlights a number of potentially harmful consequences that can arise from use of these dolls, including that their use may lead to:

- an escalation in offending behaviours;
- normalisation of the sexual abuse of children;
- the sexual objectification and commodification of children; and
- the grooming of potential child victims.[11]

The Bill creates new offences criminalising the possession, production and supply of anatomically correct life-like child replicas for sexual gratification.[12]

2.2 Implementing key recommendations of the Criminal Justice Report

The Bill implements key recommendations of the Criminal Justice Report with amendments to the Criminal Code (the Code) and the PSA. Those amendments are discussed in detail below.

2.2.1 Maintaining a sexual relationship with a child

Consistent with the Royal Commission's recommendation 21, the Bill inserts new sections 746-748 into the Code to retrospectively apply section 229B of the Code (Maintaining a sexual relationship with a child) to acts done and offences committed before 3 July 1989 and to acts done and offences committed between 3 July 1989 and 30 April 2003.[13]

New section 748 (Proceedings for offences against s 229B) provides that in relation to a charge (of maintaining a sexual relationship with a child) under section 746 (i.e. a charge relating to the period before 3 July 1989) or section 747 (i.e. the period 3 July 1989 to 30 April 2003), a proceeding may be started, and the person convicted and punished for the offence, as if section 229B had always applied in the way provided for under section 746 or 747.[14]

The explanatory notes advise that:

> *Retrospective operation of the* [s 229B] *maintaining offence will have the effect of altering the way in which unlawful sexual conduct toward a child is relied upon by making the 'relationship' an offence. The offence also does not require the jury to unanimously agree as to the commission of particular sexual acts, so long as they are unanimously satisfied beyond a reasonable doubt, that the evidence establishes an unlawful sexual relationship. Additionally, the unlawful sexual acts do not have to be particularised to the same extent as would be required to establish an individual offence.*[15]

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[9] Rick Brown and Jane Shelling, Exploring the implications of child sex dolls, *Trends & issues in crime and criminal justice no. 570*, Australian Institute of Criminology, Canberra, 2019 (www.aic.gov.au/publications/tandi/tandi570).

[10] Explanatory notes, p 3.

[11] Explanatory notes, p 3.

[12] Explanatory notes, p 1.

[13] Clause 21 and consequential amendments to section 229B in clause 17. See also explanatory notes, p 4.

[14] Explanatory notes, p 26.

[15] Explanatory notes, p 4.

2.2.1.1 Acts done before 3 July 1989

New section 746 applies the offence in section 229B[16] retrospectively, to acts committed before 3 July 1989,[17] subject to the following limits to the maximum penalties that are to apply:

- 14 years imprisonment – if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 5 years but less than 14 years; or
- Life imprisonment – if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 14 years or more; and
- 7 years imprisonment otherwise.

Section 229B will not apply to pre 3 July 1989 conduct if, before commencement, the conduct was the subject of a charge of an offence, irrespective of whether or not the charge was finalised (see section 746(3)).

2.2.1.2 Acts done between 3 July 1989 and 30 April 2003

New section 747 (Application of s 229B during period 3 July 1989 to 30 April 2003) provides that the section 229B offence, as in force at commencement, applies to acts committed in the period between 3 July 1989 and 30 April 2003.

The retrospective application of section 229B, to acts committed from 3 July 1989 to 30 June 1997, is subject to the limit that the maximum penalties that can be applied to offences over this period are:

- 14 years imprisonment – if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 5 years but less than 14 years; or
- Life imprisonment – if in the course of the unlawful sexual relationship the adult committed an unlawful sexual act for which the adult is liable to imprisonment for 14 years or more; and
- 7 years imprisonment otherwise.[18]

The retrospective application of section 229B, to acts committed from 1 July 1997 to 30 April 2003, is subject to the qualification that the maximum penalties to be applied to offences over this period are:

- 14 years imprisonment; or
- Life imprisonment – if in the course of the unlawful sexual relationship the offender committed an unlawful sexual act for which they are liable to imprisonment for 14 years or more.[19]

New section 747(4) provides that if, prior to commencement, a person has been charged with a section 229B offence, where the offending was within the 3 July 1989 to 30 April 2003 period, the subsection (1) retrospectivity will not apply to the offence proceedings or to any appeal for the offence.

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[16] Additionally, the reference in section 229B(10) to the definition of '*offence of a sexual nature'* to an offence defined in section 210 (other than sections 210(1)(e) or (f), 215, 222, 349, 350 or 352) is taken to include a reference to an offence in force in the Code before - 3 July 1989 (for s 746), or 1 July 1997 (for s 747(2)), or 1 May 2003 (for s 747(3)) - and constituted by an act that would, if committed on commencement, also constitute an offence defined in a section mentioned in that definition.

[17] 3 July 1989 is when the s 229B offence of maintaining a sexual relationship with a child first came into effect – see s 23 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989.*

[18] Proposed section 747(2) and see also footnote 14.

[19] Proposed section 747(3) and see also footnote 14.

2.2.1.3 Submissions

Submitters[20] were generally supportive of these amendments, however some submitters considered that the proposed changes needed further consideration.

The submission from knowmore was generally supportive:

> *knowmore supports the amendments in Clause 21 that will apply the offence of maintaining a sexual relationship with a child in section 229B of the Criminal Code to unlawful sexual acts that occurred before the introduction of the offence on 3 July 1989. These amendments are consistent with Recommendations 21 and 22 from the Royal Commission[21], which supported the Queensland offence but noted it could be improved by being given retrospective operation.*[22] *Given the often lengthy delays in victims reporting child sexual abuse, particularly abuse by people in authority, this is an important change that will help to overcome barriers to prosecuting historical offences of this nature.*[23]

knowmore did however recommend that section 229B should be further amended to extend the offence to cases involving a child aged 16 or 17 years who is under the 'special care' of an adult:

> *We do note, however, that the amendments in Clause 21 do not completely reflect the Royal Commission's recommendations for this offence. Specifically, the Model Provisions set out by the Royal Commission also make it an offence to maintain a sexual relationship with a child under the age of 18 where they were under "the special care of the adult in the relationship."*[24] *In contrast to the existing Queensland offence, which only relates to sexual offending against a child under the age of 16, this captures sexual offending against a child aged 16 or 17 by a person in authority, such as a parent, carer, school teacher, sports coach or custodial officer. The power imbalance in such relationships means that they are inherently exploitative and can cause significant long-term harm to victims. In recognition of this, the ACT and South Australia have already enacted legislative changes to implement the Royal Commission's recommendation.*[25] *knowmore recommends that further amendments to section 229B be included in the current Bill to fully implement this recommendation in Queensland, and extend the offence to cases involving a child under the age of 18 who is under the special care of the adult in the relationship.*[26]

In response, the department advised:

> *In Queensland sexual offences specifically applying to children under 16 years (including the offence of maintaining a sexual relationship with a child) do not require an element of consent. This reflects that children at this age are considered incapable of consenting to sexual activity.*
>
> *Distinct from the sexual offences applying to children under 16 or persons with an impairment of the mind, absence of consent is an element of the offences of rape and sexual assault that are applied to children 16 or 17 years of age. DJAG notes that the section 348 of the Criminal Code provides that consent is not freely and voluntarily given (i.e. negated) in a range of circumstances. One such circumstance in which consent can be negated is where it has been obtained by exercise of authority.*

[20] See submissions 7, 15, 18 and 23.

[21] Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 74.

[22] Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 68.

[23] Submission 15, p 14.

[24] Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, 2017, Appendix H, definition of a child.

[25] See section 56, *Crimes Act 1900* (ACT); section 50, *Criminal Law Consolidation Act 1935* (SA).

[26] Submission 15, pp 14-15.

The Bill does not contain an amendment to create a new position of authority offence in Queensland. The relevant recommendations in the Royal Commission's Criminal Justice Report in this area are recommendations 27-29.

The Queensland Government Response to the Royal Commission (June 2018) noted recommendation 27 of the Criminal Justice Report and stated that Queensland's Criminal Code currently has no position of authority offence. Recommendations 28 and 29 were noted and are under further consideration and consultation.[27]

Several submitters also considered that the terminology employed, that of 'maintaining a sexual relationship´ sends an inappropriate message regarding the power dynamics between a perpetrator and victim and that the offence would be better termed as 'persistent sexual abuse of a child'.[28]

Women's Legal Service Queensland (WLSQ) submitted:

Our only comment is that the provision is out of step with modern understandings of child sexual abuse and sends the wrong message to the community. That is, in persistently sexually abusing a child we should be clear the perpetrator is not in any way in a 'relationship with the child'. Section 229B should be changed to an offence of 'persistent child sexual abuse' as this better reflects the issue and removes any notion of mutuality, normalcy or relationship.[29]

Similarly, Bravehearts Foundation Ltd (Bravehearts) raised:

… our concern around the continued use of inappropriate language describing this offence type as a 'sexual relationship'. The use of this sanitised terminology continues to misrepresent the offence and minimise its seriousness. We believe that describing these offences as a 'sexual relationship', is incredibly erroneous and can add to the trauma of the assault itself.

For victims, to have such horrific offences described and recorded as a 'sexual relationship', may give the message that the criminal justice system does not deem what occurred to them as serious. Bravehearts advocates for a review of language used to 'modernise' terminology used to describe offence types. Acknowledging that the offence of 'maintaining a sexual relationship with a child', includes both penetrative and non-penetrative offences, we would suggest that this offence type could be better termed 'persistent sexual abuse of a child'.[30]

The submission from knowmore also drew the committee's attention to the terminology, commenting:

As a final point, we note that the Tasmanian Government has recently released a consultation paper that includes a proposal to change the name of the comparable offence in Tasmania from 'maintaining a sexual relationship with a young person' to 'persistent child sexual abuse'.[31] *This follows significant criticism from victims and their advocates that the current name of the offence normalises sexual abuse of children, and suggests that the child was "a willing participant in an equal relationship".*[32] *The Royal Commission raised similar concerns about the name of the offence in its report, noting that it was "uncomfortable with the language of 'relationship'", but ultimately concluding that it was "content to adopt it in the interests of achieving the most*

[27] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 5-6.

[28] See submissions 7, 15 and 23.

[29] Submission 7, p 2.

[30] Submission 23, pp 1-2.

[31] Department of Justice (Tasmania), *Proposal Paper — Renaming Sexual Offences: Removing Outdated Language in Chapter XIV of the Criminal Code Act 1924*, Tasmanian Government, Hobart, 2019, p. 9.

[32] E Bevin, "Overhaul of sex abuse laws needed to remedy community confusion, advocates say", ABC News, 15 August 2019, <www.abc.net.au/news/2019-08-15/call-for-sexual-assault-laws-overhaul-in-tasmania/11414982>.

effective form of [the] offence".[33] *Its view was that the name may help to emphasise the actus reus of the offence, particularly as compared to 'persistent sexual abuse of a child', the alternative name preferred by many victims.*[34]

In response, the department noted that this issue is being considered.[35]

2.2.2 Expansion of categories of persons who may be 'groomed' by an offender

The current prohibition against 'grooming' a child under 16 years in section 218B of the Code only applies to conduct directed, or in relation to, a person under the age of 16 years where there is an unlawful intention to commit sexual offending.

Currently there are two elements to be satisfied for an offence against section 218B to be established, firstly, there must be an adult engaged in conduct in relation to a child under 16 years, or a person the adult believes to be a child under 16 years, or a fictitious person represented to the adult to be a real child under 16 years. Secondly, the conduct must be engaged in with intent to either facilitate the procurement of a child to engage in a sexual act (either in Queensland or elsewhere) or to expose, without legitimate reason, the child to any indecent matter (either in Queensland or elsewhere).

Clause 13 of the Bill purports to replace section 218B to provide that grooming includes conduct directed towards 'a person who has the care of a child under the age of 16 years', defined to include a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not they have lawful custody of the child. The new provision expands the application of the offence to conduct by an adult, in relation to a person who has the care of the child, or a person who is believed to have care of the child, where the conduct is accompanied by the intent to either facilitate the procurement of a child to engage in a sexual act (either in Queensland or elsewhere) or expose, without legitimate reason, the child to any indecent matter (either in Queensland or elsewhere).

The expansion of the category of persons who may be considered to have been 'groomed' by an offender is in response to recommendation 26 of the Royal Commission which recommended that each jurisdiction extend their broad grooming offence to capture the grooming of persons, other than the child, which is intended to facilitate sexual access to that child.

This approach acknowledges that offenders may manipulate or groom family members and carers of a child so as to gain opportunities for access to a child for sexual purposes. The Royal Commission's recommendation was informed by submissions it received from victims' family members who expressed that they had themselves been 'groomed' by an offender to the extent that they came to trust that person and encouraged their child to spend time with them, only later to discover that they had used those opportunities to abuse the child.[36]

The maximum penalties that apply to new section 218B will continue as now, being 5 years imprisonment, or 10 years imprisonment if the child is, or is believed to be, under 12 years.

2.2.2.1 Submissions

The submission from WLSQ[37] supported the extension of the grooming offence in section 218B to certain persons other than the child.

[33] Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 71.

[34] Submission 15, pp 14-15.

[35] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 5.

[36] Explanatory notes, p 4.

[37] Submission 7, p 1.

The submission from knowmore[38] was supportive of the extension of the offence, although expressed knowmore's concern that the changes do not go far enough in implementing recommendation 26, noting:

> *…*
>
> *Notwithstanding this, it appears that a 'person who has care of a child', as defined in new section 218B(12), will not capture as broad a range of people as intended by the Royal Commission.*
>
> *…*
>
> *In contrast, we note that Recommendation 26 calls on governments to extend their grooming offences to 'the grooming of* persons other than the child' [emphasis added]. *In this regard, the Royal Commission supported Victoria's grooming provisions, which capture conduct directed at any person with care or supervision of, or authority over, the child. This includes, for example, teachers, employers, youth workers and sports coaches.*[39]
>
> *knowmore considers it important that the extended grooming offence in section 218B is broad enough to capture conduct that occurs outside of parental or ordinary care-giving contexts. While the offence is unlikely to be charged often in these circumstances, it would recognise the potential for grooming behaviour to be directed at a variety of people who can help facilitate an offender's access to children. For example, a key issue raised with the Royal Commission by People with Disability Australia was that perpetrators in disability services will groom people within the institution to gain access to their victims. Perpetrators in schools have likewise been identified as likely to groom other employees to gain unsupervised access to students.*
>
> *To capture these types of situations and more faithfully implement the Royal Commission's recommendation, we submit that Clause 13 should be amended to make it an offence to groom a person who has care or supervision of, or authority over, a child. This would be consistent with the approach in Victoria, and also more consistent with the approach adopted in the ACT to implement the Royal Commission's recommendation.*[40]

The submission from PeakCare Queensland Inc. (PeakCare), also recognised the importance of proscribing 'grooming' conduct directed towards persons such as parents or carers where that is intended to facilitate sexual access to a child, observing:

> *It would seem that the difficulty in distinguishing between behaviour which is grooming parents/carers with the intention of gaining trust and facilitating access to a child for sexual exploitation, and similar behaviour which is innocent in intention, would make this offence difficult to prosecute, however the offence recognises the impact of grooming behaviour on others in addition to the child which is important. It may also have the positive impact of promoting more awareness in institutions and in the community generally, about the need to have measures in place to prevent behaviour and circumstances which create risk through opportunity.*[41]

In response to these concerns the department advised:

> *DJAG notes that the term, 'person who has care of a child' utilised in the grooming offence contained in the Bill is defined to include 'a parent, foster-parent, step-parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child'. This is an*

[38] Submission 15, pp 13-14.

[39] See submission 15 at p 13; and Royal Commission, *Criminal Justice Report: Parts III-VI,* p 97; and *Crimes Act 1958* (Vic) sections 49M and 37.

[40] Submission 15.

[41] Submission 11, p 5.

inclusive definition and is consistent with the use of the term in section 286 (Duty of a person who has care of the child) of the Criminal Code.[42]

2.2.3 Removal of limitation periods for prosecuting certain child sexual offences

Recommendation 30 of the Criminal Justice Report proposes removal of any remaining limitation periods or immunities that may act as an obstacle to justice for historical child sex abuse survivors. The Royal Commission also noted that a removal of limitation periods should have retrospective effect. [43]

In respect of the need for this amendment in Queensland, the explanatory notes advise that:

While there are no limitation periods that apply currently to child sexual offences in Queensland, there is potential for the application of now repealed limitation periods to apply to historic offending. Sections 212 (Defilement of girls under twelve), now repealed, and section 215 (Defilement of girls under seventeen and of idiots) of the Criminal Code that existed prior to 30 March 1989, applied a limitation period of six months within which a prosecution could be commenced. The repeal of this limitation period was prospective which means that any immunity already arising in relation to offending prior to 30 March 1989, would continue.

To implement recommendation 30, the Bill gives retrospective effect to the amendments made in 1989 by removing the limitation period in the relevant sections of the Criminal Code. This will ensure that victims are not prevented from seeking justice for pre-1989 offending.[44]

Clause 21 inserts new transitional provisions 744 and 745, which, respectively, abolish the provisions of section 212 and 215, as in existence before 3 July 1989, which limited the period within which a prosecution for the offences in those sections had to be commenced. The limitation provisions were abolished in relation to post 3 July 1989 conduct by virtue of sections 13 and 14 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989.*[45]

Under new section 745(3), the abolition of the immunity from prosecution does not apply to acts committed under section 215 in relation to a girl of 16 years, prior to the commencement of section 19 of the *Criminal Code Amendment Act 1976* (which lowered the threshold age for a victim under former section 215 from being under 17 years to under 16 years). Prior to these 1976 changes, an offence under section 215 could be committed against a 16 year old girl. As such conduct against a 16 year old girl is no longer an offence, section 11 of the Code prohibits punishing that behaviour. Accordingly, new section 45 does not retrospectively apply the abolition of the immunity from prosecution acquired in relation to a pre-*Criminal Code Amendment Act 1976* offence under section 215 where the girl was 16 years of age.[46]

The explanatory notes acknowledge that clause 21 acts to *retrospectively* apply amendments that remove the limitation period applying to sections 212 and 215 of the Code and in doing so breaches fundamental legislative principles.[47] The notes state:

The amendments are considered justified in that they enable potential survivors of historical child sexual abuse to access justice and ensures that justice is seen to be done by the broader community. Additionally, this breach is mitigated by the safeguard available to the defendant through making a stay application to protect against any abuse of process or in circumstances where they cannot receive a fair trial.

[42] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 4.

[43] Explanatory notes, p 5; and see Criminal Justice Report, Executive Summary, p 45.

[44] Explanatory notes, p 5.

[45] Explanatory notes, p 24.

[46] Explanatory notes, pp 24-25.

[47] Explanatory notes, p 16.

It is impossible to predict the number of prosecutions that might flow from this proposal but it is anticipated that this amendment will have limited application and will not necessarily equate to a significant increase in previously barred prosecutions. As noted by the Royal Commission, there are a number of competing factors that prevent the prosecution of older offences associated with the passage of time including the deterioration of evidence and the death of perpetrators.[48]

2.2.3.1 Submissions

The submission from Bravehearts supported the retrospective application of the removal of limitation periods and immunities from prosecution for certain child sexual offences, noting that the amendment will 'remove any doubt around immunity from prosecution based on limitation provisions'.[49]

In regards to the issue of retrospectivity, the department advised:

DJAG notes that in relation to this issue the Explanatory Notes for the Bill state:

'The Bill amends the Criminal Code to retrospectively apply the offence in section 229B to unlawful sexual acts committed prior to the inception of the offence in 1989, including the maximum penalties that applied at that time.

The Bill also amends the Criminal Code to apply the offence in section 229B to unlawful sexual acts committed post 1989, except the maximum penalty and applied those maximum penalties in place at the time the offence was committed.

This approach recognises that persistent sexual abuse of children commonly results in the child being unable to distinguish between particular episodes of abuse, especially if the conduct is the same or similar on all occasions and reflects the delays in reporting associated with child sexual abuse. Retrospective application of the maintaining offence ensures a consistency across all time periods and appropriately affords victims of historic abuse the same access to justice as all other victims of persistent child sexual abuse.'

DJAG further notes that this approach is consistent with the approach in other jurisdictions.[50]

2.2.4 Offence of failing to protect a child from a child sexual offence in an institutional context

Consistent with recommendation 36 of the Criminal Justice Report, clause 25 of the Bill inserts new section 229BB into the Code to now make it a crime, punishable by up to 5 years imprisonment, for an 'accountable person' to fail to protect a child from a child sexual offence.

An 'accountable person' is defined in subsection (4) as an adult who is associated with an 'institution', other than a regulated volunteer.[51]

An 'institution' is defined as an entity, other than an individual, that provides services to children or operates a facility for, or engages in activities with, children under the entity's care, supervision or control. Examples of institutions given in subsection (4) are schools, government agencies, religious organisations, hospitals, child care centres, licensed residential facilities, sporting clubs and youth organisations.[52]

[48] Explanatory notes, pp 16-17.

[49] Submission 23, p 2.

[50] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 14-15.

[51] Regulated volunteers include the adult household members of family day care residences, homestay providers, home-based stand-alone care services, and foster and kinship carers (see explanatory notes, p 28).

[52] Proposed section 229BB(4), Code.

For the purposes of section 229BB, an adult is 'associated' with an institution if the adult:

- owns, or is involved in the management or control of, the institution;
- is employed or engaged by the institution;
- works as a volunteer for the institution;
- engages in an activity in relation to the institution for which a working with children authority is required; or
- engages in the delivery of a service to a child who is under the care, supervision or control of the institution.[53]

The elements of the 'failure to protect' offence are that:

- an accountable person knows there is a significant risk that another adult (the alleged offender) will commit a child sex offence in relation to a child, whether or not that knowledge was gained by the accountable person during, or in connection with, a religious confession[54]
- the alleged offender is associated with an institution or is a regulated volunteer
- the child is under the care, supervision or control of an institution
- the child is either under 16 years, or aged 16 or 17 with an impairment of the mind, and
- the accountable person has the power or responsibility to reduce or remove the risk and wilfully or negligently fails to reduce or remove the risk.[55]

As advised by the Hon Yvette D'Ath, Attorney-General and Minister for Justice, in her speech introducing the Bill:

> *Notwithstanding the expanded approach to the reporting offence, the failure-to-protect offence retains an institutional context. This is because the types of offending the provision captures are unique to an institutional context. It includes, for instance, an organisation moving a known child sex offender to different branches of its organisation, despite knowing the danger that person poses to vulnerable children. This type of behaviour cannot be allowed to continue.*[56]

2.2.4.1 Submissions

As with other provisions of the Bill, submitters were generally supportive of the policy intent of the 'failure to protect' offence, however they differed in their views as to how it should be further amended for best practice operation.

A number of submitters commented on the terminology employed by the offence, citing 'issues of inconsistent use of terminology and lack of alignment between different pieces of relevant legislation.'[57]

The submission from the Queensland Catholic Education Commission (QCEC) raised the fact that the Bill's section 229BB failure to protect offence refers to an accountable person knowing there is a '*significant risk*' that another adult will commit a child sex offence, whereas under the *Child Protection*

[53] Proposed section 229BB(3), Code.

[54] The term 'religious confession' is defined in section 207A (Definitions for this chapter) to mean a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the member's church or religious denomination.

[55] Proposed section 229BB(1) and (2), Code.

[56] Hon Y D'Ath, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 27 November 2019, pp 3872-3876 at p 3874.

[57] Submission 6, p 5.

Act 1999 the Chief Executive must be advised when there is a reasonable suspicion that 'a child may be in need of protection', and the *Education (General Provisions) Act 2006* requires a report to be made when there is a reasonable suspicion that a child is '*likely*' to be sexually abused.

The QCEC commented that:

> *…this use of multiple legislative reporting regimes will likely cause confusion. Harmonisation across the relevant legislation would be preferable to avoid misinterpretation of reporting/protection obligations*.[58]

The Anglican Church Southern Queensland (ACSQ) agreed that a failure to protect offence is necessary, noting:

> *The examples in evidence at the Royal Commission of known perpetrators being moved on to other roles following complaints only for other children to be abused are compelling reasons for reform. Even though such behaviour would be an unthinkable outcome for any institution in the wake of the Royal Commission, providing a standard and a criminal sanction is an important means to eliminate this culture.*
>
> *As we stated above, care must be taken when legislation sets out to substitute a legal duty which is enforced by a criminal sanction for a moral one unless there are overall substantial benefits to society in doing so. The construction of this proposed offence, being based on knowledge and being directed at persons with power and responsibility to reduce or remove risk, strikes a reasonable balance*.[59]

ACSQ also sought clarification regarding the terminology used in s 229BB in respect of, *inter alia*:

- The Royal Commission used 'substantial risk' in recommendation 36 but the Bill refers to 'significant risk'; ACSQ believing substantial to be a more meaningful word in the context;[60]
- ACSQ believes s 229BB(1)(a) refers to a subjective test, of an accountable person's *actual* knowledge of a significant risk, not an objective test of whether a reasonable person should have known there was a significant risk;[61]
- Suggesting that 'by reason of their role or function in the institution' be included to clarify that the power and responsibility to reduce or remove the risk must arise in an institutional context.[62]

In response to the ACSQ's concerns, the department advised:

> *The failure to protect offence in the Bill has been drafted to accord with the Royal Commission recommendations as far as possible factoring in consistency within a Queensland context.*
>
> *Page 49 of the Royal Commission's Criminal Justice Report states:*
>
> > *"The standard of 'should have suspected' requires a person to report where a reasonable person in the same circumstances as the person would have suspected. It allows for consideration of what the person knew – both inculpatory and exculpatory – and asks whether, with that knowledge and in those circumstances, a reasonable person would have suspected. In line with the standard of criminal negligence, the offence would have been committed on the basis that a suspicion should have been formed only where there is a great falling short of what would be expected of a reasonable person."*

[58] Submission 6, p 5.

[59] Submission 12, p 2.

[60] Submission 12, p 3.

[61] Submission 12, p 3.

[62] Submission 12, p 4.

> *The test of significant risk is consistent with the threshold provided for already in the reporting regime under the* Child Protection Act 1999.
>
> *The concept of power or responsibility to remove or reduce risk is not defined. Key terms such as this are not defined as it is impossible to adequately capture all the contingencies that may arise and may unintentionally limit and complicate the application of the offence*.[63]

In a similar vein, knowmore were supportive of the intention of the offence, noting:

> *We believe that the failure to protect offence will encourage organisations to implement effective systems for preventing and responding to institutional child sexual abuse. It will also place increased responsibility on staff with leadership roles to foster effective organisational cultures in this area.*[64]

Also concerned with the choice of terminology, knowmore commented that the offence would be further strengthened by being amended to refer to a 'substantial risk' rather than a 'significant risk' because this would 'better reflect the intent of the Royal Commission's recommendation and impose an obligation on institutional staff to reduce or remove risks to children in a broader range of circumstances'.[65]

The submission from knowmore further considered that that term 'negligently' should be defined to clarify that a person negligently fails to reduce or remove a risk if the failure involves a great falling short of the standard of care which would be exercised by a reasonable person in the same circumstances.[66]

The submission from the Queensland Law Society (QLS) acknowledged the policy intent of the section, but expressed concern that a significant period of imprisonment is proposed (maximum 5 years) for an offence that requires an 'assessment of potential future offences by an 'alleged offender', particularly where the offence may be satisfied by a lesser burden of proof'.[67]

In respect of the terminology employed by the provision, QLS commented:

> *The drafting of the Bill has the effect that an* accountable person *commits a crime for failing to identify that an offence will occur in the future, as the offence appears to arise even if no child sexual offence has yet occurred.*
>
> *The provision requires the accountable person to* know *that there is a significant risk that another adult* will *commit an offence, which effectively requires an accountable person to assess* if *someone might commit an offence (emphasis added). It also imposes a civil burden of proof in subsection 229BB(1)(f) by providing that the accountable person commits the crime if, in addition to the factors in (a) to (e), the person wilfully or* negligently *fails to reduce or remove the risk (emphasis added).*
>
> *….*
> *The definition of* accountable person *extends to volunteers with organisations including sporting clubs and youth organisations. This offence provision is likely to have a negative effect on the willingness of volunteers to serve in organisations of this kind, in circumstances where organisations are already subject to a wide range of child protection compliance burdens.*
>
> *In this regard, we also note recent changes to the* Civil Liability Act 2003 *which impose further civil obligations on institutions to prevent child abuse in an institutional setting (see the insertion*

[63] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 26-27.

[64] Submission 15, p 9.

[65] Submission 15, p 10.

[66] Submission 15, p 10.

[67] Submission 25, pp 2-3.

of new chapter 2, part 2A as part of the Civil Liability and Other Legislation Amendment Act 2019*).*

In light of these civil liability changes and the proposed section 229BC, QLS suggests that further consideration be given to the drafting of section 229BB to give guidance as to when a person 'knows', what might constitute a 'significant risk' and what the accountable person should do to 'reduce or remove the risk' of the potential offence and the applicable burden of proof.[68]

In response to the QLS concerns, the department advised:

The failure to protect offence in the Bill requires an accountable person to act if they know there is a significant risk of offending.

The term 'remove or reduce risk' *is not defined in the Bill and will depend on particular circumstances.*

In pages 54-56 of the Royal Commission's Criminal Justice Report, the Royal Commission considered the offence should not be unfairly onerous so as to prevent institutions from continuing to provide services to children or require institutions to distort how they provide services by adopting unnecessarily expensive or risk adverse behaviour.[69]

2.2.5 Offence of failing to report belief of child sexual offence committed in relation to a child

Recommendations 33-35 of the Criminal Justice Report were for each state and territory government to introduce legislation to create a criminal offence of failure to report, targeted at child sexual abuse in an institutional context, which specifically addresses religious confessions, including by applying to information disclosed in, or in connection with, a religious confession and excluding any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.[70]

In her speech introducing the Bill, the Attorney-General advised:

The royal commission heard evidence suggesting that some institutions emphasised reputational protection over the protection of children in their care. This informed its recommendations that jurisdictions create offences of failure to report and failure to protect against child sexual abuse in an institutional setting. Accordingly, the draft bill contained two new third-party offences of failure to report and failure to protect, both targeted at child sexual abuse in an institutional context.

Whilst feedback on these provisions generally supported the need for the new reporting and protecting offences, strong concerns were raised that the complexity of the failure-to-report offence made the offence extremely difficult to apply and enforce. The complexity arose largely because detailed definitions are necessary to establish the institutional parameters of the offence. Having regard to these concerns, the bill contains a reporting offence that applies beyond an institutional context. This sends a strong message to the entire community that child sexual abuse is not something that can be ignored by any adult. This approach is also consistent with New South Wales, Victoria, the Australian Capital Territory and Tasmania, which have all introduced broad failure-to-report offences that are not limited to an institutional context.[71]

Clause 25 of the Bill as introduced inserts new section 229BC into the Code to create a new offence of 'failure to report belief of child sexual offence committed in relation to [a] child'.

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[68] Submission 25, pp 2-3.

[69] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 26.

[70] Explanatory notes, p 5.

[71] Hon Y D'Ath, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 27 November 2019, pp 3872-3876 at p 3873.

The provision mandates that where an adult gains information (including information gained during, or in connection with, a religious confession) that causes the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a child sexual offence is being committed or has been committed against a child by another adult, *and* at the relevant time[72] the child is or was under 16 years of age or a person with an impairment of the mind, the adult must, unless they have a reasonable excuse, disclose the information to a police officer as soon as reasonably practicable after the belief is, or ought reasonably to have been, formed. If the adult fails to do so they commit a misdemeanour that attracts a maximum penalty of three years imprisonment.

Subsection (4) states that, 'without limiting what may be a reasonable excuse for subsection (2), an adult has a reasonable excuse if –

(a) the adult believes on reasonable grounds that the information has already been disclosed to a police officer; or

(b) the adult has already reported the information under any of the following provisions, or believes on reasonable grounds that another person has done or will do so –

i. the *Child Protection Act 1999*, chapter 2, part 1AA;

ii. the *Education (General Provisions) Act 2006*, chapter 12, part 10;

iii. the *Youth Justice Act 1992*, part 8 or 9; or

(c) the adult gains the information after the child becomes an adult (the *alleged victim*), and the adult reasonably believes the alleged victim does not want the information to be disclosed to a police officer; or

(d) both of the following apply –

I. the adult reasonably believes disclosing the information to a police officer would endanger the safety of the adult or another person, other than the alleged offender, regardless of whether the belief arises because of the fact of the disclosure or the information disclosed;

II. failure to disclose the information to a police officer is a reasonable response in the circumstances.'

Pursuant to subsection (5), an adult who, in good faith, discloses the information to a police officer is not liable civilly, criminally or under an administrative process for making the disclosure.

The explanatory notes advise that the new reporting offence will apply to information received on or after commencement, even where the information relates to abuse that occurred before commencement.[73]

2.2.5.1 Submissions

A majority of submitters[74] commented favourably on the intent of the mandatory reporting obligations and 'failure to report' offence in proposed section 229BC, however some submitters[75] were opposed to the mandatory reporting regime's use of information gained during, or in connection with, a religious confession. The religious confession aspect of the mandatory reporting regime is discussed below at 2.2.6.

[72] 'relevant time' is defined in subsection (6) as the time that the adult believes to be the time of commission of the offence, or ought reasonably to believe to be the time of the commission of the offence.

[73] Explanatory notes, p 6.

[74] See submissions 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17, 18 and 23.

[75] See submissions 10, 14, 19, 20 and 24.

Of those submitters who were supportive of the intent of mandatory reporting, many[76] raised disparate concerns about unintended consequences and potential problems with its implementation, or sought clarification of how it might apply to particular persons or situations.

The QLS commented:

> *This is an extremely broad provision and imposes obligations on every adult member of the community to understand the complexities of child sexual offences and whether any of the excuses in the Bill are applicable to the specific circumstances. In the absence of specific disclosure by a child, it may be difficult for an ordinary member of the community to ascertain whether the information gained should raise suspicion. This creates a level of uncertainty in circumstances where there is a reversal of the onus of proof[77] and a custodial sentence on conviction.*[78]

PeakCare noted that:

> *There is a range of circumstances which would impact on a person's capacity to reasonably believe sexual abuse was occurring, or impact on a person's capacity to take the required action to report*.[79]

PeakCare also concisely summarised the breadth of persons to whom mandatory reporting obligations may 'inappropriately apply',[80] including:

- Adults with cognitive impairment or learning disabilities;
- Those experiencing family or domestic violence who are fearful of violence, ostracism or intimidation if they disclose;
- Those who have been 'groomed' by the offender;
- Those with traumatic lived experiences of interacting with authorities; and
- Those from communities with diverse cultural values and beliefs that may impact their capacity to either recognise, or appropriately respond to, the behaviours occurring.[81]

Some of these concerns are canvassed in greater detail below.

<u>Mandatory reporting for persons with disability</u>

Queensland Advocacy Incorporated (QAI) welcomed mandatory reporting but noted that it is:

> *…only the first step in a process that may or may not lead to the cessation of abuse….*
>
> *…*
>
> *It is not enough to have mandatory reporting if reports are not properly investigated because children with disabilities, particularly those with cognitive disabilities, are not taken seriously as complainants and allowed to be witnesses because they are not credible.*[82]

PeakCare noted that the offence and mandatory reporting obligations 'may inappropriately apply to adults with cognitive impairment or learning disabilities'.[83]

---

[76] See submissions 5, 6, 7, 10, 11, 12, 13, 15, 21, 22, 23, 25 and 26.

[77] The effect of the reasonable excuse provision in s 229BC is to reverse the onus of proof to the defendant.

[78] Submission 25, pp 3-4.

[79] Submission 11, p 3.

[80] Submission 11, p 3.

[81] Submission 11, p 3.

[82] Submission 5, p 2.

[83] Submission 11, p 3.

Mandatory reporting impact on child victims

Youth Advocacy Centre (YAC) noted that their child clients are '…entitled to know and understand the consequences of any abuse they have suffered being reported,'[84] commenting:

> *Reports made without their consent and adequate preparation have the potential to re-victimise them.*[85]

Mandatory reporting for persons experiencing domestic and family violence

The submission from knowmore commented that the failure to report offence:

> *…may unfairly criminalise non-reporting by victims of family violence*.[86]

Brisbane Rape and Incest Survivors Support Centre (BRISSC) did not support the application of a failure to report offence outside of institutional contexts, commenting:

> *The expansion of this offence to apply to all adults will potentially harm vulnerable and marginalised members of the community. It will criminalise vulnerable groups of people who face significant barriers to reporting, particularly women who experience domestic violence, and impose an additional obstacle to getting help in such circumstances. Further, it may curtail women from disclosing to sexual violence support workers the level of violence and abuse in their lives.*
>
> *…*
>
> *In these cases, a failure to report may not be a result of wilful ignorance, negligence, or a desire to prioritise reputation over a child's safety. Rather, there may be a lack of suitable social, emotional, financial and housing supports available to enable a woman to safely and appropriately report the child abuse in a domestic violence context. There may also be a fear or distrust of the police as a result of other reporting experiences.*[87]

The submission from Australia's National Research Organisation for Women's Safety (ANROWS) noted that the high co-occurrence of children experiencing sexual abuse and being exposed to domestic violence[88] means that many of the Queenslanders who would be compelled to report instances of suspected child sexual abuse will be women experiencing domestic and family violence (DFV).[89]

The ANROWS submission identified a number of factors that might inhibit victims of DFV from recognising/identifying, and discharging their legal duty to report, child sexual abuse:

- A victim's own history of childhood sexual abuse;
- Factors such as unresolved trauma, cultural change and dislocation for indigenous women experiencing DFV;
- An ongoing relationship with the offender adds risk and complexity to reporting;
- Feeling a need to protect the perpetrator from imprisonment;
- Raising child abuse in the context of separation from a violent partner could increase risk;

[84] Submission 26, p 1.

[85] Submission 26, p 1.

[86] Submission 15, p 7.

[87] Submission 22, p 4.

[88] Estimated at 40 percent, see references in submission 13 at p 2.

[89] Submission 13, p 2.

- Outstanding warrants, fines or other reasons that make a person 'legally compromised' will increase their reluctance to bring themselves to the attention of police by reporting knowledge of child sexual abuse;
- Structural inequities (poverty, historical trauma, colonisation, disability, racism, sexuality and gender and geographic isolation) mean women from diverse backgrounds experiencing DFV have additional barriers to reporting crime:
    - Intergenerational trauma stemming from the forced removal of children and fear that their children will be removed from a violent home can be a barrier to Aboriginal women reporting DFV and/or child sexual abuse;
    - Anxiety experienced by particular racial groups when they are compelled to interact with police and other government agencies;
    - Reliance on a violent partner for financial support, visa status and access to health care services, language barriers, fears of racism and different cultural attitudes about trusting authorities (immigrant and refugee women);
    - Dependency upon caregivers may be a barrier to women with disability reporting child sexual abuse in the home;
    - Marginalisation of lesbian, bisexual, queer, intersex and gender non binary people; and
    - Geographical isolation, a lack of services and concerns about maintaining confidentiality in a close-knit community could hamper women in remote and rural areas in reporting child abuse.[90]

Safety concerns as a 'reasonable excuse' for not reporting

As noted above in 2.2.5, proposed new section 229BC(4)(d) does allow for an exculpatory 'reasonable excuse' for a failure to report belief of child sexual abuse, including that the adult reasonably believes disclosing the information to a police officer would endanger the safety of the adult or another person, other than the alleged offender, regardless of whether the belief arises because of the fact of the disclosure, or the information disclosed, and failure to disclose the information to a police officer is a reasonable response in the circumstances.

This exculpatory provision would appear to remove the reporting obligation for persons in DFV situations who reasonably believe disclosure would endanger themselves or another person such as the child.

Those submitters who commented on the appropriateness of imposing a mandatory reporting obligation on a person experiencing DFV, also commented on the 'reasonable excuse' exception to criminal liability.[91]

PeakCare noted the reasonable excuse requirement for there to be danger to the 'safety' of the adult or another person and submitted that 'safety' should be broadly defined and extend beyond 'physical safety' in order to also incorporate notions of 'emotional', 'psychological' and 'cultural' safety.[92]

The submission from ANROWS observed '…we recognise some attempt has been made in the proposed Bill to address situations like DFV, without specifically using DFV as a limiting case'.[93]

[90] Submission 13, pp 6-8.

[91] See submission 22, pp 4-5; submission 13, pp 5-6 and 8.

[92] Submission 11, p 3.

[93] Submission 13, p 5.

The reasonable excuse exception to liability for failure to report, based around a danger to the safety of the adult or another person, was considered by BRISSC to be 'inadequate' and 'unlikely to protect vulnerable people'.[94]

While acknowledging that some women will fail to report due to safety concerns, BRISSC noted that non-reporting may occur because a women in a DFV situation fears physical retribution against themselves or their child/children or others, or may fear other adverse child outcomes such as continuation or intensification of the abuse, or removal of the child into another, potentially worse, environment. Fears of financial impoverishment and/or homelessness may similarly discourage a vulnerable woman from fulfilling her mandatory reporting obligations.[95]

BRISSC further observed that:

> *…..vulnerable people may struggle to prove that a failure to report is "reasonable in the circumstances". What a court determines is 'reasonable' may not align with what a women experiencing violence believes is reasonable for the safety of her child, herself, or another person while the abuse occurs.*[96]

Addressing the above concerns about the viability of the reasonable excuse defence, the department noted:

> *The reasonable excuse provision for failing to report contained in new section 229BC(4) is not exhaustive. This ensures that the potential application of the reasonable excuse provision will be assessed with reference to the particular distinct facts of each case.*
>
> *As noted above, the Bill specifically provides that a person will have a reasonable excuse if they hold a reasonable belief that disclosure would endanger their own safety or the safety of another person.*
>
> *The ACT Report, in considering concerns raised with a wide offence applying to all adults (i.e. beyond an institutional context), including the likelihood that over-reporting will increase and that it could affect vulnerable people who are themselves living with the abuser and subject to abuse. The ACT Report notes this issue was also considered in the Victorian Royal Commission into Family Violence which recommended that section 327 of the* Crimes Act 1958 *(Vic) be amended to require the Director of Public Prosecutions to approve a prosecution for the offence in cases where the alleged offender is a victim of family violence. Another means of addressing the potential adverse effect on vulnerable people noted in the ACT Report is to frame an appropriate defence (i.e. where the reporter believes on reasonable grounds that disclosure of the information would risk the safety of any person other than the person believed to have committed the offence). The ACT Report concluded that with the sensible exercise of prosecutorial discretion, this exception goes a long way towards protecting vulnerable people*.[97]

Further to these issues, the department response also noted:

> *Liability under the offence is subject to the absence of a reasonable excuse. Without limiting the scope of what constitutes a reasonable excuse, a number of specific reasonable excuses are set out within the provision. Consistent with recommendation 34 of the Royal Commission's Criminal Justice Report that appropriate defences be included in the failure to report offence to avoid duplication of reporting, the reasonable excuse provision includes reference to reporting requirements under the* Child Protection Act 1999, Education (General Provisions) Act 2006 *and the* Youth Justice Act 1992*.*

[94] Submission 22, p 4.

[95] Submission 22, p 4.

[96] Submission 22, p 5.

[97] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 16.

DJAG notes that proposed new offence will apply to adults who gain information about child sexual offending in a domestic or family context. The Bill specifically provides that a person will have a reasonable excuse if they hold a reasonable belief that disclosure would endanger their own safety or the safety of another person (see proposed new section 229BC(4)(d)).

…

In exercising prosecutorial discretion, the police and the Director of Public Prosecutions will consider evidential issues, including the availability of lines of defence and excuses which are open. Consideration is also given to public interest criteria.[98]

Complexity of multiple mandatory reporting regimes

As it also flagged in respect of the failure to protect offence, the submission from QCEC noted that in Queensland currently there are already a number of legislative requirements[99] imposed on schools requiring them to have appropriate processes to deal with and report harm or potential harm to students, including sexual abuse.[100]

In respect of the mandatory reporting obligations and failure to report offence in s 229BC, QCEC expressed a general concern that:

The new offence proposed by the Bill of failure to report will overlay these existing reporting provisions. From an education perspective, the addition of another reporting regime will raise issues of alignment and harmonisation of terminology being used, as well as differences between reporting thresholds. This adds complexity to what is already a very complicated regulatory regime.[101]

…

While any measures aimed at supporting the elimination of child sexual abuse are strongly supported, the complexity of the interrelating legislative provisions as they apply to schools, makes it more challenging for staff and volunteers to understand their obligations. The risk created by this complexity is that reporting will become less effective. The lack of alignment between the different legislative provisions may have the potential to cause uncertainty or misunderstanding. The focus of staff should be on protecting and supporting students, rather than attempting to reconcile the legal complexities of the various legislative reporting regimes.

To guard against this, it is considered that a more coherent and coordinated legislative framework should apply to school staff and volunteers reporting harm or potential harm to children. This could be promoted by a review of all legislative provisions currently applying to schools, with the aim of achieving greater consistency and alignment in child protection reporting and procedural requirements applicable to schools across Queensland.[102]

In response to these concerns, the department advised:

The Royal Commission acknowledged in its report that the failure to report offence has some overlap with mandatory reporting and reportable conduct schemes but was satisfied that there are good reasons for the criminal law to impose obligations on third parties to report to police in relation to child sexual abuse. It stated that these reasons recognise the great harm that child abuse can cause to victims and that the impact of child sexual abuse on individual victims may be lifelong, and the impact on their families and the broader community may continue into

[98] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 8-9.

[99] Outlined in submission 6, pp 1-2.

[100] Submission 6, p 1.

[101] Submission 6, p 2.

[102] Submission 6, pp 2-3.

subsequent generations (refer to page 49-51 of the Royal Commission's Criminal Justice Report - Executive Summary and Parts 1-11).

The failure to protect and failure to report provisions in the Bill will commence on a date set by proclamation to allow the necessary implementation activities, such as training, to occur. DJAG is working with other relevant departments across the Queensland Government to develop an appropriate communications plan to support implementation.[103]

Mandatory reporting of peers by adult school students

In respect of the obligation for all adults to report child sex abuse, the QCEC noted that this requirement could effectively mean that an 18 year old Year 12 school student would be legally obligated to report on an 18 year old student peer's sexual relationship with a 15 year old student as suspected child abuse. An 18 year old student could therefore be charged with an offence for failing to report knowledge of peers engaged in a sexual relationship where one of the parties is under 16 years old (unlawful carnal knowledge). The QCEC noted that, given the introduction of the prep year in 2007, a larger number of students will reach the age of 18 years in Year 12 as from 2020.[104]

In response, the department advised:

The offence places the obligation to report on all adults (i.e. persons aged 18 years and over) across the community. This reflects the position as enunciated by the Attorney-General in her explanatory speech for the Bill delivered on 27 November 2019 that: '... child sexual abuse is not something that can be ignored by any adult'.[105]

Over-reporting and resourcing implications

Several submitters[106]expressed concern that mandatory reporting obligations may generate significant 'over-reporting' to police with consequential resourcing implications.

The submission from ANROWS quoted research which cautioned that:

without effective reporter training, severe penalties might influence hypersensitive or "defensive" reporting of minor incidents not intended to be covered by the law.[107]

And:

With the inclusion of this offence, and the resulting expanded awareness of, and willingness to, report child abuse, as well as the expanded definitions of child abuse and mandatory reporting requirements, there is a risk that without additional resources, child protection departments will become overwhelmed. This will make it difficult for child protection workers to identify serious cases of child abuse requiring immediate action.[108]

[103] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 13.

[104] Submission 6, p 3.

[105] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 10.

[106] See submissions 7, 13, 23 and 25.

[107] Submission 13, p 1, citing Mathews, B. & Walsh. K. (2014). 14. *Mandatory reporting laws. Families, policy and the law: Selected essays on contemporary issues for Australia*.

[108] Submission 13, p 1, citing Humphreys 2008, 2007; Powell and Murray 2008, cited in Richards, K. (2011). *Children's exposure to domestic violence in Australia. Trends and issues in crime and criminal justice*, 419. Retrieved from Australian Institute of Criminology website.

Bravehearts noted that:

> *…if individuals feel they will be penalised for not reporting concerns this may result in over-reporting and a waste of investigative resources. It may be argued that if a criminal offence for failing to report is introduced, then the concern around over-reporting will be intensified.*[109]

Similarly, WLSQ observed:

> *As a new law people will be uncertain about what 'reporting a belief' on 'reasonable grounds' actually means in practical terms and the result may be a lot of notifications to police by people primarily concerned about ensuring they are not committing a crime. This will obviously have resourcing and other implications.*[110]

The submission from QLS also acknowledged:

> *There is a risk that the provision may be contrary to the policy intent of addressing and investigating child sexual abuse offences, by overburdening the police with reports and overshadow conduct or information which should otherwise be investigated.*[111]

In response to submitters concerns about over-reporting and consequential resourcing implications, the department advised:

> *DJAG notes that an increase in the number of reports of child sexual abuse as a consequence of the new failure to report offence is likely, however the extent of the impact is unknown and will be monitored.*
>
> *An appropriate communications strategy to support implementation will also help to mitigate the possible impact by ensuring that the community clearly understands the operation of the new offence*.[112]

Mandatory reporting and legal professional/client legal privilege

Submissions from the legal profession sought clarification as to how the mandatory reporting obligation imposed under s 229BC will co-exist with the confidentiality obligations imposed on legal practitioners in respect of the exchange of information between lawyers and their clients, known as legal professional privilege or client legal privilege.[113]

YAC noted that it may be arguable that the client-lawyer relationship and its inherent confidentiality obligations, could constitute a 'reasonable excuse' for a failure to report.[114]

The Family Law Practitioners' Association of Queensland (FLPA) questioned whether a legal practitioner who is taking instructions from a client and is informed of alleged sexual offending, which they do not report, commits an offence against section 229BC, noting its view that it would be a breach of legal professional privilege to make such a report without the consent of the client to waive the privilege.[115]

The FLPA further posed the scenario that, if a legal practitioner is presented with nothing more than an uncorroborated allegation of abuse made by a parent, and the practitioner is of the view that the extent of the evidence is insufficient to permit any disclosure without breaching their duty of

[109] Submission 23, p 3.

[110] Submission 7, p 2.

[111] Submission 25, p 4.

[112] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 11.

[113] See submissions 21, 25 and 26. Also see Australian Solicitors Conduct Rules 2012, Rule 9 and Bar Association of Queensland, Barristers' Conduct Rules, Rules 108 and 109.

[114] Submission 26, p 2.

[115] Submission 21, p 2.

confidence, will the practitioner, on those allegations alone, be committing an offence against s 229BC if they fail to disclose the information to police immediately? Further, if there is a higher degree of supporting or corroborating evidence such as a written or taped admission or confession by a parent, but the practitioner nevertheless maintains adviser-client confidentiality, will the adviser have committed an offence by not reporting the conduct to police, in light of the mandatory reporting obligations imposed on all adults by s 299BC?[116]

The submission from the FLPA recommended that, in order to clarify this issue, an amendment be made to confirm that s 299BC does not require a legal practitioner to waiver legal professional privilege, or, alternatively, that the provision be amended to state that a legal practitioner does not commit an offence if they are provided information in the course of taking instructions from a client for the dominant purpose of providing legal advice, and fail to disclose the information obtained to police. The FLPA also noted the merit of amending s 299BC(4) to provide that the maintenance of legal professional privilege constitutes a reasonable excuse for non-compliance with the mandatory reporting obligations.[117]

As the peak professional body for Queensland's legal practitioners, the QLS also expressed concerns that proposed new sections 229BB and 229BC have the potential to over-ride the long established doctrine of client legal privilege and, while acknowledging the advice in the explanatory notes[118] that the offences do not override any other privilege, including the privilege against self-incrimination or legal professional/client legal privilege, the QLS called for express clarification in the Bill to exclude legal practitioners from the operation of these provisions.[119]

The QLS commented:

> *QLS is concerned that the wide application of the proposed reporting obligations in proposed section 229BC will extend to a legal practitioner representing an institution.*
>
> *This paragraph would apply to an in-house lawyer or a legal practitioner in a firm or a community legal centre who is approached by an institution seeking advice as to, for example, its obligations under sections 229BB and 229BC.*
>
> *This wide drafting has the potential effect of over-riding client legal privilege so that the legal practitioner may be exposed to potential penalties in sections 229BB and 229BC.*
>
> *QLS recommends that this section be clarified to exclude legal practitioners employed or engaged by the institution, in circumstances where the information and knowledge referred to in sections 229BB(1)(a) and 229BC(1)(a) is provided to the legal practitioner in the context of the relevant institution seeking legal advice. In these circumstances, the reporting obligation would then properly fall on the adult who is the client, not the adult who is the legal practitioner.*
>
> *Under the Australian Solicitors Conduct Rules (ASCR), legal practitioners are generally subject to obligations of confidentiality with respect to confidential client information, but legal practitioners may disclose confidential client information if:*
>
> - *the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence; or*
> - *the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person (Rule 9.2).*

[116] Submission 21, p 2.

[117] Submission 21, p 3.

[118] See explanatory notes, p 7.

[119] Submission 25, pp 1-2 and p 6.

Clarifying this section to exclude legal practitioners as proposed above will not jeopardise the safety of children currently in the care of an institution as legal practitioners are permitted to disclose information of the kind contemplated in sections 229BB and 229BC if a child is presently in danger.

However, QLS is concerned that without this clarification, legal practitioners will unintentionally be caught by these offence provisions where advice is sought in relation to historical offences (section 229BC) or the "significant risk that another adult (the alleged offender) will commit a child sexual offence" (section 229BB).[120]

The response from the department confirmed the advice in the explanatory notes:

The provisions are not intended to override legal professional privilege. This has been clarified on page 7 of the Explanatory Notes to the Bill.[121]

2.2.6 Application of failure to report and failure to protect offences to information or knowledge gained during, or in connection with, a religious confession

As noted above,[122] the new failure to report and failure to protect offences apply to any information or knowledge gained during, or in connection with, a religious confession. 'Religious confession' is defined in section 207A of the Code (Definitions for this chapter) to mean a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the member's church or religious denomination.

According to the explanatory notes, the genesis for these reforms were recommendations 33-35 of the Criminal Justice Report which recommended that 'each state and territory government introduce legislation to create a criminal offence of failure to report, targeted at child sexual abuse in an institutional context which specifically addresses religious confessions'.[123] The recommendation was that such legislation would apply 'to information disclosed in, or in connection with, a religious confession and excluding any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.'[124] It was not intended that the offences would override any other privilege, including the privilege against self-incrimination or legal professional privilege.[125]

In introducing the Bill, the Attorney-General and Minister for Justice commented:

Unlike most other jurisdictions, in Queensland there is no statutory evidential privilege applying to religious confessions. Whether a common law religious confession privilege exists is not entirely clear due to a paucity of case law. To remove doubt, both the failure-to-report and the failure-to-protect offences in the bill include express provisions to apply to information and knowledge gained during, or in connection with, a religious confession.[126]

[120] Submission 25, pp 5-6.

[121] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 21.

[122] See 2.2.4 and 2.2.5 above, and proposed sections 229BB(2) and 229BC(3) of the Code.

[123] Explanatory notes, p 5.

[124] Explanatory notes, p 5.

[125] Explanatory notes, p 7.

[126] Hon Y D'Ath, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 27 November 2019, pp 3872-3876 at p 3874.

2.2.6.1 Submissions

While some submissions were supportive[127] of the reforms making the new failure to report and failure to protect offences apply in respect of information and knowledge obtained from a religious confession, other submitters expressed either strong objection to the proposed changes or concern as to a perceived diminution of religious freedom.

Advice from ACSQ about the applicability of the proposed reforms to the Anglican Church is that:

> *The use of confession as a formal rite in the Anglican Church is not as common as in the Roman Catholic Church. There is no expectation that a member of the Anglican Church would regularly make an express personal confession to a member of the clergy so the instances of confession as a formal rite are relatively rare.*
>
> *Nevertheless, the General Synod of the Anglican Church has passed legislation which, in effect, allows clergy to comply with mandatory reporting laws relating to child sexual abuse or avoid committing a failure to report offence without breaching Church laws regarding confession. That legislation is now in force in ACSQ.*
>
> *On our initial review of the Bill, there is no impediment in Anglican Church law in force in this diocese to any licensed member of the clergy in ACSQ being able to report information about a child sex offence gained during a confession.*[128]

Organisations which commented specifically in support of the reforms were Bravehearts, knowmore and WLSQ.[129]

Bravehearts submitted:

> *We fully endorse ensuring that the failure to report offence applies to information gained during, or in connection with, a religious confession.*
>
> *…*
>
> Certainly, with the issue of child protection, secular law should override any Church law and there should be no exemptions. *We believe that for most parents, if their child was being sexually assaulted and the offender confessed to a priest or a child disclosed within confession, they would want the authorities to know about it. This is particularly relevant, but not exclusively so, to on-going sexual assault and the prevention of future sexual harm*.[130]

The submission from knowmore also stated its support for the reforms:

> *knowmore strongly supports subsection (3) of new section 229BC, which will ensure that the obligation to report extends to information about sexual offences against children obtained during religious confessions. In doing so, Queensland will join the ACT, Victoria and Tasmania, where comparable laws have already been passed.*[131] *We also support the addition of subsection (2) in new section 229BB, which will ensure that there is no gap with respect to the new failure to protect offence.*
>
> *These reforms are consistent with Recommendation 35 from the Royal Commission,*[132]*which heard numerous examples of child sexual abuse being disclosed during confessions, by both*

[127] Submissions 2, 7, 8, 15, 16, 17, 18 and 23.

[128] Submission 12, p 2.

[129] Submission 23, p 3; submission 15, p 11; and submission 7, p 1.

[130] Submission 23, p 3.

[131] Section 66AA(3), *Crimes Act 1900* (ACT); sections 16 to 18, *Children Legislation Amendment Act 2019* (Vic); section 105A(5), *Criminal Code Act 1924* (Tas).

[132] Royal Commission, *Criminal Justice Report: Parts III-VI,* p 224.

perpetrators and victims, where no action was taken to stop the offending or ensure that it was dealt with by the police.[133] *The accounts of the many victims who made a disclosure of abuse during confession are particularly startling. In many of these cases, the victim's disclosure during confession was the first and only time as a child that they had told someone about the abuse they had suffered. The failure of the priests in question to act appropriately on the information they were given meant that the perpetrators were allowed to continue – and in some cases escalate – their abuse.*[134]

…

After some discussion during the Royal Commission's hearings about whether the seal of confession would apply to a child's disclosure about being the victim of sexual abuse,[135] *it was confirmed that the position of the Catholic Church in Australia is that the priest hearing confession is not free to follow up any such report, and can only seek to persuade the child to make a further report outside the confession (which of course may not be effective):*

> *Disclosure by a child*
>
> *When in the sacrament the child reveals he/she has been abused, the priest-confessor should advise the child to tell another responsible person, not the priest-confessor, outside of the sacrament what has happened. Due to the seal of confession the priest-confessor is not free to follow this up. The initiative rests with the child, so the conversation in the sacrament between the priest-confessor and the child needs to be understanding, compassionate and encouraging.*[136]

Where a child discloses, it is inappropriate to place the "initiative" for further action on that child victim. Rather, every instance in which a child discloses sexual abuse during confession is an opportunity for intervention, and for that information to be taken to the police to bring perpetrators to justice and ensure that they can do no further harm to children. Whether these circumstances arise frequently or not, there can be no question that the protection of children should be paramount.

In light of the significant and repeated disclosures of child abuse made to priests in this context, as evidenced in the narratives published by the Royal Commission, knowmore believes it is essential for the new failure to protect and failure to report offences to apply to knowledge gained and information received during, or in connection with, a religious confession, as per sections 229BB(2) and 229BC(3). We note that these provisions are consistent with the principles concerning confessional privilege recently agreed to by the Council of Attorneys-General,[137] *and we welcome this approach.*[138]

Whilst the submitters quoted above were strong advocates for the reforms, the committee received a number of submissions either opposing the use of religious confessional evidence altogether, or urging caution in proceeding with the provisions as they are currently worded.

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[133] Royal Commission, *Criminal Justice Report: Parts III-VI.*

[134] Submission 15, p 11.

[135] Royal Commission, *Public Hearing Transcript – Case Study 50: Institutional Review of Catholic Authorities (Day 245)*, 9 February 2017, pp.25138-25140.

[136] Bishop Terence Curtin (Chair of the Australian Catholic Bishops Conference Commission for Doctrine and Morals), *Comments on the Sacrament of Confession Prepared for the Royal Commission for Panel 4.2,* 2017, p 1.

[137] Council of Attorneys-General, *Communique*, 29 November 2019, Adelaide, p 2.

[138] Submission 15, pp 12-13.

Those submitters who oppose the mandatory disclosure of child abuse information given during a religious confession raised various reasons for their opposition, including that:

- Persons guilty of abuse do not go to confession;[139]
- Confessions are made anonymously and lack details to report to police;[140]
- Individuals may falsely present as penitents and fabricate a confession to incriminate priests who fail to report their confessions;[141]
- Canon law forbids priests from breaching the confidentiality of the confessional;[142]
- Priests already urge children to speak about abuse or mistreatment to an adult or authorities outside of confession;[143]
- The offence of 'failure to report belief of child sexual offence' is 'discriminatory' to Catholic priests,[144] 'amounts to an attack on a sacred rite of the Catholic Church'[145], 'unfairly and detrimentally target[s] Catholics and would lead to unjust prosecution of Catholics.'[146]; and
- It has serious consequences for freedom of religion.[147]

The submission from the Queensland Human Rights Commission (QHRC) further explored the issue of whether mandating the disclosure of knowledge received by way of religious confession, limits freedom of religion as provided by section 20 of the *Human Rights Act 2019* (HRA). The QHRC submission noted:

> *As acknowledged by the Criminal Justice Report, inclusion of knowledge received by way of religious confession limits freedom of religion, as provided by s 20 HRA. In the Roman Catholic Church, breach of confidentiality of information received under the confessional seal is against canon law, resulting in automatic excommunication.*
>
> *The Criminal Justice Report carefully considers arguments raised in defence of the confessional seal, balanced against the purpose of the new offence and whether it is likely to achieve this purpose. It considers other people's rights to security and safety, and the rights of the child. It notes that reporting to police is an important safeguard that may prevent further abuse of that child and other children, and also points to case examples of child sexual abuse having been disclosed in religious confession. It further acknowledges that while the practice of religious confession is declining, disclosure is still a possibility and the risk associated with not reporting justifies imposition of the limitation on freedom of religion.*[148]

[139] Submissions 14, 20 and 24.

[140] Submissions 14, 20 and 24.

[141] Submissions 14, 20 and 24.

[142] Submissions 14 and 20.

[143] Submissions 14 and 20.

[144] Submission 19

[145] Submission 24

[146] Submission 20

[147] Submissions 20 and 24. See also submission 8 at p 6.

[148] Submission 8, p 6.

The QHRC concluded that:

> *The Commission is of the view that non-exemption of religious confession, while limiting the right to freedom of religion, is 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' and therefore lawful pursuant to s 13 HRA.*[149]

The QHRC reached this conclusion having noted a report from the Australian Capital Territory when it implemented similar criminal provisions.[150] That report, in recommending that information disclosed in connection with religious confession not be exempt, noted:

> *Information highly relevant to the detection and prevention of child sexual abuse may be disclosed in the confessional, even if infrequently, by a wide range of persons, including not only perpetrators, but also victims and third parties. Although mandated reporting is not a panacea and may entail some serious drawbacks, the significant value and benefits of reporting on the basis of such information are clear, as recognised by the Royal Commission. Irrespective of the number of cases where relevant information is disclosed in confession, or the anticipated level of compliance by Roman Catholic priests, other stakeholders, particular survivors of child sexual abuse, have expressed indignation at the possibility of exempting any category of persons from the full obligation imposed on all others in order to accommodate the incompatible religious convictions of a particular group. That is, there appears to be a prevalent conviction that civil society may legitimately require relevant categories of citizens, whatever their religious convictions, to report information that has been found, on the basis of an extensive and profound examination and analysis of relevant evidence, to be vital to detecting, preventing and deterring child sexual abuse.*[151]

The submission from the QLS acknowledged 'the important policy intent behind this reform' but raised a number of serious concerns, summarised below:

- By seeking to remove the seal of the confession as a reasonable excuse for not reporting in the circumstances contemplated by proposed section 229BC, the legislation restricts the practice of a religion which includes the sacrament of confession. This has repercussions for freedom of religion and creates a precedent for future incursions restricting the practice of a religion.
- The provision is inconsistent with section 20 of the HRA. The effect of section 229BC(3) of the Bill is:
  a. To contravene a person's freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching (section 20(1)(b) of the HRA); and
  b. To coerce or restrain a person in a way that limits the person's freedom to have or adopt a religion or belief, in contravention of section 20(2) of the HRA.
- Removing the privilege associated with religious confession will set a precedent which may be relied on, in the future, to remove or restrict legal professional/client legal privilege.
- Creating an offence of 'failing to report child abuse confessed to a priest during confession' will only make confessions of child abuse more unlikely.
- There is a question of equality of application of the law. The specific provisions in section 229BC(3) will only apply to members of the clergy and such discriminatory application must be justified as effectively achieving the over-riding policy objective of protecting vulnerable children. Questions have been raised whether the source of the issues identified by the Royal

[149] Submission 8, p 7.

[150] The Hon Justice Julie Dodds-Streeton *Analysis Report: Implementation of Royal Commission into Institutional Responses to Child Sexual Abuse recommendations regarding the reporting of child sexual abuse, with implications for the confessional seal* (14 Jan 2019).

[151] The Hon Justice Julie Dodds-Streeton *Analysis Report: Implementation of Royal Commission into Institutional Responses to Child Sexual Abuse recommendations regarding the reporting of child sexual abuse, with implications for the confessional seal* (14 Jan 2019), p 189, quoted in submission 8 at p 7.

Commission result from a failure of ethical leadership in institutions rather than the practice of confession.

- The obligation to report raises questions of hearsay evidence, as the member of the clergy can only repeat information delivered to them.[152]

The Very Reverend Archbishop Coleridge of the Catholic Church explains the confidentiality of the confessional in his submission, noting:

> *Within the Church, there is the confidentiality of what is called the internal forum, referring to the exchanges that take place, for example, in spiritual direction. The confidentiality of the internal forum is strict but not absolute. The Church's own internal mandatory reporting, and any state-legislated mandatory reporting would apply to matters within the internal forum.*
>
> *Absolute and inviolable confidentiality applies only to the seal of the sacrament of penance, which in Church law if not quite in pastoral practice applies to the sins confessed in the sacramental celebration and the identity of the penitent. Within pastoral practice, the seal has extended further without ever being thought of as applying to everything and anything that may be said in the confessional situation. It is regarded as applying to a penitent who may not confess sin but does mention temptation; it is not regarded as applying to a penitent who confirms the details of a dinner engagement. Looking to the proposed legislation, the Church is not concerned so much about strict professional confidentiality or the internal forum as they might apply to confessors but about the absolute confidentiality of the seal with its narrower application.*
>
> *The seal derives its meaning from a particular understanding of the sacrament. It is God, not the priest, to whom the penitent comes to confess sin and receive absolution. God, not the priest, is the source of the mercy which the penitent seeks. The priest simply enables and witnesses to the encounter with God which is the true meaning of the sacrament. He speaks the word of absolution not in his own name but "in the name of the Father, the Son and the Holy Spirit". The seal recognises the right of the sinful human being to approach God in complete freedom; and the seal is the guarantee of that freedom. It enables the penitent to speak openly before God, to stand open and honest before God, to hide nothing from the God who sees all and forgives all. It enables penitents to see themselves with the eye of God. That is the purpose and the healing power of the encounter which is the sacrament's true meaning.*
>
> *The encounter is a dialogue, not a monologue. It is a dialogue not between the penitent and the priest but between the penitent and God; and the task of the priest is to enable that dialogue. He may speak words of advice or admonition to the penitent, but in all that he says the priest is expected to speak the word of God; and the word of God is always a word of compassion and truth in defense of the weak and vulnerable*.[153]

In respect of the new failure to report and failure to protect offences applying to information and knowledge obtained from a religious confession, the Archbishop noted:

> *It is claimed at times that the seal must be abolished in law because it is the linchpin of a culture of secrecy and cover-up in the Catholic Church that has been identified by the Royal Commission. The Church rejects such a claim, insisting that the seal is the guarantee of a culture of true disclosure which is the opposite of cover-up. Its abolition would make it certain that abusers would never speak of the abuse in the sacramental celebration, and any hope there may have been that they might be led to see the truth of their crime, stop the abuse and report to civil authorities would be lost.*
>
> *…*

[152] Submission 25, pp 4-5.

[153] Submission 10, pp 2-3.

In the end, the proposed legislation would be unworkable, based as it is upon a poor knowledge of how the sacrament actually works in practice. Many penitents choose to remain anonymous, as is their right. What would it mean for a priest to report an anonymous abuser to authorities? Or an abuser who confesses may do so only in generic terms which leave the actual abuse undeclared and the priest is unlikely to cross-examine the penitent in such a situation. It is different with a child who mentions abuse in the sacramental celebration: an experienced and sensitive confessor would be able to invite the child to speak outside the sacrament either to him or to someone else (e.g. a teacher) and take the matter further from there. Mandatory reporting would apply in such a situation, as would the Church's own internal mandatory reporting.

Without the seal, the sacrament of penance would be no more than a spiritualised counselling session, which is what the proposed legislation seems to think it is. The legislation therefore runs the risk of forbidding the celebration of the sacrament itself. The state would effectively be saying that there is some sin that cannot be forgiven, that God has no part to play in this, that clergy should be agents of the state, that the sacrament of penance is outlawed.

If this is so, then the proposed legislation raises major questions about religious freedom. It will limit and unjustly interfere with the human right to which Roman Catholics and others are entitled to enjoy in practicing their faith by accessing the sacrament of penance according to the Church's own discipline. Human rights must be balanced one against others. The right to religious freedom stands in harmony with the right of a child to be safe. The two rights are not opposed; they must be balanced. But this proposed legislation does not get the balance right; it disturbs the harmony. A right balance would require that a strong and effective regime of mandatory reporting be put in place but that the privilege of confession be left intact not as some questionable exemption but as part of that regime when there is no evidence that the legislation is workable.[154]

In regard to the issue of religious confession evidence, the department made the following comments:

DJAG notes that the Attorney-General addressed the issue of confessional privilege in her Explanatory Speech:

'Unlike most other jurisdictions, in Queensland there is no statutory evidential privilege applying to religious confessions. Whether a common law religious confession privilege exists is not entirely clear due to a paucity of case law. To remove doubt, both the failure-to-report and the failure-to-protect offences in the bill include express provisions to apply to information and knowledge gained during, or in connection with, a religious confession. While this government respects the rights of individuals to practise their religion freely and understands there are strongly and sincerely held views about the sanctity of religious confession and the human rights concerns raised about this and the retrospective nature of some of the reforms in the bill, these concerns must be balanced against the need to protect children from child sexual abuse. The royal commission heard evidence in relation to the issue of religious confessions but ultimately concluded that there should be no exemption or privilege from the failure-to-report offence for clergy who receive information during religious confession that an adult associated with the institution is sexually abusing or had sexually abused a child.'

DJAG also notes that recommendation 35 has been considered by Council of Attorneys-General (CAG). At its meeting on 28 June 2019, CAG agreed to establish a Working Group, to be led by NSW, to consider the recommendations of the Royal Commission to exclude the reliance on religious confessions privilege by individuals required to report child abuse (including relevant recommendations outside the scope of the Royal Commission's Criminal Justice Report). CAG agreed that the Working Group would report back to CAG on its deliberations out-of-session.

[154] Submission 10, pp 4-5.

CAG considered this matter at its meeting on 28 November 2019. At that meeting participants agreed to consider the application of the following principles in their respective legislation:

- *confessional privilege cannot be relied upon to avoid a child protection or criminal obligation to report beliefs, suspicions, or knowledge of child abuse;*
- *confessional privilege cannot be relied upon by a person, in civil or criminal proceedings, to excuse a failure to comply with any child protection or criminal obligation to report beliefs, suspicions, or knowledge of child abuse;*
- *confessional privilege cannot be relied upon by a person who had an obligation to report beliefs, suspicions or knowledge of child abuse, to avoid giving evidence in civil or criminal proceedings against a third person for child abuse offences.*[155]

2.2.7 Exclusion of good character as a mitigating factor at sentencing

Clause 53 of the Bill implements recommendation 74 of the Criminal Justice Report by amending section 9 (Sentencing guidelines) of the PSA to prohibit reliance on character as a mitigating factor in sentencing for a child sexual abuse offence, including child exploitation offences, where that good character facilitated the offending.[156]

Subclause 5 inserts new section 9(6A) to provide that, for section 9(6)(h), the court must not have regard to the offender's good character if it assisted the offender in committing the offence. Similarly, subclause 8 inserts new section 9(7AA) to provide that, for section 9(7)(d), which would normally require the court to have regard to the offender's antecedents, age and character when sentencing, the court must not have regard to the offender's good character if it assisted the offender in committing the child sexual offence.

The explanatory notes give the rationale for excluding good character as a mitigating factor at sentencing in instances where the good character facilitated the offending conduct, noting that:

Preventing offenders relying on good character in this way reforms sentencing practice to align with contemporary community standards and affords justice and dignity to victims rather than rewarding offenders for a factor enabling their offending behaviour.[157]

2.2.7.1 Submissions

Most of the submitters who commented on the exclusion of good character as a mitigating factor at sentencing were in favour of the amendments.[158]

Bravehearts observed that:

Child sexual offenders, in particular, often present as trusted and 'good' members of the community. While with other offender types evidence of good character and conduct may be a redeeming feature, this very aspect of a sex offender's public image is all about gaining the trust of children, parents and carers and the community generally. *The 'good character' of child sex offenders is often the very mask behind which their crimes are committed.*

…

[155] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 17-19.

[156] Explanatory notes, p 7.

[157] Explanatory notes, p 17.

[158] Submission 12, p 2; submission 15, pp 17-18; submission 18, p 2; submission 23, p 4. Note however the concerns raised by the Queensland Law Society in submission 25 (also addressed in 2.2.7.1).

We know that often offenders present as of 'good character' as a means of both grooming victims and those around victims and of being able to continue offending without suspicion.[159]

The submission from knowmore supported the amendments, but considered that the clause should be amended[160] to refer to good character that 'enabled', rather than 'assisted', the offender in committing the offence, with knowmore commenting:

knowmore supports the amendment in Clause 53(5), which will prevent an offender's "good character" from being taken into account during sentencing for child sexual offences if it assisted them in committing the offences. This amendment is generally consistent with Recommendation 74 from the Royal Commission, as well as a 2012 recommendation from the Queensland Sentencing Advisory Council. In making its recommendation, the Royal Commission highlighted that:

> *In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator's good character and reputation facilitated the offending. In some cases, it enabled them to continue to offend despite complaints or allegations being made*.[161]

The experience of many knowmore clients reflects this, and we consider it entirely inappropriate in these circumstances for an offender's good character to be considered a mitigating factor in sentencing. While we note the Bar Association of Queensland's submission to the Royal Commission that "previous good character is not generally accepted as a significant mitigating factor" in child sexual abuse cases,[162] *we consider it important for the legislation to specifically exclude its consideration where it facilitated the person's offending. This will also ensure Queensland is in line with other jurisdictions, namely New South Wales, South Australia and Tasmania, which have had similar provisions since 2009, 2014 and 2016 respectively, and the ACT, which has already passed amendments to implement the Royal Commission's recommendation.*[163]

We note that the comparable provision in the ACT has been drafted so as to apply in somewhat broader circumstances than the Queensland provision (and the provisions in the other jurisdictions). Specifically, it refers to circumstances where the offender's good character enabled — not assisted — them to commit the offence, and includes two examples…

….

We consider the ACT's approach to be more consistent with the overall intent of the Royal Commission's recommendation, which refers to circumstances where a person's good character "facilitated" their offending.[164]

In addressing the issues raised by knowmore, the department advised:

DJAG observes that the amendment proposed in the submission may have the effect of narrowing the application of the prohibition as it would be necessary to prove that the good character was the principal means by which sexual access was gained to the child. The current

[159] Submission 23, p 4.

[160] Submission 15, p 18.

[161] Royal Commission, *Criminal Justice Report: Parts VII-X and Appendices,* p 299.

[162] Bar Association of Queensland, *Response to the Criminal Justice Consultation Paper Published by the Royal Commission into Institutional Responses to Child Sexual Abuse,* 2016, p 8.

[163] Section 21A(5A), *Crimes (Sentencing Procedure) Act 1999* (NSW); section 11(4)(c), *Sentencing Act 2017* (SA); section 11A(2)(b), *Sentencing Act 1997* (Tas); section 34A(b), *Crimes (Sentencing) Act 2005* (ACT).

[164] Submission 15, pp 17-18.

drafting enables the prohibition to apply where it was a factor that contributed to securing access to the child.

Examples are generally included in legislation to assist understanding of legislation where there may be some ambiguity.[165]

The submission from the QLS cautioned that, for historical offences, the change in clause 53(5):

…risks undermining the relevance of rehabilitation as a sentencing principle. Further, where the legislature expressly stipulates what principles can and cannot be taken into account, it undermines judicial discretion; particularly where these offences are already dealt with in a special category.[166]

In response to the concerns about the exclusion of good character evidence as a mitigating factor at sentence, the department advised:

Pages 98-99 of the Royal Commission's Criminal Justice Report make the following observations about reliance on good character evidence:

'Generally, an offender's prior or other good character (apart from the offending behaviour) can be a mitigating factor in sentencing. However, allowing good character as a mitigating factor can be highly problematic in sentencing for child sexual abuse offences. In particular, offenders may use their reputation and good character to facilitate the grooming and sexual abuse of children and to mask their behaviour. This may be particularly so in matters of institutional child sexual abuse.

In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator's good character and reputation facilitated the offending. In some cases, it enabled them to continue to offend despite complaints or allegations being made .....

Although the sentencing courts appear to give only slight consideration to good character in cases of child sexual abuse, we are satisfied that all other states and territories should introduce legislation similar to that applying in New South Wales and South Australia. In child sexual abuse cases, including institutional child sexual abuse cases, there should be no place for evidence of good character to be led on behalf of an offender as a mitigating factor in sentencing where that apparently good character has facilitated the offending.'[167]

2.2.8 Application of current sentencing standards to historical child sexual offences

Currently in Queensland, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years, the section 9(4) PSA sentencing guidelines apply, which means that an offender must serve an actual term of imprisonment unless there are exceptional circumstances. Similarly, for CEM and related offences, the sentencing principles in section 9(7) of the PSA apply. The sentencing principles in section 9(2)(a), that a sentence that allows an offender to stay in the community is preferable and a sentence of imprisonment should only be imposed as a last resort, are specifically excluded from applying to cases of child sex offences and CEM offences.

The clause 53 amendments to the section 9 PSA sentencing guidelines now also require that the court have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed, rather than those that existed at the time the offence was committed, although the amendments do not affect the maximum penalty applying at the time the offence was committed.[168]

[165] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 31.

[166] Submission 25, p 9.

[167] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 31-32.

[168] Explanatory notes, p 7.

The amendments are intended to implement recommendation 76 of the Royal Commission which recommended that child sexual offenders be sentenced according to the sentencing standards at the time of sentence, rather than those that existed at the time of the offence. The Royal Commission had observed that applying historical sentencing standards can result in sentences that do not align with the criminality of the offence as currently understood. The Commission noted that, as sentences for child sexual abuse offences have increased over time, the imposition of historical sentencing standards can mean shorter sentences are imposed than would have been under contemporary standards, which can both distress victims and undermine community confidence in the justice system.[169]

The explanatory notes advise that 'the amendment is intended to better reflect the contemporary community attitude towards this type of offending through the imposition of current sentencing standards.'[170]

2.2.8.1 Submissions

Most submitters who commented on the application of current sentencing standards to historical child sex offences were broadly supportive of the amendments.[171]

The submission from knowmore considered the amendments to be an appropriate change, noting:

> *This amendment is consistent with Recommendation 76 from the Royal Commission, and is an important one for survivors. In historical cases of child sexual abuse, the current approach to sentencing can lead to injustice and dissatisfaction when offenders receive sentences that are now regarded as being significantly out of step with community and survivor expectations. Although the new provision will not result in significantly longer sentences in all cases, given that the maximum sentence applicable at the time of the offence will continue to apply, we are satisfied this approach is appropriate*.[172]

In contrast, the submission from the QLS expressed concern that this reform could undermine the rule of law, noting:

> *Clause 53 provides that when sentencing offenders for historical child sexual offences, the court is to sentence offenders in accordance with sentencing standards at the time the sentence is imposed, rather than at the time of the offending.*
>
> *QLS acknowledges this amendment is intended to reflect contemporary community attitudes towards this type of offending. However, the rule of law requires that laws are certain and are capable of being known in advance. Laws that create offences with retrospective application breach this cornerstone principle.*
>
> *While we note the Royal Commission's recommendation to enact this reform, the presumption against retrospective effect is a central requirement for the rule of law. This reform is proposed in the context of significant changes in sentencing principles for these offences in recent times, including that the Act already imposes a requirement for a custodial sentence to be imposed, unless exceptional circumstances exist. QLS expresses concern that this reform will undermine the rule of law and may disadvantage those affected by the legislation*.[173]

[169] Explanatory notes, p 7.

[170] Explanatory notes, p 17.

[171] See submission 7, p 2; submission 15, p 18; submission 18, p 2; submission 23, p 5. Note however the concerns raised by the Queensland Law Society in submission 25 (also addressed in 2.2.8.1).

[172] Submission 15, pp 18-19.

[173] Submission 25, p 8.

In response to the concerns of QLS about using contemporary sentencing standards, the department advised:

> *The amendment to the* Penalties and Sentences Act 1992 *contained in the Bill aligns with recommendation 76 of the Royal Commission's Criminal Justice Report.*
>
> *In formulating recommendation 76, relating to the application of contemporary sentencing standards to child sexual historical offences, the Royal Commission (at page 101) made the following observations:*
>
> *'We are satisfied that, provided the maximum penalty that applied at the time of the offence continues to apply, there is no unfairness in applying contemporary sentencing standards within that maximum penalty. We are also satisfied that this would not result in an offender receiving a higher penalty than the one that was applicable at the time when the offence was committed.*
>
> *We are satisfied that historical sentencing standards were in error, based on misunderstandings of the impact of child sexual abuse on victims. We also note that, where an offender is being sentenced for historical child sexual abuse offences, 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.'*[174]

In response to a concern raised by the QHRC[175]that the amendment applying contemporary sentencing standards for offences that occurred years ago could mean that a greater penalty may be imposed than if the person had been sentenced at the time the offence was committed and, as such, limit s 35(2) of the HRA, the department advised:

> *DJAG notes that the amendment to the* Penalties and Sentences Act 1992 *to apply contemporary sentencing standards to historical matters affects the right to protection from retrospective criminal laws (section 35 of the HRA).*
>
> *The amendment implements recommendation 76 of the Royal Commission's Criminal Justice Report. In formulating the recommendation the Royal Commission observed (at p.308) that sentences for child sexual abuse offences have increased over time. The imposition of historical sentencing standards can mean shorter sentences are imposed than would have been under contemporary standards. This can be distressing for victims and may undermine community confidence in the administration of justice.*
>
> *Additionally, DJAG notes that the amendment may affect future sentences for past crimes. DJAG further notes that the amendment will only apply to adult offenders and consistent with recommendation 76 in the Royal Commission's Criminal Justice Report, the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed*.[176]

2.2.9 Reform to jury directions and warnings about delay

Recommendation 65 of the Royal Commission was for jurisdictions to review, and, if necessary, reform, legislation to restrict the giving of particular common law directions and warnings to juries. Jury directions are typically given to ensure a fair trial for an accused and to avoid the potential for miscarriages of justice. As advised in the explanatory notes for the Bill, the Royal Commission 'observed that some of the directions traditionally given to juries in child sexual abuse cases are founded upon

[174] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 33.

[175] Submission 8, pp 4-5.

[176] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 32-3.

flawed presumptions about victims, including an assumption that a genuine victim will complain at the first reasonable opportunity.'[177]

In keeping with the spirit of recommendation 65, clause 39 of the Bill inserts new section 132BA (Delay in prosecuting offence) into the *Evidence Act 1977* (Evidence Act) to apply in criminal proceedings with a jury.

In such proceedings, where a judge, on his or her own initiative or on the application of a party, is satisfied the defendant has suffered a significant forensic disadvantage[178] because of the effects of delay in prosecuting an offence (including a delay in reporting the offence), the judge may give the jury a direction under the section. In giving the direction, the judge must inform the jury about the nature of the disadvantage and the need to take that into account when considering the evidence, but must not warn, or in any way suggest to the jury, that it would be dangerous or unsafe to convict, or that the complainant's evidence should be scrutinised with great care.[179] The judge need not give the direction at all if there are good reasons for not doing so.[180]

2.2.9.1 Submissions

Most submitters who commented on the reforms to jury directions and warnings were supportive of the amendments.[181]

The submission from Bravehearts acknowledged the psychological barriers that can lead to a delay in reporting childhood sexual abuse, noting that:

> *Significant delays in disclosing the childhood sexual assault is not an anomaly but reflects key characteristics of the offending itself, namely: silence, secrecy, and, shame.*
>
> *Survivors of child sexual assault face enormous barriers in disclosing. The impacts of child sexual assault typically mean that the victim does not disclose until they feel safe to do so, and this frequently does not occur until some time has passed.*
>
> *Having been, in many cases, completely disempowered by an offender, the psychological consequences of child sexual assault have far reaching consequences: shame, self-blame and guilt can stop children from disclosing, can often mean that survivors are unable to disclose until parents have passed away; the result of grooming and the power imbalance between the child and the offender often impacts on a child's ability to speak out; many survivors are simply not ready to disclose as they may still be processing the psychological trauma and impacts of the sexual assault; and victims may experience post-traumatic stress disorder (essentially this means that a victim is aware of the harm they experienced but disassociate themselves from any reminders of the traumatic event, including disclosure).*[182]

The submission from knowmore commented:

> *knowmore supports the amendment in Clause 39, which will prohibit judges from warning or suggesting to a jury that a delayed complaint has adversely impacted a defendant's ability to*

[177] Explanatory notes, p 8.

[178] Subsection (3) provides that a 'significant forensic disadvantage' is not established by the mere fact of delay in prosecuting the offence.

[179] See proposed section 132BA (1)-(2), (4) and (7).

[180] Proposed section 132BA (5).

[181] See submission 7, p 2; submission 15, pp 19-20; submission 18, p 2; and submission 23, pp 5-6.

[182] Submission 23, p 5.

*prepare their defence (*the Longman direction*), unless the judge is satisfied that the defendant has suffered a "significant forensic disadvantage" because of the delay.*[183]

Conversely, the submission from the QLS cautioned that the amendments went further than the recommendations of the Royal Commission and expressed concern that the proposed changes to the rules of evidence could have unanticipated consequences, noting:

The effect of the proposed new section is to substantially alter the content of Longman[184] *and Robinson*[185]*directions so that judges may not refer to 'dangerous to convict', 'unsafe' or 'scrutinise with great care'.*

This change will, as drafted, affect all criminal proceeding with a jury and not only proceedings relating to child sexual offences. This is a significant shift in the legal landscape for jury trials. The directions referred to have been developed over time through common law and applied and modified by judges in response to specific factual scenarios. The directions assist in avoiding miscarriages of justice and any interference with them must not be taken lightly. The attempts to clarify the meaning of directions risks creating unanticipated consequences via an extra layer of judicial interpretation of the new statutory provisions. QLS therefore does not support the proposed amendments.

QLS appreciates that the Royal Commission had a number of concerns about the Longman direction and its tendency to perpetuate myths about sexual assault rather than actual forensic disadvantage suffered by the accused as a result of delay. However, the proposed amendments go further than the recommendation of the Royal Commission. Rather than substantially changing the Longman direction, QLS submits that it is fairer for judges to issue directions to juries noting that there is no standard way in which victims behave, as was accepted by the Court of Appeal in R v Davari[186] *and R v Cotic.*[187]

QLS is of the view that any proposed changes to the rules of evidence within the sphere contemplated by the Bill must be referred to the Queensland Law Reform Commission.[188]

In response, the department noted:

As discussed in the Explanatory Notes to the Bill:

'The recommendations of the Criminal Justice Report were informed by extensive consultation by the Royal Commission, including numerous public hearings and private sessions ....

Consultation with key legal and non-legal stakeholders occurred generally on the recommendations in the Criminal Justice Report between December 2018 and February 2019. Further feedback was invited from stakeholders in April 2019 specifically in relation to recommendations 44-51 relating to reform of tendency and coincidence evidence.

Between 22 August 2019 and 20 September 2019 public consultation was undertaken on a draft of the Bill. Additionally, some consultation forums were conducted with key stakeholders. Feedback received during consultation was taken into account in finalising the Bill.

The Chief Justice, the President of the Children's Court, the Chief Judge and the Chief Magistrate were consulted during drafting of the Bill and their comments were taken into account in finalising the Bill.'

[183] Submission 15, p 19.

[184] *Longman v The Queen* (1989) 168 CLR 79.

[185] *Robinson v The Queen* (1999) 197 CLR 162.

[186] [2016] QCA 222.

[187] [2003] QCA 435.

[188] Submission 25, pp 7-8.

Further the Explanatory Notes for the Bill note at page 8 that the Queensland Law Reform Commission in its 2009 report A Review of Jury Directions *made some similar recommendations in relation to the reform of jury directions on delay and forensic disadvantage*.[189]

2.2.10 Establishment of a pilot intermediary scheme

Clause 44 of the Bill introduces a new Part 2, Division 4C 'Intermediaries' into the Evidence Act. These amendments follow from recommendations 59 and 60 of the Criminal Justice Report[190] and support the introduction of a pilot intermediary scheme across all levels of courts, at locations to be prescribed by regulation. The aim of the pilot intermediary scheme is to mitigate the difficulties that witnesses of child sexual abuse may experience when participating in the court process and in giving evidence, with the result that there should be better quality evidence for police and courts to assess and a reduction in the stress experienced by witnesses in those proceedings.[191]

Intermediaries, being professionals such as speech pathologists, occupational therapists, psychologists and social workers, provide communication support to prosecution witnesses in child sexual offence prosecutions who are children under the age of 16, persons with an impairment of the mind, persons who have communication difficulties, or other persons of a class prescribed by regulation.[192]

Intermediaries are appointed as officers of the court to:

- Assess witness communication needs and recommend any specific communication assistance required and the most effective way to communicate with the witness;[193]
- Provide practical strategies on how to best communicate with the witness and how best to pose a question to that person to get the most reliable evidence;
- Inform 'ground rules' hearings as necessary, to establish court communication guidelines for a witness; and
- Write court reports on the communication needs of the witness.[194]

2.2.10.1 Submissions

Submitters who commented on the pilot intermediary scheme supported its intent[195] but many also suggested it be extended to other classes of vulnerable witnesses.

QAI supported the pilot intermediaries program and its communication support for vulnerable witnesses in child sex abuse matters, but suggested the program be expanded so that every witness with cognitive impairment, regardless of the type of matter, is also supported.[196]

In a similar vein, Bravehearts submitted that the pilot intermediary scheme should extend to adult survivors of child sexual abuse,[197] BRISSC suggested broadening the intermediaries scheme to make it accessible to victims of sexual and domestic violence,[198]and knowmore considered that intermediaries should be made available to all children in child sexual abuse proceedings and any adult complainant

[189] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 33.

[190] Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 101.

[191] Explanatory notes, p 8.

[192] Explanatory notes, p 9.

[193] New sections 21AZM and 21AZR

[194] Explanatory notes, p 9.

[195] See submissions 5, 11, 15, 18, 22, 23 and 25.

[196] Submission 5, p 4.

[197] Submission 23, p 6.

[198] Submission 22, p 5.

in a child sexual abuse proceeding who requires an intermediary because of their particular vulnerability.[199] The submission from knowmore also acknowledged that such additional classes of vulnerable witnesses may be able to be added to the scheme in the future under proposed new section 21AZL(1)(d).[200]

Other submitters made suggestions for the better operation of the scheme. The Centre Against Sexual Violence was supportive of the scheme but felt that the intermediary's assistance should start from when the offence is reported to the police, rather than from the court stage.[201] BRISSC noted the need for the scheme to properly assist witnesses from Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse backgrounds, commenting that:

> *Making intermediaries accessible to a wider group of witnesses will help vulnerable people give evidence, and in doing so, assist courts hold perpetrators to account.*[202]

The QLS also supported the intention of the reforms, but was concerned to ensure that the scheme be appropriately implemented and that it balance the rights of the accused.[203]

In addressing the issues raised by submitters about the pilot intermediary scheme, the department advised:

> *As noted by the Attorney-General in her Explanatory Speech for the Bill, the Bill incorporates amendments to provide the legislative basis to support a pilot program for intermediaries.*
>
> *The amendments in the Bill are aligned with the Royal Commission's recommendations which provide that intermediary schemes should be available to any prosecution witness with a communication difficulty in a child sexual abuse prosecution.*
>
> *Proposed new section 21AZL of the* Evidence Act 1977 *sets out the process for appointment of an intermediary. The section applies to prosecution witnesses who are either children under 16 years, persons with an impairment of the mind, persons who have difficulty communicating or other witnesses of a class prescribed by regulation.*
>
> *DJAG understands that the pilot intermediary scheme will be subject to an evaluation. Any expansion to other witnesses will be a matter for future consideration by Government*.[204]

2.3 Implementing select recommendations of the CEM Report

As noted above at 2.1.2, QSAC was tasked with considering the classification of CEM for sentencing purposes as a result of recommendation 4.11 of the Queensland Organised Crime Commission of Inquiry report dated 30 October 2015. The QSAC CEM Report was published in July 2017 and contains 16 recommendations comprised of legislative reform and changes to operational practice. The Bill contains amendments to implement recommendations 1 and 3 of the CEM Report.

The Bill implements recommendations 1 and 3 of the CEM Report by amending the PSA to:

- Ensure that the language of the PSA covers the broad types of material that may be covered by CEM-related Code offences and other similar statutory offences;
- Include additional sentencing guidelines that require a sentencing judge to consider:

[199] Submission 15, p 21.

[200] Submission 15, p 21.

[201] Submission 18, p 3.

[202] Submission 22, p 5.

[203] Submission 25, p 8.

[204] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, pp 30-31.

- An offenders conduct or behaviour with respect to CEM and child abuse objects when sentencing an offender for CEM offences; and
- Any relationship between an offender and his/her child victim; and

- Introduce a statutory power for a court to order that a report tendered at sentence be provided to Queensland Corrective Services.[205]

2.3.1 Ensuring consistency of language across CEM statutes and offences

As advised in the explanatory notes, recommendation 1 of the CEM Report noted an inconsistency between the broad Code definition of '*material'* and section 9(7)(a) of the PSA which requires a court to have regard primarily to, 'the nature of any image of a child that the offence involved, including the apparent age of the child and the activity shown'. The notes advise that:

> *"The reference to 'image' in section 9(7)(a) of the PSA is inconsistent with the broad definition of 'material' in section 207A of the Criminal Code which includes anything that contains data from which text, images or sound can be generated. Additionally, it is not entirely compatible with the types of material made unlawful by provisions of the* Classification of Computer Games and Images Act 1995, *the* Classification of Films Act 1991 *and the* Classification of Publications Act 1991."[206]

Clause 53 of the Bill purports to correct the inconsistency and apply the sentencing guidelines to the new child abuse object offences created by the Bill by amending section 9(7) of the PSA to remove the reference to an 'image of a child' and require a court to primarily have regard to:

- the nature of any material describing or depicting a child that the offence involved, including the apparent age of the child and any activity shown;
- the nature of any doll, robot or other object representing or portraying a child that the offence involved, including the apparent age of the child;
- the offender's conduct or behaviour in relation to the material, doll, robot or other object that the offence involved; and
- any relationship between the offender and the child the subject of the material, or represented or portrayed by the doll, robot or other object, that the offence involved.[207]

2.3.1.1 Submissions

Submissions were largely silent on these amendments, although Bravehearts expressed its support:

> *Bravehearts supports the clarification of definitions in Section 9(7), addressing the inconsistency by requiring a court to "consider the nature of (i) any material describing or depicting a child; or (ii) any doll, robot or other object representing or portraying a child", and also supports the inclusion of sentencing guidelines specific for child sexual exploitation material and sentencing for the use of child abuse objects for sexual gratification.*[208]

2.3.2 Additional sentencing guidelines for CEM offences

Clause 53 of the Bill amends the PSA to insert a new section 9(7)(ab) which requires a court to consider an offender's conduct or behaviour in relation to CEM or a child abuse object that is the subject of their offence. This gives effect to recommendation 1 of the CEM report which identified that an

[205] Explanatory notes, p 9.

[206] Explanatory notes, p 9.

[207] Explanatory notes, p 10.

[208] Submission 23, p 6.

examination of a CEM offender's role in relation to seized CEM may reveal important information which a court could use to help assess an offender's risk to the community.

The explanatory notes advise that while it 'is not possible to exhaustively state the matters which may fall for consideration under this provision'[209] some matters which may be relevant include:

- Search items or platforms used to obtain CEM or a child abuse object;
- The planning involved in obtaining CEM or a child abuse object;
- The offender's duration and frequency of access to CEM;
- How the offender came to the attention of law enforcement officials;
- How any CEM was stored, manipulated or shared across devices;
- Whether there is any evidence of any further dealings with the CEM or child abuse object; and
- Whether any apparent focus is shown, including a focus on a particular age group, activity, or type of material.[210]

The Bill also amends sections 9(6) and 9(7) of the PSA to implement another aspect of recommendation 1 of the CEM Report, which is that the sections be amended to include a requirement that the relationship between an offender and a child be included as a further factor to which the court must have primary regard when sentencing an offender for CEM offences and offences of a sexual nature committed against a child under the age of 16 years.[211]

2.3.2.1 Submissions

In commenting on these specific changes, Bravehearts submitted:

> *Bravehearts supports requiring judicial consideration of the relationship between an offender and a victim when sentencing, as reflected in amended sections 9(6) and 9(7) of the Penalties and Sentencing Act.*[212]

2.3.3 Provision of reports tendered at sentence to Queensland Corrective Services

Recommendation 3 of the CEM report was that sentencing judges order that any medical, psychiatric or psychological assessment or treatment reports submitted as part of CEM court cases be referred to Queensland Corrective Services to support rehabilitation efforts.[213]

Clause 54 of the Bill implements recommendation 3 by inserting a new section 195E into the PSA to authorise a sentencing court to order that a medical or other report tendered at sentence be provided to Queensland Corrective Services. Similarly, clause 69 of the Bill inserts new section 153B into the *Youth Justice Act 1991* (YJA) to provide courts imposing sentences under the YJA with the same power, to order medical or other reports tendered at sentence to be provided to the Department of Youth Justice.

[209] Explanatory notes, p 10.

[210] Explanatory notes, p 10.

[211] Explanatory notes, p 10 and p 36.

[212] Submission 23, p 7.

[213] Department of Justice and Attorney-General, correspondence dated 9 December 2019, attachment, p 10.

2.3.3.1 Submissions

Only one submission commented on these specific changes, being Bravehearts, which submitted:

> *We fully support this amendment of the Penalties and Sentencing Act, providing the court with the authority to order that reports tendered at sentencing be provided to Corrective Services or Youth Justice*.[214]

2.4 Child abuse object offences

In recent years, Australian law enforcement officers have detected in the community, life-like child replica dolls which resemble pubescent, prepubescent or very young children and are designed to be used for sexual gratification ('child sex dolls'). The Bill contains amendments to augment existing child exploitation offences to encapsulate child sex dolls and amends the Code to create new offences which criminalise the production, supply and possession of child abuse objects. The maximum penalty available for these offences is 14 years imprisonment, which increases to 20 years where the production or supply is for a commercial purpose. A court may order the forfeiture of a child abuse object even if no conviction results from a trial.[215]

2.4.1 What is a child abuse object?

Clause 11 of the Bill inserts a definition of 'child abuse object' into section 207A of the Code, that is intended to capture dolls, robots or other objects a reasonable adult would consider as being representative of, or portraying, a child or part of a child under the age of 16 years. This part of the definition may also be satisfied if a reasonable adult would consider that a doll, robot or other object gives the predominant impression that it is a representation or portrayal of a child under the age of 16 years, despite the presence of some adult-like anatomical features. The definition also requires that a reasonable adult would consider that the doll, robot or other object be intended for use in an indecent or sexual context or that it has been used in an indecent or sexual context.

2.4.2 The need for a legislative response

The AIC Paper reviewed the literature on child abuse objects and concluded:

> *Despite a lack of robust evidence in relation to child sex dolls, there is reason to suggest they may lead to societal harms through a number of different mechanisms. They may bridge the gap between fantasy and reality by allowing potential offenders to move from the virtual to the physical world, although it is currently unclear whether this intermediary step between viewing online CEM and contact child sexual offending increases the likelihood of subsequent child sexual abuse.*
>
> *It is reasonable to assume that interaction with child sex dolls could increase the likelihood of child sexual abuse by desensitising the doll user to the physical, emotional and psychological harm caused by child sexual abuse and normalising the behaviour in the mind of the abuser. At the same time, there is no evidence of therapeutic benefit from child sex doll use.*
>
> *From a societal perspective, questions have been raised over the potential for child sex dolls to lead to the objectification of children as sexual beings and the commodification of products that promise the opportunity for an adult to play out their sexual fantasies with a simulated child.*
>
> *This remains an under-researched topic. Little is currently known about the actual risk associated with child sex dolls and the extent to which they add to the risk associated with online child*

[214] Submission 23, p 7.

[215] See clause 14 and Department of Justice and Attorney-General, correspondence dated 9 December 2019, attachment, p 11.

exploitation material. However, by drawing on the limited material that is available, both theory and empirical research would appear to point towards possible areas of concern.[216]

2.4.3 New offences - supplying, producing or possessing a child abuse object

Clause 16 of the Bill provides for two new offence provisions in the Code, in new sections 228I (offence to supply or produce a child abuse object) and 228J (offence to possess a child abuse object). Each offence is punishable by a maximum of 14 years imprisonment, however where the supply and production is done for a commercial purpose, that maximum penalty is increased to 20 years.

The Bill also provides for the serious organised crime circumstance of aggravation in s 161Q of the PSA to apply to these new offences. This means that if the offence is committed while the offender is a participant in a criminal organisation, on conviction the court must impose a mandatory term of imprisonment to be served in addition to any other term of imprisonment imposed for the offence.[217]

Specific defences in clause 16 (s 228K) will apply to the new child abuse object offences to provide that a person will not be criminally responsible if they can prove that a child abuse object was possessed, supplied or produced for a genuine artistic, educational, legal, medical, scientific or public benefit purpose and the conduct was in all the circumstances reasonable for that purpose. A similar defence is available for existing CEM offences in the Code.[218]

2.4.3.1 Submissions

Among those who commented on the child abuse object offence provisions in the Bill, knowmore observed:

….we note that the mere existence and availability of child-like sex dolls is likely to be highly traumatising to survivors of child sexual abuse. For all of these reasons, knowmore considers that the amendments in Clause 16 are necessary and important. We note that the maximum penalties and defences for the new offences are consistent with those relating to similar offences regarding child exploitation material, and we consider this appropriate.[219]

knowmore also recommended all references in the Bill to 'child abuse objects' be replaced with 'child exploitation objects', suggesting that 'child exploitation objects' is a more suitable term than 'child abuse objects' as it is a broader term, more consistent with the definition's focus on objects intended for use in 'an indecent or sexual context', more consistent with the possible use of child-like sex dolls to groom children as noted in the AIC Paper, and consistent with the Code's existing use of 'child exploitation material.'[220]

In responding to this suggestion, the department advised:

DJAG notes the proposals in the submissions.

The phrase 'child abuse object' captures plainly that the things involved in the offence are representations or portrayals of children and that they are reasonably considered to be used in an indecent or sexual context.

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[216] Rick Brown and Jane Shelling, Exploring the implications of child sex dolls, *Trends & issues in crime and criminal justice no. 570*, Australian Institute of Criminology, Canberra, 2019. (www.aic.gov.au/publications/tandi/tandi570).

[217] Department of Justice and Attorney-General, correspondence dated 9 December 2019, attachment, p 11.

[218] Transcript, Public Briefing, 10 December 2019, p 4.

[219] Submission 15, p 16.

[220] Submission 15, pp 16-17.

> *Where a child abuse object is used for grooming purposes, it would be likely open that the accused person would be charged with other offences relating to their conduct which would speak to the gravity of the allegations made against them.*
>
> *Use of the phrase 'child abuse object' would be less prone to creating confusion with or being mistaken for 'child exploitation material' which is a separate defined term in the Criminal Code used in offences with a separate ambit.*[221]

Bravehearts expressed its full support for the amendments, noting:

> *Bravehearts fully supports the creation of new offences relating to the possession, production and supply of child abuse objects. We are also pleased to see the broad definition including dolls, robots or other objects used as child replicas for sexual gratification.*
>
> *Child-like sex dolls have been an increasing concern for a number of years. While we are aware that the Australian Federal Police have proactively prevented the entry of these dolls into Australia, providing legislative backing through creating offences related to child abuse objects is essential.*
>
> *As recently acknowledged in a paper through the Australian Institute of Criminology (Brown and Shelling, Exploring the implications of child sex dolls, March 2019), the argument often put forward by manufacturers and exporters of these dolls, that they have a therapeutic benefit in the prevention of abuse of children through the provision of a 'non-harmful means', has no support in research. While the evidence is still building, negative impacts of these dolls have been reported in the literature, including that they may desensitise users and normalise the sexual objectification of children. In addition, the potential use of these dolls to groom children for sexual assault and exploitation has been raised*.[222]

The Australian Christian Lobby commended the Bill for criminalising the possession, supply and manufacture of child abuse objects, and recommended the 'importation and manufacture of all such sex toys should be banned.'[223]

In response, the department advised:

> *DJAG notes that the Bill will criminalise the manufacturing of child abuse objects in Queensland. DJAG further notes that the importation of child abuse objects is an offence under section 233BAB(5) of the* Customs Act 1901 *(Cth). This offence carries 10 years imprisonment, a fine of up to 2500 penalty units, or both*.[224]

The QHRC raised concerns regarding the reversal of onus inherent in the s 228K defences to the new offences of possession, supply and production of child abuse objects. The explanatory notes justify the reverse onus of proof because matters supporting the defence would be peculiarly within the accused person's knowledge.

[221] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 4.

[222] Submission 23, p 7.

[223] Submission 9, p 4.

[224] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 2.

The key concerns of the QHRC were that the penalties imposed by child abuse object offences are a maximum of 14 years and that:

> *There may also be a more significant proof imbalance between what must be proved by the prosecution (that is, production, supply or knowing possession of a child abuse object) and what must be proved by the defence (genuine and reasonable purpose).*[225]

The QHRC questioned whether the reverse onus of proof, which places the evidential burden on the accused to raise a defence, is a justified limitation on the right to the presumption of innocence under s 32 of the HRA.[226]

In response to the concerns raised by QHRC, the department advised:

> *Part of clause 16 of the Bill provides a defence for the offences relating to a child abuse object.*
>
> *Drafted as a defence separate to the offence provisions, and consistent with the operation of defences (as distinct from excuses) contained in the Criminal Code 1899 (Criminal Code), the defendant must discharge the onus of proof to the balance of probabilities.*
>
> *The existence of the defence does not relieve the prosecution of its obligation to prove each of the elements of the offence to the higher standard of beyond a reasonable doubt. An accused person may still be acquitted without raising a defence under clause 16 of the Bill were the prosecution to fail to prove each element of the offence beyond a reasonable doubt.*
>
> *The presence and purpose of the defence including the reversal of the onus provides a defendant with an avenue to raise exculpatory matters arising outside the elements of the offence.*
>
> *To the extent that the reversal of an onus limits a right protected by section 32 of the HR Act, there is no less restrictive or reasonably available way of achieving the protection of a genuine purpose given that there are likely to be a range of matters provided for in the defence that are peculiarly within the knowledge of the defendant.*
>
> *DJAG notes that it could be argued that the need to identify a legitimate purpose for the production, supply or possession of a child abuse object outweighs the impact on the person's rights in criminal proceedings and the right to a fair hearing in the identified circumstances.*
>
> *It is noted that other simpliciter offences involving child exploitation material (to which a similar defence applies) in the Code carry a maximum penalty of 14 years imprisonment. See for example section 228C (Distributing child exploitation material); section 228D (Possessing child exploitation material); section 228DA (Administering child exploitation material website); section 228DB (Encouraging use of child exploitation material website); and, section 228DC (Distributing information about avoiding detection*).[227]

[225] Submission 8, p 9.

[226] Submission 8, p 10.

[227] Department of Justice and Attorney-General, correspondence dated 15 January 2020, attachment, p 2.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of fundamental legislative principles to the Bill and considers that clauses 13, 16, 21, 25, 28, 39, 44 and 53 raise issues of concern. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

Right to privacy of personal information – disclosure of criminal history

Clause 44 amends the Evidence Act to provide for the appointment of certain qualified persons to a panel of intermediaries.

Proposed section 21AZX empowers the chief executive, when deciding whether a person is suitable to perform the functions of an intermediary, to ask the police commissioner for a written report (including a brief description of the circumstances of any conviction or allegation), about the criminal history of the person.

A criminal history here excludes spent convictions (s 21AZX(6)).

The person must have given their prior written consent before the chief executive can seek a report.

Any report must be destroyed as soon as practicable after it is no longer needed for the purpose for which it was given (s 21AZY(4)). There is no sanction in the Bill for a failure to comply.

Issue of fundamental legislative principle

Proposed section 21AZX raises an issue of fundamental legislative principle relating to the rights and liberties of individuals, particularly regarding an individual's right to privacy with respect to their personal information.[228]

The right to privacy, and the disclosure of private or confidential information, are relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

Comment

The explanatory notes state that the provisions are considered justifiable:

> *… having regard to the functions that an intermediary performs and are necessary to promote and protect the rights, interests and wellbeing of witnesses*.[229]

[228] See *Legislative Standards Act 1992*, section 4(2)(a).

[229] Explanatory notes, p 13.

Further, any potential breach:

> *… is also balanced against the safeguards provided in the Bill which provide for the confidentiality of criminal history information, including a requirement for the chief executive to destroy the criminal history report as soon as practicable after it is no longer needed.*[230]

In considering similar provisions, committees have considered whether adequate safeguards are included in the Bill, such as whether:

- the criminal history can only be obtained with consent
- there are strict limits on further disclosure of that information
- the criminal history information must be destroyed when it is no longer required for the purpose for which it was obtained.[231]

Consideration has also been given to the extent of information covered by the term 'criminal history', including for example, whether the term extends to charges that do not result in convictions, and to 'spent' convictions, and convictions that are quashed or set aside, and convictions which are 'not recorded'.

Here, the following can be noted:

- A person's criminal history can only be obtained with their consent.
- There are limits on disclosure, and an offence for unauthorised disclosure.
- There is a requirement for destruction of the information as soon as practicable after the information is no longer needed.
- The convictions included in a criminal history *do not* extend to spent convictions.

Clause 44 inserts new section 21AZY(2) of the Bill, which goes some way to addressing confidentiality issues regarding criminal history information. This provision makes it an offence for an officer, employee or agent of the department in possession of criminal history information to directly or indirectly disclose that information to another person, unless:

- the disclosure is:
    - necessary under the Act or otherwise required or permitted by law, or
    - made with consent of the person to whom the information relates, or
    - is in a form that does not identify the person to whom the information relates
- or the information is, or has been, lawfully accessible to the public.

The maximum penalty for an unauthorised disclosure is 100 penalty units. This is commensurate with the penalty in numerous similar offence provisions in other Acts.

Conclusion

The committee is satisfied that there are sufficient protections for the privacy of the individual and there is sufficient justification for the breach of the individual's right to privacy in the Bill.

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230 Explanatory notes, p 14.

231 See for example, Transportation and Utilities Committee, Report No. 13, 55th Parliament, *Plumbing and Drainage and Other Legislation Amendment Bill 2015*, March 2016, p 24.

Any restriction on rights and liberties involved in any new offence must be warranted and penalties should be reasonable and proportionate

The Bill establishes, or expands the reach of, a number of offences and penalties. The more significant of these are discussed below.

Clause 13 replaces current section 218B of the Code, which provides for the offence of grooming a child under 16 years. The new section 218B extends the reach of the current offence to also cover conduct directed towards a person having care of a child (not just conduct directed to the child).

Clause 16 inserts sections 228I and 228J in the Code, which respectively create new offences of:

- producing or supplying a child abuse object (maximum penalty of 14 years imprisonment, or 20 years if for a commercial purpose)
- possessing a child abuse object (maximum penalty of 14 years imprisonment).

Additionally, the Bill provides that the 'serious organised crime' circumstance of aggravation in section 161Q of the PSA will apply to these new offences.[232]

Clause 25 creates two new Code offences:

- New section 229BB makes it an offence for an 'accountable person' to fail to protect a child from a child sexual offence, with a maximum penalty of 5 years imprisonment
- New section 229BC makes it an offence to fail to report knowledge of/belief in a child sexual offence, with a maximum penalty of 3 years imprisonment.

Issue of fundamental legislative principle

Proportion and relevance

The creation of new offences and penalties affects the rights and liberties of individuals.

From the perspective of the fundamental legislative principles, there are two aspects to consider.

The first is whether the restriction on rights and liberties involved in the proscription of activity through the creation of a new offence is justified.

The second is whether the level of penalties and other consequences for an offence are proportionate and relevant to the actions to which the consequences relate. A penalty should be proportionate to the offence:

> *In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.*
>
> *… Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*[233]

Comment and conclusions - Clause 13

Regarding the extended grooming offence, the explanatory notes state:

> *The effect of this expansion of the offence upon individuals' rights and liberties must be weighed against the need to ensure that legislation can adequately acknowledge and punish the full range of manipulative measures employed by offenders in attempting to gain access to a child with a*

[232] Proposed sections 228I(2) and 228J(2).

[233] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

view to sexual abuse. Relevantly, the conduct will only be captured under the offence if it is accompanied by a requisite unlawful intention to sexually abuse the child.[234]

The committee is satisfied that any breach of the rights and liberties of the individual involved in the extension of the conduct proscribed by the offence is justified.

Comment and conclusions - Clause 16

Regarding the new offences relating to child abuse objects, the explanatory notes state:

The creation of these offences is justified on the basis that the use of a child abuse object poses potential risks to the Queensland community and Queensland children.

To the extent that the rights and liberties of an individual may be curtailed by the introduction of these offences, that curtailment is justified on grounds relating to ensuring the safety of children and the community.[235]

The AIC Paper reviewed the literature on child abuse objects and concluded:

Despite a lack of robust evidence in relation to child sex dolls, there is reason to suggest they may lead to societal harms through a number of different mechanisms. They may bridge the gap between fantasy and reality by allowing potential offenders to move from the virtual to the physical world, although it is currently unclear whether this intermediary step between viewing online CEM and contact child sexual offending increases the likelihood of subsequent child sexual abuse.

It is reasonable to assume that interaction with child sex dolls could increase the likelihood of child sexual abuse by desensitising the doll user to the physical, emotional and psychological harm caused by child sexual abuse and normalising the behaviour in the mind of the abuser. At the same time, there is no evidence of therapeutic benefit from child sex doll use.

From a societal perspective, questions have been raised over the potential for child sex dolls to lead to the objectification of children as sexual beings and the commodification of products that promise the opportunity for an adult to play out their sexual fantasies with a simulated child.

This remains an under-researched topic. Little is currently known about the actual risk associated with child sex dolls and the extent to which they add to the risk associated with online child exploitation material. However, by drawing on the limited material that is available, both theory and empirical research would appear to point towards possible areas of concern.[236]

The statements in the explanatory notes address the creation of the new offences, but do not address the level of the penalties for those offences.

For some comparison, it might be observed that:

- The grooming offences in the Code attract penalties of up to 5 years (10 years if the child is under 12).
- The maximum penalty for making child exploitation material is 25 years imprisonment (if the offender uses a hidden network or an anonymising service in committing the offence) or otherwise 20 years imprisonment.[237]

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234 Explanatory notes, p 13.

235 Explanatory notes, p 13.

236 Rick Brown and Jane Shelling, Exploring the implications of child sex dolls, *Trends & issues in crime and criminal justice no. 570*, Australian Institute of Criminology, Canberra, 2019 (www.aic.gov.au/publications/tandi/tandi570).

237 Code, section 228B.

- Penalties for other various offences regarding child exploitation material, including distributing, or possessing, child exploitation material, or administering a child exploitation website, in corresponding circumstances, are 20 and 14 years imprisonment.[238]

The committee is satisfied that any breach of the rights and liberties of the individual involved in the creation of the new offences and the high penalties are justified in the circumstances.

Comment and conclusions - Clause 25

The issue of whether the restriction on rights and liberties involved in the proscription of activity through the creation of a new offence is justified is more problematic in the context of the failure to report offence created by clause 25. More specifically, the issue arises as to whether this amounts to an undue restriction on freedom of religion.

This new offence would extend to a requirement to disclose information obtained by a person in the context of a religious confession. This accords with a recommendation in the Criminal Justice Report.[239] In that report, the Royal Commission noted the concern with such a requirement:

> *Submissions to the Royal Commission argued that any intrusion by the civil law on the practice of religious confession would undermine the principle of freedom of religion. In a civil society, it is fundamentally important that the right of a person to freely practise their religion in accordance with their beliefs is upheld.*[240]

The Royal Commission noted that this right was not absolute, and must:

> *… accommodate civil society's obligation to provide for the safety of all and, in particular, children's safety from sexual abuse.*[241]

The Royal Commission considered a range of factors and arguments, including the risk of re-offending if perpetrators are not reported to police and concluded:

> *… there should be no exemption or privilege from the failure to report offence for clergy who receive information during religious confession that an adult associated with the institution is sexually abusing or had sexually abused a child.*[242]

Regarding the new Code offences criminalising conduct amounting to a failure to protect or a failure to report, the explanatory notes state:

> *This impacts on the rights and liberties of individuals, however this must be weighed against the need to protect the most vulnerable members of our community from child sexual abuse and accordingly any breach of fundamental legislative principles is considered justified.*[243]

The statements in the explanatory notes address the creation of the new offences, but do not address the level of the penalties for those offences.

The committee is satisfied that any breaches of the rights and liberties of the individual involved in the creation of the new offences and the fixing of significant maximum penalties are justified in the circumstances.

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238 Code, sections 228C, 228D, 228DA, 228DB, 228DC.

239 Criminal Justice Report, recommendation 35 at p 54. See the discussion at pp 50-54.

240 Criminal Justice Report, p 52.

241 Criminal Justice Report, p 53.

242 Criminal Justice Report, p 53.

243 Explanatory notes, p 13.

Right to a fair trial

Clause 39 modifies directions and warnings to a jury. It inserts section 132BA in the Evidence Act to provide:

- A judge in a criminal proceeding may, on the judge's own initiative or on the application of a party, give the jury a direction, if the judge is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting any subject offence.
- The mere fact of delay in prosecuting the offence does not of itself amount to a significant forensic disadvantage.
- The judge must not warn or in any way suggest to the jury that:
    - it would be dangerous or unsafe to convict the defendant, or
    - the complainant's evidence should be scrutinised with great care.

The new provision will apply to any jury proceeding, not just those involving child sexual offences.

Issue of fundamental legislative principle

The right to a fair trial is intrinsic to the rights and liberties of the individual. The purpose of jury directions is to ensure a fair trial for the accused and to avoid miscarriages of justice.

As acknowledged in the explanatory notes, it could be considered that the restriction on warning the jury can 'impact on a judge's discretion to comment on the evidence which may affect the judge's ability to ensure that the trial is fair.'[244]

The amendment gives effect to recommendations in the Criminal Justice Report that each state and territory government should review and amend their legislation regarding judicial warnings and directions.[245]

Comment

The explanatory notes state that the Royal Commission:

> *… observed that some of the directions traditionally given to juries in child sexual abuse cases are founded upon flawed presumptions about victims, including an assumption that a genuine victim will complain at the first reasonable opportunity*.[246]

The Criminal Justice Report includes this statement:

> *In some cases, we know that judges' assumptions have been far from correct. For years, judges assumed that victims of sexual offences will complain at the first reasonable opportunity. As a consequence, delay was accepted to adversely affect the complainant's credibility. The common law developed special rules for warning the jury in accordance with this assumption. Research has discredited this assumption. We now know that delay in complaint of sexual abuse is common rather than unusual, particularly in the context of child sexual abuse. Parliaments have legislated to limit or displace this erroneous assumption and the common law rules that developed from it*.[247]

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244 Explanatory notes, p 14.

245 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, 2017, pp 86-89 (in particular, Recommendation 65). Available here: https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_executive_summary_and_parts_i_to_ii.pdf

246 Explanatory notes, p 14.

247 Criminal Justice Report, p 86.

The explanatory notes conclude that any breach of fundamental legislative principles is considered justified having regard to the Royal Commission's recommendations.[248]

Conclusion

The committee is satisfied that any limit on a fair trial occasioned by the restriction on judicial warnings is justified in the circumstances.

3.1.2 Natural justice

Clause 53 effects a number of amendments to the sentencing guidelines in section 9 of the PSA, including:

- excluding good character as a mitigating factor in sentencing where that good character facilitated the child sexual offending[249]
- requiring defendants in child sexual offences and CEM offences to be sentenced in accordance with sentencing practices, standards and guidelines applicable at the time the sentence is imposed, rather than when the offence was committed.[250]

Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.[251]

Both of these amendments could be seen as being inconsistent with the principles of natural justice.

Comment

The amendment regarding 'good character' accords with recommendations in the Criminal Justice Report.[252] In relation to this amendment, the explanatory notes state the breach of fundamental legislative principles is justified:

> … [to] *prevent offenders from benefiting from their previous good character where those factors assisted the offender to commit a child sexual offence. Preventing offenders relying on good character in this way reforms sentencing practice to align with contemporary community standards and affords justice and dignity to victims rather than rewarding offenders for a factor enabling their offending behaviour.*[253]

In relation to the amendment regarding which sentencing standards to apply, the explanatory notes state the breach of fundamental legislative principles is justified:

> *… given that the amendment is intended to better reflect the contemporary community attitude toward this type of offending through the imposition of current sentencing standards. Additionally, to mitigate impacts on procedural fairness and natural justice, the amendments do not affect the maximum penalty applying at the time the offence was committed.*[254]

Conclusion

The committee is satisfied that any breaches of fundamental legislative principle involved in these amendments are justified in the circumstances.

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248 Explanatory notes, p 14.

249 Proposed section 9(7AA).

250 Proposed section 9(4)(a).

251 *Legislative Standards Act 1992*, section 4(3)(b).

252 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, 2017, pp 98 and following.

253 Explanatory notes, p 17.

254 Explanatory notes, p 17.

3.1.3 Reversal of the onus of proof

In accordance with s 4(3)(d) of the LSA, whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification. Clauses 16 and 25 of the Bill raise issues in this regard.

Clause 16

Clause 16 inserts new section 228K in the Code to provide for a defence to charges under the new child abuse object offences in sections 228I and 228J of the Code. It is a defence if the person charged proves both that:

- the person engaged in the conduct that is alleged to constitute the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose;
- the person's conduct was, in the circumstances, reasonable for that purpose.

Whether conduct was engaged in for a specified purpose is a question of fact.

Issue of fundamental legislative principle

By requiring a defendant to prove that conduct that was engaged in was reasonable and for a genuine specified purpose, section 228K involves a reversal of the onus of proof.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[255]

Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence:

> *For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.*[256]

Generally, in criminal proceedings:

- the legal onus of proof lies with the prosecution to prove the elements of the relevant offence beyond reasonable doubt; and
- the accused person must satisfy the evidential onus of proof for any defence or excuse he or she raises and, if the accused person does satisfy the evidential onus, the prosecution then bears the onus of negativing the excuse or defence beyond reasonable doubt.[257]

Comment

The defence is fairly broadly drafted. There is a similar defence for various existing offences in the Code, including CEM offences. (See section 223(4) for the offence of distributing intimate images and section 228E(2) for the various CEM offences set out in sections 228A to 228DC.)

The explanatory notes state:

> *The reversal of the onus is justified on the basis that matters supporting the defence would be peculiarly within an accused person's knowledge, particularly those matters which would inform*

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255 *Legislative Standards Act 1992*, section 4(3)(d).

256 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

257 See Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reversal of onus of proof,* p 3, at legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf

consideration of whether a purpose was a genuine one and also a consideration of the reasonableness of the conduct against that genuine purpose.[258]

Conclusion

The committee is satisfied that the breach of fundamental legislative principle involved in the reversal of the onus of proof is justified in the circumstances.

Clause 25

Clause 25 inserts new section 229BC in the Code to provide for an offence of failure to report information reasonably giving rise to a belief that a child sexual offence has been committed.

The offence applies if certain elements are satisfied and if the person fails to disclose the information to police as soon as reasonably practicable 'without reasonable excuse'.

Issue of fundamental legislative principle

With an offence being committed by certain actions 'without reasonable excuse' section 229BC in effect contains a reversal of the onus of proof. The person bears the onus of proof to show that they had a reasonable excuse.

(The general commentary under the issue of fundamental legislative principle considered immediately above is of relevance in this context as well.)

Such 'reasonable excuse' provisions are discussed in some detail in the Office of the Queensland Parliamentary Counsel (OQPC), *Principles of good legislation: Reversal of onus of proof.* That discussion starts with the following:

If legislation prohibits a person from doing something 'without reasonable excuse' it would seem in many cases appropriate for the accused person to provide the necessary evidence of the reasonable excuse. While there is no Queensland case law directly on point, the Northern Territory Supreme Court has held that the onus of proving the existence of a reasonable excuse rested with the defendant on the basis that the reasonable excuse was a statutory exception that existed as a separate matter to the general prohibition … That approach is consistent with the principles used to determine whether a provision contains an exception to the offence or whether negativing the existence of the reasonable excuse is a matter to be proved by the prosecution once the excuse has been properly raised …

… [It] is understood that in Queensland, 'reasonable excuse provisions' are drafted on the assumption that the Justices Act 1886*, section 76 will apply and place both the evidential and legal onus on the defendant to raise and prove the existence of a reasonable excuse. On the other hand, … departments have often taken the view in their Explanatory Notes that a provision containing an exemption where a reasonable excuse exists is an excuse for which only the evidential onus lies with the accused.*[259]

The OQPC discussion concludes:

It seems likely that in most cases a reasonable excuse will constitute a statutory exception to be proved by the defendant. However, in the absence of an express statement as to the allocation of the onus, the question will ultimately need to be determined by a court having regard to the established rules of statutory interpretation.[260]

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258 Explanatory notes, p 15.

259 See Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reversal of onus of proof,* p 25, at legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf

260 Office of the Queensland Parliamentary Counsel, *Principles of good legislation: Reversal of onus of proof*, p 26.

In the present case, the explanatory notes state:

> *The effect of the reasonable excuse provision in the new section 229BC (Failure to report belief of child sexual offence committed in relation to child) is to reverse the onus of proof to the defendant.*[261]

Often, the reversal of the onus of proof in such a provision could be considered to be justified on the basis that establishing the defence would involve matters which would be peculiarly within the defendant's knowledge or on which evidence would be available to them. The OQPC has noted:

> *Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.*
>
> *For example, if legislation prohibits a person from doing something 'without reasonable excuse', it is generally appropriate for a defendant to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the case for the prosecution.*[262]

In relation to the proposed section 229BC, the explanatory notes state:

> *The offence anticipates that information that would ground a reasonable belief that a sexual offence has occurred and triggers the obligation to report, will often be gained in clandestine circumstances. This unique aspect of the offence means that there are likely to be a range of matters that are peculiarly within the knowledge of the accused person. In these circumstances the defendant would be in a better position than the prosecution to meet the evidential burden. The 'reasonable excuse' provision is included to ensure liability for the failure to report offence would not be unjustly imposed given the complexity and unpredictability of the situations likely to arise.*[263]

Conclusion

The committee considers that any breach of fundamental legislative principle involved in the reversal of the onus of proof in this 'reasonable excuse' provision is sufficiently justified in the circumstances.

3.1.4 Retrospective operation

In accordance with s 4(3)(g) of the LSA, whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

Clauses 21 and 28 contain a number of transitional provisions, some of which could be seen as involving some retrospective application.

Clause 21 inserts sections 746 to 748 in the Code, which have the effect that the offence of maintaining a sexual relationship with a child in section 229B in the Code will have retrospective operation. The provisions are complicated in their wording. The explanatory notes succinctly summarise the retrospective effects of the provisions:

> *The Bill amends the Criminal Code to retrospectively apply the offence in section 229B to unlawful sexual acts committed prior to the inception of the offence in 1989, including the maximum penalties that applied at that time.*

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261 Explanatory notes, p 16.

262 See the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook,* p 36.

263 Explanatory notes, p 16.

> *The Bill also amends the Criminal Code to apply the offence in section 229B to unlawful sexual acts committed post 1989, except the maximum penalty* [to be] *applied* [will be] *those maximum penalties in place at the time the offence was committed.*[264]

Clause 21 also removes retrospectively certain limitation periods for the offences in the now repealed section 212 and section 215 (unlawful carnal knowledge with a child) of the Code.

Clause 28 contains a transitional provision regarding the new 'failure to report' offence created in the new section 229BC of the Code (considered above).

Section 229BC will mandate the reporting of information gained on or after the commencement. Clause 28 inserts new section 751 of the Code to provide that this information may relate to offending that is reasonably believed to have occurred prior to commencement.

Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect the rights and liberties, or impose obligations retrospectively.[265]

> *Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively*.[266]

> *The retrospective imposition of a liability to pay a penalty, in particular a criminal penalty, is one of the most objectionable things that can be provided for in legislation.*[267]

Section 20C of the *Acts Interpretation Act 1954* provides that if an Act makes an act or omission an offence, the act or omission is only an offence if committed after the Act commences. Additionally, if an Act increases a penalty relating to an offence, the increase applies only to an offence committed after the Act commences.

Section 11 of the Code provides:

- A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.
- If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law.

Comment

Regarding the impacts of clause 21 on section 229B, the explanatory notes state:

> *This approach recognises that persistent sexual abuse of children commonly results in the child being unable to distinguish between particular episodes of abuse, especially if the conduct is the same or similar on all occasions and reflects the delays in reporting associated with child sexual abuse. Retrospective application of the maintaining offence ensures a consistency across all time*

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264 Explanatory notes, p 16.

265 *Legislative Standards Act 1992*, s 4(3)(g).

266 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 55.

267 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 57.

periods and appropriately affords victims of historic abuse the same access to justice as all other victims of persistent child sexual abuse.[268]

Regarding the impacts of clause 21 on the limitation periods for the offences in the now repealed section 212 and in section 215, the explanatory notes state:

The amendments are considered justified in that they enable potential survivors of historical child sexual abuse to access justice and ensures that justice is seen to be done by the broader community. Additionally, this breach is mitigated by the safeguard available to the defendant through making a stay application to protect against any abuse of process or in circumstances where they cannot receive a fair trial.[269]

As to the possible impact of these changes, the explanatory notes state:

It is impossible to predict the number of prosecutions that might flow from this proposal but it is anticipated that this amendment will have limited application and will not necessarily equate to a significant increase in previously barred prosecutions. As noted by the Royal Commission, there are a number of competing factors that prevent the prosecution of older offences associated with the passage of time including the deterioration of evidence and the death of perpetrators.[270]

Finally, regarding clause 28, the explanatory notes, acknowledging the partial retrospective operation of the proposed failure to report offence, offer this justification:

This partial retrospective application of the offence is justified when balanced against the need for community protection. Child sex offenders victimise one of the most vulnerable groups in the community. Given children are generally unequipped to protect themselves from such predation, it is incumbent on the community to take steps to provide adequate protection from harm to these children by ensuring that offenders are identified and brought to justice.[271]

Conclusion

The committee considers that any breach of fundamental legislative principle involved in the retrospective operation of these various provisions is sufficiently justified, having regard to the policy intent behind the provisions.

3.1.5 Delegation of legislative power

Section 4(4)(a) of the LSA provides that whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

Clause 44 inserts:

- new section 21AZL to allow for the appointment of an intermediary for certain prosecution witnesses, including a witness of a class prescribed by regulation,
- new section 21AZV(2) to allow for specified matters relating to the suitability of a person to perform the functions of an intermediary to be prescribed by regulation.

[268] Explanatory notes, p 16.

[269] Explanatory notes, p 16.

[270] Explanatory notes, p 17.

[271] Explanatory notes, p 17.

Issue of fundamental legislative principle

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the legislation allows for the delegation of legislative power only in appropriate cases and to appropriate persons.[272]

Comment

This matter is concerned with the level at which delegated legislative power is used. The greater the level of potential interference with individual rights and liberties, or the institution of Parliament, the greater will be the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.[273]

Regarding prescribing a class of witness, the explanatory notes state:

> *… any breach is justified given that the Bill supports the establishment of a limited pilot intermediary scheme. During the pilot or possible future expansion, it could become apparent that an additional class (or classes) of vulnerable witnesses need an intermediary to help them.*[274]

Regarding prescribing matters about the suitability of persons to be intermediaries, the explanatory notes state:

> *Any breach of fundamental legislative principles is justified given that these provisions are intended to ensure appropriate standards are in place for intermediaries who work with vulnerable witnesses, including children.*[275]

In relation to both aspects, as the explanatory note observe, provision for certain matters to be prescribed by regulation provides flexibility. At the same time, any such regulation will be required to be tabled and subject to disallowance.[276]

Conclusion

In the circumstances, the committee is satisfied that these are matters suitable for prescription by regulation and accordingly, the provisions have sufficient regard to the institution of Parliament.

3.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

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272 *Legislative Standards Act 1992*, section 4(4)(a).

273 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 145.

274 Explanatory notes, p 18.

275 Explanatory notes, p 18.

276 Explanatory notes, p 18.

Appendix A – Submitters

Sub #	Submitter
001	Confidential
002	Maurice Blackburn Lawyers
003	Children & Young People Solutions
004	Queensland Family & Child Commission
005	Queensland Advocacy Inc.
006	Queensland Catholic Education Commission
007	Women's Legal Service Qld
008	Queensland Human Rights Commission
009	Australian Christian Lobby
010	Archbishop Mark Coleridge, Archbishop of Brisbane
011	PeakCare Queensland Inc.
012	Anglican Church Southern Queensland
013	Australia's National Research Organisation for Women's Safety
014	Lara Byrnes
015	knowmore
016	Name suppressed
017	Life Without Barriers
018	Centre Against Sexual Violence
019	Marie Keen
020	Nicole Elliott
021	Family Law Practitioners' Association of Queensland
022	Brisbane Rape and Incest Survivors Support Centre
023	Bravehearts Foundation Ltd
024	Helen Connell
025	Queensland Law Society
026	Youth Advocacy Centre Inc.

Appendix B – Officials at public departmental briefing

Department of Justice and Attorney-General

- Ms Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Ms Julie Rylko, Director, Strategic Policy
- Ms Jo Hughes, Principal Legal Officer, Strategic Policy
- Mr Justin O'May, Principal Legal Officer, Strategic Policy

Appendix C – Witnesses at public hearing

Queensland Catholic Education Commission

- Dr Lee-Anne Perry AM, Executive Director
- Chris Woolley, Chief Operating Officer

Australia's National Research Organisation for Women's Safety

- Michele Robinson, Director, Evidence to Action
- Jackie McMillan, Project Officer, Evidence to Action

knowmore

- Anna Swain, Assistant Principal Lawyer
- Lauren Hancock, Law Reform and Advocacy Officer

Queensland Human Rights Commission

- Neroli Holmes, Acting Queensland Human Rights Commissioner
- Sean Costello, Principal Lawyer

Queensland Law Society

- Luke Murphy, QLS President
- Ken Mackenzie, Deputy Chair Criminal Law Committee
- Kerryn Sampson, QLS Policy Solicitor