



Queensland
Human Rights
Commission

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

**Submission
to
Legal Affairs and Community Safety Committee,
Queensland Parliament**

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Introduction

1. The Queensland Human Rights Commission (**the Commission**) has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* (**HRA**) to promote understanding, acceptance and discussion of human rights in Queensland, and to provide information and education about human rights.
2. In making these submissions, the Commission does not propose to consider each provision and its compatibility with human rights, but rather to provide broad analysis and draw the Committee's attention to human rights of particular relevance.
3. This submission refers to findings and detailed discussion in:
 - a. Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report* (2017) (**Criminal Justice Report**);
 - b. Queensland Sentencing Advisory Council Classification of child exploitation material for sentencing purposes: Final report (July 2017) (**CEM report**).
4. The Commission is generally supportive of the proposed amendments, most being in implementation of recommendations from the Criminal Justice Report and the CEM Report, and in furtherance of the rights of children to protection provided for by s 26(2) HRA.

Retrospective laws – Clauses 17, 21, 25 and 53

5. A number of amendments result in the application of criminal offences retrospectively.
6. Section 35(1) HRA provides that a person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. Like all human rights under the HRA, this right can be subject to necessary and proportionate limits for a legitimate purpose under s 13 HRA. However, article 15 of the *International Covenant on Civil and Political Rights*, upon which s 35 is modelled, is not subject to a general limitations clause.
7. In this Bill:
 - a. Clauses 17 and 21 allow for the retrospective application of s 229B (Maintaining a sexual relationship with a child) of the *Criminal Code*, which changes the way unlawful conduct can be charged. For example, s 229B makes the 'relationship' the offence and requires

proof beyond reasonable doubt of an unlawful sexual relationship, rather than the commission of particular sexual acts;

- b. Clause 21 abolishes limitation periods for certain historical offences, bringing them into line with current child sexual offences which have no limitation periods; and
 - c. The new failure to report offence under s 229BC, proposed in clauses 25 and 28, only applies to a failure to report information gained after commencement, but the information may concern conduct occurring before commencement.
8. Such amendments, which do not make previously lawful conduct unlawful, have been found not to engage the right against retrospective criminal laws. The European Court of Human Rights has stated:

47. The principle of non-retroactivity is infringed in cases of retroactive application of legislative provisions to offences committed before those provisions came into force. It is prohibited to extend the scope of existing offences to acts which previously were not criminal offences. However, there is no violation of Article 7 where the acts in question were already punishable under the Criminal Code applicable at the material time – even if they were only punishable as an aggravating circumstance rather than an independent offence - (... provided that the penalty imposed does not exceed the maximum laid down in that Criminal Code) or where the applicant's conviction was based on the international law applicable at the material time¹

9. It is understood that the proposed amendments ensure that maximum penalties for the offences do not exceed the maximum penalties that may have been imposed if the offender had been charged at the time of the offending behaviour.
10. Clause 21 also provides, consistent with the right not to be tried or punished more than once under s 34 HRA, that s 229B (Maintaining a sexual relationship with a child) cannot be applied retrospectively to someone who has already been charged in relation to the conduct, irrespective of whether the charge was finally dealt with.
11. Even if human rights were limited by the retrospective application of these laws, the underlying purpose and rationale for these provisions as described in the Criminal Justice Report, the right to protection of children, and continuing safeguards for defendants such as the presumption of innocence and right to a fair trial, are likely to result in a finding that the

¹ European Court of Human Rights *Guide on Article 7 of the European Convention on Human Rights - No punishment without law: the principle that only the law can define a crime and prescribe a penalty* (31 Aug 2019)

limitation is proportionate and therefore compatible with the defendant's human rights.

Contemporary sentencing standards – clause 53

12. Section 35(2) HRA provides that a penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

13. In the case of *Stalio v The Queen* [2012] VSCA 120, the sentencing judge was required under s 5(2)(b) the *Sentencing Act 1991* (Vic) to have regard to 'current sentencing practice' in relation to child sexual abuse occurring in the 1970s and early 1980s. The Court of Appeal found that while this referred to practices at the time of sentencing, it was still relevant to consider sentencing practice at the date of the offence when sentencing occurs many years later:

53. The principle of equal justice requires that regard be had to sentencing practices at the date of the offence when sentencing occurs after a substantial lapse of time. In *Lowe*, [(1984) 154 CLR 601] Mason J stated:

Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community. (citation omitted)

54. It would be wrong for a prisoner to be sentenced to a substantially higher sentence than an offender who committed like offences at or about the time of the offences in issue, simply because of the lapse of time.

14. In *R v Wruck* [2014] QCA 39 the Queensland Court of Appeal considered whether a limitation on sentencing discretion inserted in 2010 should have retrospective application to offences committed in 1982 and 1983. The provision in question was that an offender of a child sexual offence must serve an actual term of imprisonment, unless there are exceptional circumstances.² Considering the authorities, including *Stalio*, the Court found that the provision could not be retrospectively applied to the applicant's case. Notwithstanding, the Court of Appeal reached the same conclusion as the sentencing judge regarding length of sentence despite applying a different approach.

15. Clause 53 of the Bill, like under the Victorian *Sentencing Act*, proposes to expressly make contemporary sentencing standards applicable, rather

² *Penalties and Sentences Act 1992*, s 9(4)(b)

than those that existed at the time of the offence. This will also mean that existing s 9(4)(b) of the *Penalties and Sentences Act*, which requires a sentence of actual imprisonment be imposed on a child sex offender, will have retrospective application.

16. As identified by the Explanatory Notes, the purpose of this amendment is to implement recommendation 76 of the Criminal Justice Report. The Report gives careful consideration of potential unfairness to the offender and the principle against retrospectivity, as balanced against the rights of child victims, contemporary views about the damage these offences can cause victims, and maintaining public confidence in the judicial system. Further, offenders should not benefit from the vulnerable person's delay in making a complaint. The Report notes overseas jurisprudence that has found that sentencing, provided it does not exceed the maximum sentence applicable at the time the offence occurred, does not contravene the right against retrospectivity under article 7 of the *European Convention on Human Rights*. In fact, England and Wales, where the Convention is in force, has adopted the contemporary standards approach to sentencing.
17. The Committee should consider whether the findings of the Criminal Justice Report or other matters tip the balance in favour of limiting a defendant's rights by applying contemporary sentencing standards, notwithstanding the decision of *Stalio*. The Queensland amendment does not affect maximum penalties applying at the time the offence was committed.

New offences in relation to failure to report and protect – clause 25

18. Clause 25 inserts two new offences into the Criminal Code in relation to:
 - a. an adult associated with an institution who fails to reduce or remove risk of a sexual offence to a child where the alleged offender and the child are associated with the institution, s 229BB *Criminal Code* (**failure to protect**); and
 - b. any adult who fails to report to the police a belief that a child sexual offence has been or will be committed, s 229BC *Criminal Code* (**failure to report**).
19. In both cases, the proposed sections specifically provide that knowledge received during or in connection with a religious confession is not exempt.
20. Any proposal which creates a new criminal offence necessarily engage human rights, for example, the right to liberty and security of a person under s 29 HRA. The potential to increase the burden on public resources

is also a relevant consideration. Any new offence must therefore have a clear legitimate purpose and be only as broad as needed to achieve that purpose to be compatible with human rights.

21. The Criminal Justice Report provides the following reasons for the introduction of a failure to report offence at p 49:

These reasons recognise the great harm that child sexual abuse can cause to victims. 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 subsequent generations. These reasons also recognise that, unlike other categories of crime, child sexual abuse is often not reported and stopped at the time of the abuse because the child victims face such difficulties in disclosing or reporting the abuse. When a perpetrator is not discovered and stopped from abusing a child, they may continue to abuse that child and other children.

22. The failure to protect offence is justified as a mechanism to prevent child sexual abuse, rather than reporting abuse that has already occurred, and places responsibility on the appropriate persons within institutions to protect children in their care from sexual abuse.³

Religious confession

23. 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.
24. 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.
25. The Australian Capital Territory (**ACT**) also considered this issue at length when implementing similar criminal provisions in a report by Justice Dodds-Streeton (**ACT Report**)⁴ In recommending that information

³ Criminal Justice Report, pp 55-56

⁴ 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 sea* (14 Jan 2019)

disclosed in connection with religious confession not be exempt, the ACT Report states:

189 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.

26. Adopting these reasons, 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.

Reporting obligations apply to all adults

27. The failure to report offence goes beyond the recommendations in the Criminal Justice Report, which limits reporting obligations to those adults associated with an institution.
28. In recommending that the reporting obligation apply to all adults, the ACT Report noted:

270 ...However, we remain of the view that the definitional difficulties associated with the limited institutional context of the Royal Commission model offence (in addition to the associated complex and potentially draconian mental element) are likely to render the provision ineffective in practice. (This is especially likely in relation to religious organisations, which were of particular concern to the Royal Commission). While it may be possible to draft a simplified version of the Royal Commission model offence and to alter the mental element, significant problems are likely to be intractable.

...

272 Finally, broadening the ranks of potential reporters may better promote the goal of child protection. ...

29. Failure to report is not an offence if there is 'reasonable excuse'. While this carries a reverse onus of proof, discussed below, this broad defence

helps balance out any concerns regarding a reporting offence that applies to all adults.

Duplication of reporting

30. It is a reasonable excuse to not report a child sexual offence if the person has already reported the information, or believes on reasonable grounds that another person has or will do so, under the mandatory reporting regimes under the *Child Protection Act 1999*, *Education (General Provisions) Act*, or the *Youth Justice Act 1992*.
31. The ACT Report considered that the different purposes and triggers of the mandatory reporting regimes gave reason not to include the defence. On the other hand, it agreed that criminal liability should not be imposed on a person, who has already reported to one government agency, for failure to report to another agency. The ACT Report recommended the defence, but only if supported by well-managed report sharing between agencies to ensure the objectives of each reporting regime, and more importantly the safety of children, were met.⁵
32. This Commission adds that any information sharing regime between entities must take into account a person's right to privacy under s 25 HRA. This may require adequate safeguards against improper disclosure of personal information, and clear, publicly available guidelines as to when and how information will be shared.

Reverse onus of proof – clauses 25 and 16

Defence to failure to report – clause 25

33. As noted above, clause 25 inserts a new offence under s 229BC for failure to report to the police a belief that a child sexual offence has been or will be committed. The provision places the evidential burden on the accused to raise a 'reasonable excuse' for the failure to report. The legal burden remains with the prosecution to prove beyond reasonable doubt that the information gained by the accused caused, or ought reasonably to have caused, the belief that a child sexual offence is being or has been committed against a child.
34. Section 32 HRA provides a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. In Australian common law, fundamental to the presumption of innocence is the burden of proof on the prosecution to prove a person's guilt beyond

⁵ Ibid at [56] to [68]

reasonable doubt. The Parliamentary Joint Committee on Human Rights has stated:

2.10 An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as 'a reverse burden', with regard to the existence of some fact engages and limits the presumption of innocence. This is because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.

2.11 ... Reverse burden offences will be likely to be compatible with the presumption of innocence where they are shown by legislation proponents to be reasonable, necessary and proportionate in pursuit of a legitimate objective. Claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent.⁶

35. In this case, the Explanatory Notes state that there are likely to be a range of matters that are peculiarly within the knowledge of the accused, and who would be in a better position than the prosecution to meet the evidential burden. Almost all of the reasonable excuses listed in s 229BC rely on what the accused believes, for example, where the adult believes on reasonable grounds that the information has already been disclosed to the police.

Defence to child abuse object offences – clause 16

36. Clause 16 creates two new offences under ss 228I and 228J of the *Criminal Code* to produce, supply or knowingly possess a child abuse object. Under s 228K, it is a defence if the person can prove they engaged in the conduct for a genuine artistic, education, legal, medical, scientific or public benefit purpose and the conduct was reasonable for that purpose.
37. Again, the Explanatory Notes justify the reverse onus of proof as matters supporting the defence would be peculiarly within the accused person's knowledge.
38. However, unlike the failure to report offence, the penalties imposed by child abuse object offences are substantially higher, being a maximum of 14 years (compared to a maximum of 3 years). 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).

⁶ Parliamentary Joint Committee on Human Rights *Human rights scrutiny report: Thirty-third report of the 44th Parliament* (2 Feb 2016)

39. Further justification for the reversal of onus may be required by the Committee to ensure the presumption of innocence in this case has not been breached.

Conclusion

40. In summary, the Commission is generally supportive of the proposed amendments but makes the following suggestions to ensure human rights are appropriately considered:
- a. In relation to clause 53, the application of contemporary sentencing standards for offences that occurred many years ago means that a greater penalty may be imposed than if the person had been sentenced at the time the offence was committed, in limitation of s 35(2) HRA. The Committee should consider whether this limitation is justified, having regard to the findings in the Criminal Justice Report, the right of every child to protection, the decision in *Stalio v The Queen* [2012] VSCA 120, and any other matters.
 - b. In relation to clause 25, any reporting and information sharing frameworks between entities to ensure the efficacy of mandatory reporting regimes must take into account an individual's right to privacy under s 25 HRA. This may include adequate safeguards against improper disclosure of personal information and clear, publicly available guidelines as to when and how information will be shared.
 - c. In relation to clause 16, which creates new child abuse object offences, the Committee should consider 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 HRA. Regard needs to be had to the maximum penalty of 14 years that can be imposed, and the 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).