Response by Catholic Dioceses in New South Wales to the Royal Commission's Criminal Justice Report and NSW Government's Discussion Paper on Strengthening Child Sexual Abuse Laws in NSW

1. This submission is on behalf of the following Catholic Dioceses in New South Wales:

   - Archdiocese of Canberra and Goulburn (partially located in NSW and partially located in the Australian Capital Territory);
   - Archdiocese of Sydney;
   - Diocese of Armidale;
   - Diocese of Bathurst;
   - Diocese of Broken Bay;
   - Diocese of Lismore;
   - Diocese of Maitland-Newcastle;
   - Diocese of Parramatta;
   - Diocese of Wagga Wagga; and
   - Diocese of Wilcannia-Forbes.

   (**NSW Dioceses**).

2. The NSW Dioceses welcome the opportunity to provide this submission to the NSW Government in response to the release of the discussion paper "Strengthening Child Sexual Abuse Laws in NSW" (**Discussion Paper**) relating to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in its recent Criminal Justice Report (**Criminal Justice Report**).

3. The bishops of the NSW Dioceses are committed to child protection and to justice for survivors. In NSW, there has been a very close working relationship between the dioceses and State institutions protecting children, such as the NSW Ombudsman.

4. The recommendations of the Royal Commission are acknowledged by all of the bishops of the NSW Dioceses to be important groundwork for the development of public policy and legislation to deliver the continuous improvement in child protection that our entire community rightly expects. Through the Truth Justice and Healing Council, the bishops of the NSW Dioceses have extensively co-operated with, and made several policy submissions to, the Royal Commission. With the rest of the Catholic Church in Australia, the bishops of the NSW Dioceses have a strong commitment to ensuring that child safety plays a prominent role in all activities where children may be present.

5. This paper responds to the questions in Part 10 of the Discussion Paper relating to the introduction of specific offences of failing to protect and failing to report.

The NSW Province of the Catholic Church

6. The Catholic Church is complex and diverse. It comprises diverse groups of dioceses, religious institutes and societies of apostolic life, as well as networks of lay organisations, that are each juridically separate. There is no one leader of the Catholic Church in Australia.

7. A diocese is generally a territorial or geographical unit of administration. There are 28 dioceses in Australia with defined geographical areas. There are other dioceses in Australia that are not geographically defined but are for special categories of people, such as the Military Ordinariate. Dioceses are independent of each other and are under the authority of a bishop (or, in the case of an archdiocese, an archbishop). The bishop of each diocese has the Pope as his superior.

8. The Province of Sydney and Archdiocese of Canberra Goulburn (**NSW Province**) comprises the 11 dioceses geographically located in New South Wales, 10 of which are making this submission.

9. It is noted that Eastern Rite Churches in New South Wales are separate Catholic entities with their own jurisdiction unrelated to the 11 dioceses of the NSW Province.

10. As set out above, each archdiocese is under the jurisdiction of an archbishop. Each diocese is under the jurisdiction of a bishop. Whilst each archbishop and bishop governs his diocese, they come together as a Province. In NSW Province, the bishops seek to work collectively in relation to policy decisions that affect all NSW Province dioceses and to promote common pastoral action in the NSW/ACT region.

A Duty to Report

11. The Criminal Justice Report of the Royal Commission has made a number of recommendations, which are set out below (**CJR Recommendations**).

CJR Recommendation

> 32. Any person associated with an institution who knows or suspects that a child is being or has been sexually abused in an institutional context should report the abuse to police (and if relevant in accordance with any guidelines the institution adopts in relation to blind reporting under recommendation 16).

Overview

Question
Q23. Should the Royal Commission's model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?
Q24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?
Q25. Should protection be afforded to people who make disclosures of child sexual abuse?

12. The NSW Dioceses support the existence of a legal duty to report serious crime in New South Wales, including child sexual abuse.

13. The duty to report should apply across society and be designed to protect all children in New South Wales, not just those abused in an institutional context.

14. The duty should be subject to recognised exceptions such as a defence of reasonable excuse and religious confession. The obligation should not be retrospective, having regard to the obligations that already exist under section 316 of the *Crimes Act 1900* (NSW) (**Crimes Act**)

15. The duty should be breached in circumstances of actual knowledge or suspicion, but not in the absence of the relevant person actually forming those states of mind.

CJR Recommendation

33. Each state and territory government should introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context as follows:

    a. The failure to report offence should apply to any adult person who:

        i. is an owner, manager, staff member or volunteer of a relevant institution – this includes persons in religious ministry and other officers or personnel of religious institutions

        ii. otherwise requires a Working with Children Check clearance for the purposes of their role in the institution

        but it should not apply to individual foster carers or kinship carers.

    b. The failure to report offence should apply if the person fails to report to police in circumstances where they know, suspect, or should have suspected (on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect), that an adult associated with the institution was sexually abusing or had sexually abused a child.

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

d. If the knowledge is gained or the suspicion is or should have been formed after the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:

i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years).

ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either: still associated with the institution known or believed to be associated with another relevant institution.

iii. The knowledge gained or the suspicion that is or should have been formed relates to abuse that may have occurred within the previous 10 years.

e. If the knowledge is gained or the suspicion is or should have been formed before the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:

i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years) and is still associated with the institution (that is, they are still in the care, supervision or control of the institution).

ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either: still associated with the institution known or believed to be associated with another relevant institution.

Institution specific or general application

16. It is noted that s 316 of the Crimes Act already contains a duty to report knowledge or belief of serious indictable offences to the police or relevant authority. As this provision is understood by the NSW Dioceses, there is already an obligation in New South Wales to report child sexual abuse. Historically, s 316 of the Crimes Act appears to have been an underutilised provision with respect to all types of crimes, not only child sexual abuse.

17. CJP Recommendation 33 recommends an additional duty to report in Australian States, breach of which is a criminal offence, which is to apply to all institutions save for individual foster carers or kinship carers. That duty is proposed to extend to all volunteers within such institutions, and indeed all 'personnel' of religious institutions.

18. That casts a wide net indeed. Presumably the duty to report would extend to a parent who attended to help out at a scout jamboree, to a time-keeper at a local sporting club, to the organiser of a church fete, to surf lifesavers paid or unpaid, and so on and so forth. If those persons knew, suspected or should have suspected that there was someone within the institution they were associated with who might have abused a child, they would have a duty to report to police. As a matter of policy, there is no reason why such a duty should apply to institutions but not to the public generally. So, for example, if a person knew that a child was being abused by an adult, there is no logical rationale for imposing a duty to report if the person was associated with an institution but not if they had no such connection. Either way, the child needs protection. The importance of a duty of general application is borne out by the evidence of an eminent psychiatrist who told the Royal Commission that the sexual abuse of children in institutions (not just religious but all institutions) accounts for 10 to 15% of all cases of child sexual abuse.[1] If this figure is even close to the position in Australia, it underscores the need for law reform to consider **all** children at risk of harm.

19. The logical inference to draw from the recommendation's limited scope is that the Royal Commission could not recommend a duty to report which applied to the general public because such a recommendation was beyond its remit and terms of reference. However, if the legislature accepts that a specific duty to report should be enacted, it should be of general application and not limited merely to persons relevantly connected to an institution.

20. The conceptual difficulties in an institution-only offence may be illustrated by example. Sue is a volunteer at the local tennis club and umpires the under 15 tennis on Saturdays (assume the club is an institution within the legislative definition). John is an adult who coaches the under 15s. Chris is John's nephew who plays in the squad coached by John. Sue suspects Chris is being abused by his uncle John.

21. The proposed offence would make it a crime if Sue did not report her suspicion to police. If, however, John did not coach the tennis team and had no club involvement, Sue would have no duty to report even if she was certain John was abusing his nephew. The criminal law should be developed by sound principle, and ought not turn on matters of happenstance.

[1] See statement of Dr Evans in Case Study 28 (STAT.0872.001.0001) at [108] and his oral evidence at T16190-16191. Dr Evans is an experienced psychiatrist, having practised in many institutions including Callan Park Hospital, Rozelle; Caritas Centre, St Vincent's Hospital, Darlinghurst; Department of Psychiatry, St Vincent's Hospital, Melbourne; Prior Hospital, Roehampton, London; the Melbourne Clinic, Richmond (Vic); and the Department of Psychiatry, the Austin Hospital, Heidelberg. He is also a Fellow of the Royal Australian and New Zealand College of Psychiatrists.

22. In summary, any proposed duty to report should not be limited to persons associated with institutions because:

    a. a law of general application would provide greater protection to children.

    b. if the duty was targeted towards persons involved in institutions that may have the unintended consequence of discouraging citizens from engaging in their community or exercising civic responsibilities.

    c. to the extent possible, there should not be different laws applicable to different people, and a duty for institutional employees and volunteers only runs the risk of a two-tiered legal system of reporting.

Level of knowledge and criminal culpability

23. It appears that the recommended reforms are driven not so much by a desire to punish persons who do not report abuse, but, rather, a desire to protect children. That legislative purpose is important. However, that purpose should not be pursued by exposing employees and volunteers holding no actual knowledge or suspicion about abuse to imprisonment.

24. There are both conceptual and practical difficulties in the operation of such a legal standard. The concept of criminal negligence is not unknown to the law. However, ordinarily a criminal offence which has negligence as its touchstone is amenable to objective consideration. It is usually possible to determine whether someone was driving in a negligent manner when they caused death or injury by assessing objective factors such as speed, use of a mobile phone, or whether the driver kept a proper lookout. Whether someone 'should have suspected' that an adult was abusing a child is not conducive to assessment in the same way. There is a risk that an objective test will create unjust outcomes. It would be unfair to convict a person of a criminal offence if, in the circumstances, they did not suspect any abuse because, for example, they had a sheltered upbringing, or were particularly naïve, or were young and lacked life experience. Historically, there has been a reticence on the part of the criminal law to impose criminal liability where there was no intention to break the law. It is submitted that lowering the standard of culpability to an objective standard of suspicion is not appropriate or justified with respect to a duty to report, particularly one which carries a sentence of imprisonment.

25. The use of *reasonable suspicion* as a touchstone is problematic because of the variability of the concept. Section 316 of the Crimes Act employs the criteria *"knows or believes"*. The word "believes" refers to a situation where the relevant person has enough facts such that they form the view that the crime has occurred. This is preferable to reasonable suspicion for several reasons. Firstly, it provides criteria by which a person can consider whether they have a duty to report (ie they can ask themselves: *Do I suspect a crime has occurred*?). Secondly, it is important that there is legislative consistency and coherency in the law. The proposal would create a crime where a person who "ought to have suspected" child abuse commits an offence in not reporting that suspicion, but one who "ought to have suspected" (for example) a terrorism offence or other heinous crime does not have any obligation to report it until they know or believe it has occurred. Thirdly, if the standard of suspicion is set too low it imposes an unnecessary burden on the resources of the State's law enforcement bodies. The inaugural Children's Commissioner Megan Mitchell has noted that overly cautious reporting can "create a chain of events that can traumatise the child and cause [the family member] to take a step back"[2]. Commissioner Mitchell was responding to media reports that a grandfather who was at a suburban Sydney beach with a naked toddler was spoken to by police after a complaint by a member of the public. There is no bright line between when one should suspect child abuse and when they should not.

26. In the context of considering criminal sanctions against institutions, the Criminal Justice Report states:

> We consider that the primary effort of governments and institutions at this time should be to develop and improve regulatory standards and practices and oversight mechanisms. We will address these issues in detail in our final report.
>
> We consider that governments, regulatory and oversight agencies and institutions should be given an opportunity to do this as well as to improve their expertise and practices. There has been, and continues to be, a significant amount of change in relation to the regulation of children's services.
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> …
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> We also appreciate that our work, particularly through our public hearings, has already prompted some change in particular institutions and more broadly. The recommendations we make in our various reports, if implemented, will lead to further changes.[3]

27. This statement provides a reason why the legislature should not impose any duty to report which imposes further sanctions in criminal law beyond the current obligation in s

[22] http://www.smh.com.au/national/age-of-innocence-lost-forever-as-trust-clouded-by-paranoia-20130511-2jelm.html
[3] P 265.

316 of the Crimes Act. The NSW Dioceses agree with the statement that the 'primary effort' of governments and institutions should be the development and improvement of regulatory standards and practices and oversight mechanisms. In the view of the NSW Dioceses, the practical outcomes in focusing on this type of structural reform will be far more effective at protecting children within institutions than by the imposition of further criminal sanctions.

Religious Confessions

CJR Recommendation

35. Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 addresses religious confessions as follows:

    a. The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.

    b. The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.

    c. Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.

28. The seven sacraments are signs and instruments by which God acts and works in the Catholic Church. They are celebrated by the Church by way of visible rituals and are listed as follows:

    a. Baptism,
    b. Confirmation,
    c. Eucharist,
    d. Penance (confession),
    e. Marriage,
    f. Receiving holy orders (becoming a bishop, priest or deacon), and
    g. Anointing of the sick

29. The modern codification of the Sacrament of Penance can be traced to the Fourth Lateran Council in 1215,[4] but the practice itself is much older. The concept of the 'seal of confession' is also ancient and the phrase was used as early as the 4th century.[5]

30. Baptism is the first and chief sacrament of forgiveness of sins because it unites us with Christ. Through the Sacrament of Penance, the baptised can be reconciled with God, with his Church, and with neighbour[6]. Catholics believe that the priest who hears confession does so as a representative of God, so that the confession of sin to a priest is made in the context of one's relationship with God. The forgiveness of sin comes from God, through the priest.

31. If the penitent believed that their conversation with God could be made public for whatever reason, then this would be an active discouragement from going to confession and hence receiving the Sacrament of Penance.

32. The modern formulation of the seal is enshrined in Canon 983 of the Code of Canon Law 1983. Canon 983 §1 unequivocally provides:

> The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.

33. The punishment for violation of the seal is equally certain. Canon 1388 §1 provides:

> A confessor who directly violates the sacramental seal incurs a *latae sententiae* [sentence already passed] excommunication reserved to the Apostolic See; one who does so only indirectly is to be punished according to the gravity of the delict.

34. The NSW Dioceses opposes any incursion or abrogation of the seal of confession for the reasons which follow.

Church and State

35. In the 2016 Australian census, more than 5 million people identified as being Catholic.[7] Whilst sometimes conflict between Canon Law and domestic civil law might appear inevitable, if a conflict can be avoided, it should be.

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[4] O'Dwyer, M. A Matter of Evidence: Sacerdotal Privilege and The Seal of Confession in Ireland, 2013, *University College Dublin Law Review, v 13, 2013* at 104-5.
[5] Daly, B., *Canon Law in Action*, St Pauls Publications, 2015, at p 242-3.
[6] *Catechism of the Catholic Church* para 977.
[7] Website of Australia Bureau of Statistics

36. A law which, in its effect, requires a Catholic priest to ignore the seal of the confession impacts in a very real way on the freedom of both priest and penitent to practice their religion. The following observation is made in the Criminal Justice Report:

> We acknowledge that if this recommendation is implemented then clergy hearing confession may have to decide between complying with the civil law obligation to report and complying with a duty in their role as confessor. It is a matter for each faith within which a confessional seal operates to consider whether that practice could or should be changed.[8]

37. Such an observation encapsulates the notion with some clarity that if the law was changed in the manner recommended in the Criminal Justice Report, the ability of Catholic priests (and penitents) to freely exercise their religion would be directly compromised.

The abrogation of the seal will have adverse social consequences

38. There is a social benefit to confidential relationships which ought not be undermined. There is value in a patient disclosing a full history to a psychiatrist. There is value in a client providing full instructions to a solicitor. There is also value in Catholics who confess their sins to their confessor. Such relationships are commonly understood to be confidential. That confidentiality has historically been protected in Australia on public policy grounds, namely, that if such communications were required to be disclosed from time to time that would prevent honest and candid disclosure which would substantially undermine the benefit and efficacy of those relationships. That protection should remain in respect of religious confessions.

The abrogation of the seal will result in damage without corresponding benefit

39. As is clear from the discussion above, the practice of going to confession is not an incidental or perfunctory ritual in Catholicism. It is a central aspect of the practice of the Catholic religion, being one of the seven sacraments. If met with a choice between disobedience to the civil law, and a fundamental violation of a priest's religion resulting in automatic excommunication, the outcome is inevitable.

40. It is important when considering legislative reform to consider what consequences would flow from the proposed enactment. For Parliament to change the law and expose priests to a criminal penalty if they do not break the seal of the confession will be the

[8] At p 223.

easy part. If a priest is in fact charged with failing to report a crime the spectacle of such a trial would be grotesque. It would undermine utterly and completely the public policy behind mandatory reporting. That policy is to protect children. If a priest goes to gaol for refusal to break the seal, that is not going to be a deterrent to other priests taking the same course. If anything, it is likely to harden their resolve and incite others to follow the example of Saint Thomas More. None of that process achieves the ultimate aim of protecting children. But the damage incurred by such a trial and punishment would be immense. It will result in substantial disharmony and division in the community, to no beneficial end.

41. There is a further reason for not abrogating the seal of confession which arises from the policy underpinning the privilege against self-incrimination. Any law requiring a priest to divulge information imparted during a confession by definition requires that priest to incriminate himself under Canon Law. Abrogating the privilege against self-incrimination is not a concept unknown to Australian law, the *Royal Commission Act 1923 (NSW)* being one such example, but the abrogation is ordinarily accompanied by a proviso that any evidence given under compulsion is inadmissible in civil or criminal proceedings against the witness.[9] As comforting as that proviso may be in the ordinary course, the proviso is limited to the jurisdiction and would not prevent the use of the evidence in any Canon Law proceedings for the imposition of a penalty.

<u>The sacramental seal is not a factor of abuse in the context of a confession</u>

42. The Royal Commission cites examples of a priest violating the seal of the confession, or using confession in some way to perpetrate abuse.[10] The examples are, without exception, appalling. They are also a gross violation of Canon Law. However, the misuse of the sacrament is not an argument for the abolition of the seal. An abuser of children understands the abuse they perpetrate makes them liable to a lengthy term of imprisonment but are undeterred. Such a person is impervious to the deterrence of both Canon Law and criminal law, and it is hard to see how abrogating the seal impacts upon the commission of abuse as part of or connected to a confession.

43. Similarly distressing examples were recounted to the Royal Commission of priests who whilst hearing confession were told by a child of the occurrence of abuse, only to have that confidence betrayed when the priest communicated the disclosure to the abuser, compounding or facilitating further abuse. In those circumstances, not only is the

[9] See for example s 17(2) of the *Royal Commissions Act 1923 (NSW)*
[10] Criminal Justice Report p 202.

confessor subject to automatic excommunication from the Church, they are also subject to the criminal law, including for offences of being an accessory before and after the fact. A confessor who acts in such flagrant disregard for both criminal law and the Canon Law would hardly be deterred by a mandatory reporting requirement which abrogated the seal.

44. Whilst these terrible examples are included in a discussion in the Criminal Justice Report about whether the sacramental seal should provide an exception to a duty to report, they do not play any relevant part in that discussion. In neither scenario (ie. where the confessor has abused a child directly or facilitated the ongoing abuse of a child) is the confessor going to report that fact to police because to do so would implicate themselves in a far greater crime than a failure to report. The seal is not in issue.

45. Moreover, the law does not necessarily protect the use of the confession in the manner described above. Section 127(1) of the *Evidence Act 1995* (NSW) (**Evidence Act**) provides that clergy are entitled to refuse to divulge the existence or contents of a religious confession. The provision is not limited merely to proceedings in which the rules of evidence apply and the privilege has a broader application. However, s 127(2) provides that the protection does not apply if the communication involved in the religious confession *was made for a criminal purpose*. That is, to the extent that confession is used to perpetrate crime, under the law as it currently stands in New South Wales, the confessor **would not** be entitled to the protection afforded by s 127(1) of the Evidence Act if otherwise required to divulge the communication made in the context of a confession.

<u>The practical consequences of abrogating the seal</u>

46. There is no cogent evidence that the abrogation of the seal will result in an increase in reports being made to the police of child abuse. Paedophiles are invariably self-obsessed masters of deceit. It is reasonable to draw the inference that if there was a change to the law that removed the protection of the seal, any occurrences of paedophiles confessing their abuse to their confessor are likely to evaporate depriving the confessor of the opportunity to persuade the penitent to turn himself in, however small this opportunity might be. The other possibility if there is a change in the law is that an abuser may seek out a confessor who is unknown to them, attend a confessional with a grille ensuring their anonymity and provide a suitably vague confession. Any report of such a communication is likely to be useless.

The real drivers of change

47. Regrettably, there is unwarranted and undeserved focus on the seal of confession as an aspect of law reform. Even if the law is changed such that confession communications are no longer protected, the reality is that the prevalence of child abuse will not be materially affected and the legislative amendment would in the colloquial vernacular amount to little more than window dressing.

48. The NSW Dioceses acknowledge the Catholic Church in Australia has a poor record of protecting children from abuse. The prevalence of abuse, particularly in the 1960s, 1970s and early 1980s, was truly terrible. Since the mid-1980s there has been a substantial decrease in the prevalence of abuse within the Church. Whilst the reasons for such a decrease are unlikely to be a matter of consensus, the main drivers of change are most probably an increased awareness within the Church community of the existence and horror of abuse, a gradual shift in attitude with respect to child abuse and, more recently, the implementation of policies, procedures and structures directed towards the protection of children. However, one thing is clear: the significant decline in the prevalence of child abuse in the Catholic Church since the mid-1980s has nothing to do with the Sacrament of Penance and the seal of the confession.

49. It was clear from the public hearings before the Royal Commission that the leaders of the Catholic Church possess a determination to achieve structural and long-lasting reform to ensure the Church is a safe place for children. That determination is genuine, and the current of change flows strongly within the Australian Church. Steps have already been taken to involve a greater proportion of the laity and trained professionals in implementing child protection policies and protocols within the church. Those professionals have an open and collaborative relationship with the Ombudsman in New South Wales which includes a process of mandatory reporting. In some cases, such as in many Catholic schools, the way in which children go to confession has changed so that children are now more likely to go to confession in open view of others rather than in a closed confessional.

50. In summary, the view of the NSW Dioceses is that any legislative change which requires a priest to break the seal of confession:

    a. is symbolism without meaning and is unlikely to achieve any good.

    b. will risk the disobedience of priests who are faced with an inevitable conflict between the civil law and their faith.

c. is unlikely to result in an increase in reporting because child abusers will not disclose abuse to their confessors if the law is changed.

d. will result in Catholics invariably feeling that such a law is an attack on their religion, resulting in social disharmony.

A Duty to Protect

CJR Recommendation

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

    a. The offence should apply where:

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

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

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

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

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

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

Overview

Question
Q26. Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?

51. The NSW Dioceses accept that the Catholic Church has a moral duty to protect children in its care. Persons within the Church also have a legal duty not to take action that has resulted in or appears likely to result in the sexual abuse of a child or young person.[11] Breach of that duty renders the person liable to a conviction and fine.

52. The NSW Dioceses are not theoretically opposed to a properly framed duty to protect. However, the Church as an institution has been criticised for historically dealing with matters of child sexual abuse 'in-house'. CJR Recommendation 36 effectively imposes an obligation on one person within the institution to determine the most appropriate method of dealing with another person who is a substantial risk of sexually offending against children.

53. It is submitted that the focus of reform should not be to penalise someone criminally who knows there is a substantial risk of abuse but negligently fails to reduce or remove the risk. Rather, it is submitted that a more appropriate and consistent approach would be to require reporting of any knowledge of substantial risks to an external agency so that the risk can be properly managed. Institutions are not the police. They do not have the same access to information or resources to investigate. If there is a substantial risk, external agencies should become involved rather than a legal obligation to self-regulate.

54. One of the examples cited in favour of the reform recommended by the Criminal Justice Report is the movement of an abuser within an institution. It is noted that sweeping the problem under the carpet, including the movement of an offender away from a victim, is a decision or action which would be in breach of section 227 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*. The current maximum penalty for that offence is 200 penalty units and it may be appropriate for that maximum penalty to be reconsidered given the potential seriousness of the offence with which it deals.

[11] Section 227 of the Children and Young Persons (Care and Protection) Act 1998 (NSW).

Conclusion

55. NSW Dioceses appreciate the opportunity to provide these comments to the NSW Government. NSW Dioceses would be pleased to have the opportunity to engage in dialogue with, and to assist, the NSW Government in this important work.

Date: 6 October 2017